

AUSTRALIAN PROPERTY LAW (LAW1024) EXAM NOTES
Semester 1, 2025

TABLE OF CONTENTS

WEEK 1- DEFINING PROPERTY	2
WEEK 2- POSSESSION/ FINDER’S RIGHTS	8
WEEK 3- ADVERSE POSSESSION	14
WEEK 4- SYSTEMS OF LAND TITLE/ FUTURE INTERESTS	25
WEEK 5- CREATION OF PROPRIETARY INTERESTS	37
WEEK 6- LEASEHOLD ESTATES	46
WEEK 7-EASEMENTS AND RESTRICTIVE COVENANTS	61
WEEK 8- MORTGAGES	71
WEEK 9- EXCEPTIONS TO INDEFEASIBILITY	80
WEEK 10- CAVEATS/ PRIORITY NOTICES/ PRIORITY DISPUTES	91
WEEK 11- CO-OWNERSHIP	104

WEEK 3- ADVERSE POSSESSION

Written out

Adverse possession occurs where someone has possession of land without permission of the true owner or person with the right to immediate possession.

For a claim of adverse possession to succeed, the claimant must prove two common law elements for the relevant period of time: factual possession and intention to possess..

Note cannot have AP of council land: **LAA s 7B**.

Factual possession according to *Mulcahy v Curramore*, requires an appropriate degree of physical control of the land in the circumstances. The possession must be open not secret, peaceful not by force, and adverse without the consent of the true owner.

Possession must be single and exclusive (owner and possessor can't be in possession at the same time).

The requirement that possession must be adverse, means it must be without the consent of the true owner.

Possession is not adverse if it is under a lease or licence. Cannot adversely possess while under licence as have consent (*JA Pye v Graham*).

Evidence of physical control can include carrying out improvements or repairs or by the erection of buildings, such as a studio in *Riley v Pentilla*.

Enclosure and access through a gate only by a key held by the AP suffices, could exclude others including owner (*JA Pye v Graham*).

Physical control, completely enclosed, only entrance, lock and chains, holder of key, used it as if it were his own (mowing, trimmings, private garden, planted grass and daffodils, used as part of garden) (*Buckinghamshire v Moran*).

Here the possession was not by force and was not secret but open to discovery if steps were taken.

If on making an inspection, had found the gate newly padlocked, they could have come to any conclusion other than that...was intending to exclude everyone, including themselves, from the land (*Buckinghamshire v Moran*).

Intention to Possess is the intention to use the land as their own and exclude all others, including the true owner.

The intention must be present and made clear to the world (*Powell v McFarlane*).

However, it is the intention to possess the land as their own for the time being, not necessarily to own it forever (*Buckinghamshire v Moran*).

It does not mean that there must be a conscious intention to exclude the true owner (*Abbatangelo*).

Willingness to pay rent or requests for permission/license is not inconsistent with them intending to possess the land in the meantime (*JA Pye v Graham*).

The focus is on the intention of the AP not the owner, however, if the AP's awareness of the owner's future intentions/ plans for the land affected their use that factor may provide support against intention to possess (*Buckinghamshire v Moran*).

Enclosure is the strongest possible evidence of adverse possession (*Abbatangelo*).

Look for: Land being used in same way as their other land, special benefits they get, continuous intention to possess not negated by knowing what true owner intends.

Limitations of Actions Act 1958 (Vic)

Under the LLA the limitation period for bringing an action to recover land is fifteen years from the date the right of action accrued (**s 8**). Consequently, at the expiration of that period, the person's title to the land shall be extinguished (**s 18**). After 15 years, an AP's possessory title can be recognised as being the same as the former owner.

Time starts running when the owner is dispossessed or discontinues possession (**s 9(1)**) and the land is in adverse possession (**s 14(1)**). Possession with consent is not adverse possession.

Time stops running if the owner asserts their superior right (**s 16**) or if the adverse possessor admits that the owner has a superior right in writing (**s 25**).

Under common law time stops if there was a break in the adverse possession, thus possession by successive trespasses must be continuous (*Mulchay v Curramore*).

