

## Adverse Possession

Where if a dispossessor has possessed another's land for 15 years adversely, the owner will not be able to recover the land and the documentary title holder's rights will be extinguished (s8, s18 LAA)

The act whereby a possessor of land, even if wrongful, gains a right in land which can be enforced against the world at large except against someone with superior title (Toohey J in Mabo)

The principle of relativity of title means that a person in possession has a legal claim against any other person except someone with a better title (Perry)

If it is a good, then the period is 6 years s5(1)(A)

### 1. Is it land that can be possessed

Any land can be AP as long as it isn't:

- Crown land LAA s7
  - o If the crown transfers land to another person, the 15 must be satisfied under the new owner, even if time has already started to run against the crown
    - S8 LAA
- Vic Track land LAA s7A
- Water authority land LAA s7AB
- Council land LAA 7B
- Owners corporation LAA s7C
  - o Interests in land which is common property affected by the owners corporation cannot be adversely possessed.

### 2. When does time start to run

- From when the AP starts to possess and also owner is dispossessed or has discontinued their possession (s9)
  - o The first time both the AP is in possession and the owner has been dispossessed
- It must be dispossessed by a person in whose favour time can run s14(1)
  - o This is anyone that isn't an owner or someone with another interest in the lan

### When are they in possession?

Need both factual possession and intention to possess in order for an AP to be deemed in possession

## Factual possession

- Objective test by looking at outward actions/manifestations
- The possession must be (**Mulcahy**)
  - “open, not secret”
    - Such that it would be noticed by a documentary owner reasonably careful of their interest (**Re Riley**)
    - People need to be able to see what they are doing, not hiding at all.
  - “peaceful, without force”
  - “adverse to the owner” or “without consent”
    - Cannot be adverse if the possessor is under a lawful title such as a lease or licence
- It must have an appropriate degree of physical control, **more than mere occupation.**
- This is deemed in relation to the character, nature and mode of the land (**Pye**)
  - If it is rural expect less upkeep.
- Dealing with the land as an occupying owner might have been expected to deal with it (**Whittlesea, Perry**) acting like you own it
- Did they maintain the land? Pay taxes? (**Perry, Buckinghamshire**)
- Did they have sole access through keys and locks (**Pye**)
- Fences are normally good indicator
  - It doesn't matter if people can step through them, just because it is not for keeping people out doesn't mean its excluded.
  - “nature and purpose of a fence will be affected by the nature, location and characteristics of the land and the uses to which it is put” (**Whittlesea**)
- Doesn't matter if there is no physical change to the land (**Whittlesea**)
- Doesn't need to use that is inconsistent with what the owner was doing (**Buckinghamshire**)

<u>Case</u>	<u>Factors for Factual Possession</u>
<i>JA Pye v Graham - YES</i>	<ul style="list-style-type: none"> <li>• Hedges act as a fence so G could exclude</li> <li>• Padlock used by G, access was controlled</li> <li>• Grazing the land: the normal character to satisfy requisite physical control</li> </ul>
<i>Whittlesea v Abbatangelo - YES</i>	<ul style="list-style-type: none"> <li>• A had physical control in accessing the land with the only route through their property</li> <li>• Using the land for its ordinary use</li> <li>• Placing property on the land (ie. bathtub for water trough)</li> <li>• Played on the land: an extension of the backyard</li> <li>• Erected a fence: sufficient to exclude</li> <li>• Did not act 'stealthily' or in 'sub defuse'</li> </ul>
<i>Buckinghamshire v Moran - YES</i>	<ul style="list-style-type: none"> <li>• Peaceful and continuous for 18 year s</li> <li>• No secret as the council knew he was there</li> <li>• Chain and lock only he had – controlled access</li> <li>• Fence around the entire property: locking the gate to exclude the world at large</li> <li>• Using vacant land as a garden</li> <li>• Another factor: Council conceded their rights</li> </ul>

## Intention to Possess

- Must have intended to exclude the world at large as far as is reasonably practicable (**Buckinghamshire**)
- It is an objective test
- The acts must be unequivocal regarding intention to possess but they need not be specifically to exclude the owner
- The acts do not need to show an intention to be the owner, just to possess (**Pye**)
- Irrelevant that person acknowledges they aren't owner (**Whittlesea**)
- Just need intention to possess at the time (**Buckinghamshire**)
- Irrelevant that they are willing to pay (**Pye**)

