

Adverse Possession (AP)

A possessor of land, even if they are a wrongful possessor, gains a right in land which can be enforced against the world at large except against someone with superior title (*Mabo (No2)* per Toohey J).

In order for [party dispossessed] to be successfully adversely possessed, [party possessing] will have to make out that [party dispossessed] is out of possession (*LAA, s 9*), that the land is in the adverse possession of someone in whose favour the limitation period can run (*LAA, s 14(1)*) and that the limitation period of 15 years (*LAA, s8*) has been met. Among other things this involves an inquiry of the factual possession and animus possidendi of [party possessing]. If these requirements are satisfied, then [party possessing] will have extinguished the title of [party dispossessed].

Assume:

- *LAA* = *Limitation of Actions Act 1958 (Vic)*.
- *TLA* = *Transfer of Land Act 1958 (Vic)*.

Can [party dispossessed] be disposed?

- Crown cannot be adversely possessed per *LAA, s 7*.
 - Where land is alienated by the Crown, the land can be adversely possessed from the date of sale per *LAA, s 8*.
- Public Transport land or Vic Rail cannot be adversely possessed per *LAA, s 7A*.
- Water Authority cannot be adversely possessed per *LAA, s 7AB*.
- Council land cannot be adversely possessed per *LAA, s 7B*.
- Owners corporation land cannot be adversely possessed per *LAA, s 7C*.

Is there factual possession?

In order for [party possessing] to make out factual possession, the possession must be “open, not secret; peaceful, not by force; and adverse, not by consent of the true owner” (*Mulchay v Curramore* per Bowen CJ). Sufficiency of possession is to be assessed against “the character and value of the property; the suitable and natural mode of using it; and the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests” (*Kirby v Cowderoy; Mulchay v Curramore*). The AP does not have to have exercised inconsistent use (*Buckinghamshire CC*).

Consider:

- Is there consent of true owner?
 - If there is consent of the true owner through licence then such possession cannot amount to AP (*JA Pye*).
- Is possession “such that it would be noticed by a documentary owner reasonably careful” of their interest (*Re Riley*)?
- Does [party possessing] act as though they were the true owner of the land in question (*Whittlesea CC v Abbatangelo; Perry v Clissold*)?