AP have 'paramount interests' under TLA **s 42(2)(b)**.

Outcome: LAA s 8; 18 – is time period met?

TLA s 60-62: A person who claims that he has acquired a title by possession to land may apply to the Registrar for an order vesting the land in him for an estate in fee simple (s 60). Where a vesting order is so made the Registrar shall make any amendments to the Register that are necessary to give effect to the vesting order (s 62). A person claiming any estate or interest in the land may lodge a caveat (s 61).

Future interests

The LAA has special rules for when the limitation period starts and how long it lasts for holders of future interests.

Accrual of Right of Action (**LAA s 10(1)**): For a future interest holder (e.g., someone with an estate in reversion or remainder), their right of action to recover the land is generally deemed to have accrued only when their estate or interest becomes an estate or interest in possession. This is the critical difference – their clock doesn't start just because an adverse possessor is on the land, it starts when they gain the right to immediate possession (e.g., upon the death of the life tenant).

Length of Limitation Period (**LAA s 10(2)**): Once the future interest becomes an interest in possession, the period within which they must bring an action is the longer of two options:

15 years from the date the right of action accrued to the person entitled to the preceding estate or interest (the person who had the right to immediate possession before the future interest holder).

OR 6 years from the date on which the right of action accrued to the future interest holder (i.e., 6 years from when their interest became one in possession).

Encroachment of boundaries

Boundary disputes, particularly those involving minor encroachments, may be dealt with differently compared to a full AP claim over an entire parcel under LAA.

Under statute it must not fall within 'little more, little less' rule. Under PLA s 272, no action may be brought for encroachments not exceeding 50mm for any one boundary line, that is not longer than 40.3m.

Break Fast Investments sets out the 'good working rule' whereby, the test is whether the interference it is of such a nature and at a height which may interfere with the ordinary uses of the land which the occupier may see fit to undertake.

If the injury to the landowner's legal rights was small, was capable of being estimated in money, could be adequately compensated by a small money payment, and the case was one in which it would be oppressive to the trespasser to grant an injunction, then damages in substitution for an injunction might be given as a matter of discretion.

Adverse Possession

Adverse possession is where someone has possession of land without permission of the person with the right to immediate possession. Under the Australian limitation statutes, the person with the right to immediate possession will lose their right to recover land from the person in adverse possession after a prescribed period. This limitation is supported on numerous policy grounds.

Adverse possession

- No statutory definition of adverse possession, elements found in common law
- Generally, adverse possession is *where someone has possession of land without permission of the person with the right to immediate possession or true owner*.
- A person unlawfully dispossessed of land has a right to bring an action against the wrongdoer to recover possession of the land.
- That right can only be pursued within prescribed time limits. These time limits are set out in the **Limitation of Actions Act 1958 (Vic)**.