<u>Case</u>	<u>Factors for Intention to Possess</u>
<i>JA Pye v Graham</i> - YES	<ul style="list-style-type: none"> <li>• Expressly told to get off the land but stayed</li> <li>• Asking for a license: intention to possess at present, does not negate intention with a future intention to own or pay</li> </ul>
<i>Whittlesea v Abbantangel o</i> - YES	<ul style="list-style-type: none"> <li>• Maintained social gatherings on the land as a backyard</li> <li>• Didn't pay rates – not decisive but not paying rates points towards intention to possess rather than own</li> <li>• Acts conferring a special benefit enhanced the enjoyment of the land by owners so as to create exclusive possession (ie. vegetation)</li> </ul>
<i>Buckinghamshire v Moran</i> - YES	<ul style="list-style-type: none"> <li>• Didn't think he had a right in the future – does not negate an intention to possess at the present time</li> <li>• Complete enclosure to the world at large: locked gate</li> <li>• Council's intention not important</li> <li>• Not an intention to acquire ownership</li> </ul>
<i>Riley v Pentilla</i>	<ul style="list-style-type: none"> <li>• Facts of case: subdivision providing an easement for recreation to purchases of lots, the person who erected a tennis court and a fence around it intended to use the easement he possessed for a specific recreational purpose therefore did not have requisite intention to take AP</li> <li>• Special Benefit: Erecting a fence and enclosing a disputed area did show an intention to produce a special benefit rather than an intention to exclude everyone.</li> </ul>

### 3. Multiple AP's – Continuity Test

- The 15 year period can be established by aggregating small successive unbroken and uninterrupted periods of possession (14(2) LAA)
- If the AP is discontinued then time starts again (14(2) LAA)
- The first of the successive adverse possessors will receive the fee simple (Mulcahy)
- 3 options for continuing AP
  - Abandonment
    - abandonment by an initial AP, followed by possession by another AP
    - can't add periods
  - successive adverse possessors
    - each of the AP's transfer their possessory title to a successive possessor
    - can be consecutively added
    - more tolerant of small gaps because title has been transferred
  - series of independent adverse possessors
    - e.g. each AP dispossesses the previous AP
    - very strict on no gaps
    - who has better interest, A or B
      - A does
      - But B's time is running against both the true owner and A
      - E.g. if B needs A's years to make 15 than A has better title, but if B makes 15 by himself then he has better claim than A.

#### What will count as discontinuance?

- Leaving property for a while is not a break (Whittlesea) – Coming on weekends is enough - although this was rural.
- AP will stop if dispossessor abandons land, this is difficult to show (Mulcahy)
- If dispossessor sells their right, it is still continuous (Mulcahy)
- If dispossessor is dispossessed by someone else, new dispossessor must move in immediately for continuity, this can be a few days. (Mulcahy)
  - If someone passed away it can be longer (Mulcahy)
- Any gap after the 15 years is made out is irrelevant (Mulcahy)

### Did the clock stop?

- Show a break from above (**14(2)**) or
- Owner effectively assert title by issuing writ (to commence legal proceedings) – needs to be express (**Whittlesea**)
  - o Stating that you are not in possession is not enough as it was simply a statement of current affairs) (**Whittlesea**)
- Owner needs to peacefully re-enter and resume possession
  - o Formal entry is not enough, must re take possession **s16 LAA**
- Show that dispossessor acknowledges owner's better title
  - o If dispossessor acknowledges true owner new right of action accrues on the date of acknowledgment (**s24 LAA**)
  - o Can be done by agent of possessor (**s25(2) LAA**)
  - o Acknowledgments bind other APS – their time resets too (**s26 LAA**)
  - o Must be signed and in writing (**25 LAA**)

### 4. Part parcel of land

- In the case of a large area of land, the acts of possession performed in a portion of the land may be sufficient to establish AP over the whole land
- Still need to demonstrate sufficient acts of possession (i.e. appropriate degree of physical control of the whole parcel of land)
- Part Parcel is more common

### 5. Future interests

- Right of action of the holder of a future interest accrues on the date on which the estate becomes one in possession (when the interest becomes present) **s10(1) LAA**
  - o E.g. if AP starts when A has land but B has remainderman interest, B is unable to take action until A dies.
- **S10(2)** Time accrues either:
  - o 15 years on the date from which AP started against preceding estate holder or
  - o 6 years from the date when the succeeding interest starts
  - o Whichever expires last.
    - E.g. A is AP for 13 years and then B gets the land. The options would be 2 years or 6, so B gets six years.
    - E.g. A is AP for 2 years and then B gets the land. The options would be 13 years or 6, so B gets 13 years.

## 6. Leases

- Fixed term lease
  - o Time starts to run when the lease expires
- Tenancy at will
  - o time starts running 1 year from commencement (**s13(1) LAA**)
- periodic lease
  - o time starts running from the end of the period, if rent is received after, from the date of last receipt of rent
- a LL's right to recover possession of land from the tenant accrues at the end of the term of the lease (**s16 LAA**)
- if AP of a tenant, the AP is of the lease, not the land and is therefore subject to the LL's reversion. (**s10(1) LAA**)

## 7. Is there a new owner of the land

- If the fee simple estate is sold, the new owner who has bought the land will be subject to any adverse possession occurring at the time. (**s42(2)(b) TLA**)

## 8. Conclusion

- If the 15 years is satisfied, the right of owner to recover land is barred and their title extinguishes (**s8, s18 LAA**)
  - o This does not mean that AP has title, they have to apply to be registered as owner (**s60 -62 TLA**)
- If future interest **s10 LAA** or **s13 LAA** if lessee is AP'ing lessor
- AP does not extinguish the rights over the land that an 3<sup>rd</sup> parties have.
- If AP is not successful, owner may be able to sue:

### **Remedy if AP not successful**

- Landowner has prima facie right to an injunction but damages may be awarded as an alternative where
  - o Injunction is too oppressive (**Breakfast**) AND
  - o The good working rule is satisfied (**Jaggard**)
    - Good working rule has 4 questions, if their answers are yes then damages are appropriate
      - The injury to the legal rights is small
      - Injury is capable of being quantified in monetary terms
      - injury can be compensated by a small amount of money
      - Would be oppressive to grant an injunction
  - o Even if good working rule is made out, injunction may still be granted dependant on D's conduct.