	<p>A person claiming title to land by adverse possession must prove:</p> <ul style="list-style-type: none"> • Factual possession for the relevant period of time: an appropriate degree of physical control of the land in the circumstances. • Intention to possess (<i>Animus possidendi</i>) – clear and unequivocal acts regarding intention to possess the land to the exclusion of others (need not specifically be owner) <p>Both are determined objectively, as questions of fact: by looking at the nature of land <i>and</i> the manner in which it is commonly used and enjoyed. Implying possession in one case may be wholly inadequate to prove it in another.</p>
Factual possession	<p>Factual Possession</p> <p>Look for: Fencing: Gates and access who has the key: Physical presence of people on land how being used</p> <ul style="list-style-type: none"> • Possession of part of a piece of land may be taken despite the fact that the owner remains in possession of other parts of the land, this occurs on a horizontal or vertical basis. • Owner and possessor can't be in possession at the same time, possession is single and exclusive. <p><i>Mulcahy v Curramore</i> - Possession must be open not secret; peaceful, not by force; adverse, without consent of the true owner. Physical control is key.</p> <p><u>Open possession</u>: means user must be unconcealed and such that it would be noticed by a documentary owner reasonably careful of his interests. Can't be fraudulent</p> <p><u>Peaceable possession</u>: uninterrupted, exclusive and continuous possession, not by force.</p> <p><u>Adverse</u>: it must be without the consent of the true owner, and contrary to their desired or actual use (ie not under lease or licence; not capable of being used as desired by both parties at the same time)</p> <p><u>Physical control</u>: look at the nature of the land and manner in which land of that nature is commonly used or enjoyed, such as carrying out improvements or repairs or by the erection of buildings will constitute strong evidence of possession— <i>Riley v Pentilla</i>.</p> <p><i>JA Pye v Graham</i></p> <p>Facts: P owned land adjacent to G's farm. P granted G a grazing licence; when it ended G asked to vacate but remained in possession. G sought a new licence on several occasions (P denied). G continued to occupy the land. Adverse land in question was owned by P.</p> <p>Factual possession?</p> <ul style="list-style-type: none"> • Held: was AP. remained in factual possession of the fully enclosed land after the expiry of the licence, manifestly intended to assert their possession against Pye. • Land fully enclosed by hedges only accessed by padlock gate (Graham had only key). • Constituted factual possession, could exclude other people. Pye, was physically excluded from the land by the hedges and the lack of any key to the road gate. • Possession contrary to what owner wanted, no permission. Not only acting without permission of the paper owner: they were acting in a way which, to their knowledge, was directly contrary to the wishes of Pye. <p>Descriptions of law</p> <ul style="list-style-type: none"> • Cannot adversely possess while under licence as have consent, so long as the Grahams were occupying the disputed land with Pye's consent, they could not be treated as having dispossessed Pye. • Word 'dispossession' in the Act as denoting simply the taking of possession in such sense from another without the other's licence or consent. A person who has 'dispossessed' another in the sense just stated as being in 'adverse possession'. • Possession is single and exclusive, therefore if the squatter is in possession the paper owner cannot be. Though there can be a single possession exercised by or on behalf of several persons jointly. • If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night he

does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession.

- If they had been asked by the paper owner to pay for their occupation or to take a lease they would have been prepared to do so. The necessary intent is an intent to possess not to own. Thus willing to pay is not inconsistent with them intending to possess the land in the meantime.

Whittlesea City Council v Abbatangelo

Facts: A's land surrounded WCC land on three sides (hedges, post and wire fences). Other side was bounded by a road. A used WCC's land to farm poultry, graze cattle, sheep, goats and horses from time to time. Spent money, maintenance of fences on the boundaries of the land, eventually constructed a fence on the roadside boundary, only entry then through WCC land.

Factual possession?

- Physical: A's land surrounded WCC land on three sides (hedges, post and wire fences). Other side was bounded by a road.
- Maintenance of fences, use of land for grazing, removing weeds, gardening etc, using it for shade, social activities, children playing. Installed water trough – reasonably permanent structure.
- Fences while serving to prevent livestock straying off land can serve multiple purposes was a sign to others not to enter the disputed land. Fences are often considered strong evidence of adverse possession and dispossession.
- Grazing of livestock can show if combined with other factors.
- Control: A maintained and used the land as if it were his own.
- Held: demonstrated both sufficient acts of factual possession and a manifest intention to exclusively possess the land for the necessary period.

“Factual possession signifies an appropriate degree of physical control.

It must be a single and [exclusive] possession (cannot both be in possession).

The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.

The alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

It does not mean that there must be a conscious intention to exclude the true owner.

Enclosure is the strongest possible evidence of adverse possession (intention).

Factual possession requires a sufficient degree of physical custody and control.”

Buckinghamshire v Moran

Facts: Council acquired land intended to use as a roadway in the future. Adjacent to land was a house and garden. Council land was used by adjacent landowner as part of his garden. This adjacent land sold to Moran. Moran aware that Council owned adjacent land, but believed he could use it until such time as roadway built. Council wrote to Moran in 1975 regarding permission to use Council land and disclaiming those rights. Council did not take action against Moran until 18 years after date land acquired.

Factual Possession?

- Defendant was well aware that the Council had acquired the plot in order to construct a road on it at some time in the future. Showed no intention to own, but intention to possess at that time which is sufficient.
- No fence between adjacent land and Council land. Access to Council land from road only by locked gate.
- If the council, on making an inspection, had found the gate newly padlocked, they could have come to any conclusion other than that Moran was intending to exclude everyone, including themselves, from the land.
- Physical control, completely enclosed, only entrance, lock and chains, holder of key, used it as if it were his own (mowing, trimmings, private garden, planted grass and daffodils, used as part of garden).

	<ul style="list-style-type: none"> Depends on intention of AP not of owner. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner.
Intention to possess	<p>Intention to possess</p> <p>Look for: Land being used in same way as their other land, special benefits they get, continuous intention to possess not negated by knowing what true owner intends. The second material consideration in determining whether adverse possession of the land has been taken concerns intention the person claiming to have taken adverse possession must have the relevant <i>animus possidendi</i>, the intention to use the land as their own and exclude all others including the true owner.</p> <ul style="list-style-type: none"> Must be more than a persistent trespasser. Intention to possess requires an intention to exercise such custody and control on one's own behalf and for one's own benefit. involves the intention to exclude the world at large, including the owner, so far as is reasonably practicable: <i>Abbatangelo</i> Intention should also be made clear to the world: <i>Powell v McFarlane, JA Pye, Abbatangelo</i> Need not demonstrate an intention to exclude true owner forever. Intention to possession can exist despite owner not being completely excluded from land. Intention to possess not to own: <i>Buckinghamshire, Abbatangelo</i> Enclosure of an area of land is an unequivocal act of adverse possession however the requisite intention may be absent. Reliance on enclosure by an already existing fence is insufficient evidence if there are no other acts on the land demonstrating physical control. Value of evidence of adverse possessor re intention needs to be objectively considered: statements made by a person whether they intended to possess may be relevant when taken in combination with other evidence, as it may be self-serving. Proof is difficult: <ul style="list-style-type: none"> Fencing – <i>Riley v Pentilla</i>: muted area shared intention to produce special benefit rather than to exclude everyone including the true owner. While <i>Abbatangelo</i>: concepts of special benefit and adverse possession are not mutually exclusive. Payment of Rates - <i>Bank of Victoria v Forbes, Kirby v Cowderoy</i>: payment by a person who was not the true owner was strong evidence of adverse possession as they had a deliberate purpose to create a title. Requests made by the adverse possessor to the owner for formal permission to occupy land (eg licence) does not negate their current intention to possess land: <i>JA Pye v Graham</i>. Actions constituting a 'special benefit' to the adverse possessor can support intention – social use, farming, maintaining land, used same as own land: <i>Abbatangelo</i>. Intention can exist despite adverse possessor being aware that true owner has a specific use of land in mind for the future. Proof of acts of user inconsistent with the purpose to which the true owner intends to put the land is unnecessary. However, if this knowledge reduces/ adjusts use to something that is not 'adverse' then is problematic. So relevant only if knowledge of what true owner wants to use for stops formation of intention to possess and exclude others: <i>Buckinghamshire v Moran</i>. If AP is aware of a special purpose for which the owner uses or intends to use the land and the use made by AP does not conflict with that use, that may provide some support for a finding as a question of fact that AP had no intention to possess the land: <i>JA Pye v Graham</i>.