## Adverse Possession Cases

<u>Name</u>	<u>Facts</u>	<u>Decision</u>
Perry	<ul style="list-style-type: none"> <li>- Crown gave notice to resume land for use as a school. At the time of this notice of acquisition, C was in possession of the land, but not the true owner</li> <li>- C argued that C was in possession and that his possession was lawful unless proven otherwise.</li> <li>- True owner never came forward</li> </ul>	<ul style="list-style-type: none"> <li>- On appeal from the HC the Privy council held for Clissold.</li> <li>- A person in possession in the assumed character of owner and exercising the rights of ownership has perfectly good title against all the world but the rightful owner.</li> </ul>
Mulcahy	<ul style="list-style-type: none"> <li>- C owned land, M purchased land next to C's from H.</li> <li>- This title included a possessor interest that H allegedly had in the disputed land through predecessor's W and G.</li> <li>- There was a condition in the contract between H and M that H would provide reasonable assistance to M to make out this AP title</li> <li>- The disputed land was owned by C</li> <li>- At the time the contract was made between M and H, M and his predecessors in title had satisfied the required period.</li> </ul>	<ul style="list-style-type: none"> <li>- Held that successive periods of possession could be aggregated to give rise to a claim to AP</li> </ul>
Pye	<ul style="list-style-type: none"> <li>- P owned manor and surrounding farm land.</li> <li>- P sold some of his land to G's father in 1982. This land was known as the manor farm.</li> <li>- In addition, P granted him a license to graze areas of land still owned by P</li> <li>- The land in question was enclosed by hedges and could only be accessed through a gate locked by G.</li> <li>- When the license ended, G was told to vacate but did not.</li> <li>- G communicated with P on several occasions to purchase hay cut from grass on disputed land and also to enter into a new license.</li> <li>- P denied G new license.</li> </ul>	<ul style="list-style-type: none"> <li>- Factual possession: enclosed by hedges and locked gate, physical control in that he grazed the farm land. Possession was adverse once license expired</li> <li>- Intention to possess: <b>a willingness to possess with consent does not negate intention to possess</b></li> <li>- Time was deemed to start as soon as the license ended.</li> <li>- Even though G was doing the same things on the land that he was doing under a license (something purely for occupation) still said to be in possession cause did extra stuff.</li> </ul>



	- G eventually stopped asking.	
<b>Whittlesea</b>	<ul style="list-style-type: none"> <li>- A used council land that was bordered on three sides by A's land as a farm. The fourth side was boarded by a road.</li> <li>- A fenced in the property</li> <li>- The only access to it was through A's land.</li> <li>- A moved to Geelong but kept their livestock on the farm and visited every weekend</li> <li>- Eventually moved back to farm full time</li> <li>- Council argued that A's had discontinued their possession</li> <li>- When applying for something A on a map said that council land was NIT (not in title)</li> </ul>	<p>Factual possession</p> <ul style="list-style-type: none"> <li>- Because surrounded by A's land and fenced, sufficient to exclude other people from using it</li> <li>- Also maintained the land and used it for their own</li> <li>- Hadn't acted surreptitiously or stealthily</li> </ul> <p>Intention to possess</p> <ul style="list-style-type: none"> <li>- A grazed animals on land, had trough on land, maintained for weeds, fencing.</li> <li>- Used land for social gatherings</li> <li>- They didn't pay rates on the land but this is not conclusive against because rates would be more like intention to acquire than intention to possess.</li> <li>- Saying they didn't have title wasn't an admission that council had better title It was just a statement of current events. Needs to be more explicit than that</li> </ul>
<b>Buckinghamshire</b>	<ul style="list-style-type: none"> <li>- Council bought land with intention to turn it into a road, this didn't happen for ages so it was vacant</li> <li>- W family were neighbours and used it as their own</li> <li>- Only access was through their land</li> <li>- Hedges separated council land from non W land.</li> <li>- They kept the lawn mown and trimmed the hedges etc.</li> <li>- W family sold to M, told M it was council land.</li> <li>- M put a lock on the property</li> <li>- M heard from council in 1976, they asked why he was using land, but never followed up on it.</li> <li>- M satisfied the time period for AP.</li> </ul>	<ul style="list-style-type: none"> <li>- M knowing it was council land didn't matter</li> <li>- Onus was on M to prove that council was dispossessed.</li> <li>- Factual possession, locked gate and dealt with land as occupying owner would</li> <li>- Intention – locked gate.</li> <li>- An AP does not have to have the intention to own</li> <li>- AP is accumulative, it can transfer between possessors as long as there is no gap</li> </ul>