<p>Adverse Possession Statute</p>	<p>Statutory requirements LIMITATION OF ACTIONS ACT 1958 (Vic).</p> <p>‘Bookend provisions’</p> <p>SECT 8 No action shall be brought by any person to recover any land after the expiration of fifteen years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.</p> <p>SECT 18 Subject to the provisions of section eleven of this Act, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action or an action to compel discharge of a mortgage) the title of that person to the land shall be extinguished.</p> <p>Time begins to run: when a person is in adverse possession.</p> <p>SECT 9(1): owner Where the person bringing an action to recover land or some person through whom he claims (a) has been in possession thereof and (b) has while entitled thereto been dispossessed or discontinued his possession: the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.</p> <p>PLUS- accumulative work together</p> <p>SECT 14(1): adverse possessor No right of action to recover land shall be deemed to accrue unless the <u>land is in the possession of some person in whose favour the period of limitation can run</u> (hereafter in this section referred to as "adverse possession"); and where under the foregoing provisions of this Act any such right of action <u>is deemed to accrue on a certain date and no person is in adverse possession on that date</u> the right of action shall not be deemed to accrue <u>until</u> adverse possession is taken of the land.</p> <p>Examples: when consent ends, construction of fence.</p> <p>Land owned by specific entities cannot be adversely possessed</p> <ul style="list-style-type: none"> – The Crown LAA s 7 – Vic Track (train station, rails) LAA s 7A – Water Authority LAA s 7AB – Council LAA s 7B – Owners Corporation (common places in apartment) LAA s 7C <p>If one of these entities sells land under possession to third party: LAA s 8 [para 2] Provided that if the right of action first accrued to the Crown the action may be brought at any time before the expiration of fifteen years from the date on which the right of action accrued to some person other than the Crown.</p> <p>Periods of Possession</p> <ul style="list-style-type: none"> • After 15 years, an AP’s possessory title can be recognised as being the same as the former owner but does not acquire or have transferred the title their interest is based upon possession. Both the right of action and the title of the owner are extinguished only against the adverse possessor. • The period of possession does not have to be satisfied in a single period of possession, but can be established by aggregating smaller successive, unbroken, and uninterrupted periods of possession by multiple people. (Recall LAA s 8) <ul style="list-style-type: none"> – This can occur even if possession is transferred informally between APs – If an AP abandons land without the 15-year period being satisfied, then the time period must be re satisfied in full. If the time period is satisfied, the right can be accrued once the AP re-enters possession LAA s 14(2) <p>Successive adverse possessors</p>
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	<p>If the adverse possessor is dispossessed by another the second can add the first period of adverse possession to their own for the purpose of barring the true owners right of action.</p> <p>Mulchay v Curramore</p> <ul style="list-style-type: none"> • When a person enters into AP of land, as long as he continues in possession before the expiry of the statutory period he has title to the land in the nature of a fee simple good against the whole world except the true owner and that title can be conveyed or devised to another person. • Possession by successive trespassers must be continuous to have this effect. • Upon the extinguishment of the true owner's title, the title in fee simple will (technically) go to the first of the successive trespassers • The final trespasser, who is in possession at the time when the true owner's title is extinguished, would, by virtue of his possession, have a title in fee simple good against all the world except prior possessors (who may not assert title against final trespasser as likely gone). If the departure of A, B, C and D in each case took place in circumstances constituting an abandonment by each of them, E would indeed have a title in fee simple good against all the world, unlikely this would occur without a break in possession, which would restore the true owner's title. • If there is a break in AP by any of the successive trespassers, then the true owner's title is restored to its pristine force. <p>"Whether have been a series of trespasses who have been an adverse possession for the limitation. The statute will operate to extinguish the true owners title, possession by successive trespasses must be continuous to have this effect".</p> <p>When does time stop "running"?</p> <p>Assertion of superior title: time stops running if the owner asserts their right or if the adverse possessor admits that the owner has a superior right.</p> <ul style="list-style-type: none"> – If the true owner asserts its right of possession for the land (more than documentary claims of ownership, or mere formal entry: e.g. start proceedings to recover, take possession): LAA s 16 – Admission of superior title by AP (admission must be in writing): LAA s 25 – Can note change/ successive landowner doesn't matter as AP have 'paramount interests' under TLA s 42(2)(b)
<p>Summary</p>	<ul style="list-style-type: none"> • General rule: LAA s 8; 18 (identify limitation period and consequence of possession for the prescribed period) • Time starts running: <ul style="list-style-type: none"> – LAA s 9(1), 14(1) establishes statutory framework for time to start running. <ul style="list-style-type: none"> • Connects to common law adverse possession (ie case law requirements of factual possession and intention to possess). • Check that adverse possession is of land in whose favour time can run (not excluded by LAA s 7-7C) • Time stops running? <ul style="list-style-type: none"> – Broken period of possession (common law) – LAA s 16, 24-26 • Outcome: LAA s 8; 18 – is time period met? • TLA s 60-2 process for becoming registered proprietor