

Your guide to application for a vesting order based on title by adverse possession

The following is a **general guide only** to the procedures to follow when applying for ownership of a parcel of land by means of adverse possession.

1. Should you use a lawyer to make ownership application by adverse possession?

An application by adverse possession is quite complex and involved.

Staff at Land Victoria are required by law to satisfy themselves as to certain evidence before approving an application by adverse possession. The evidence required is described in this pamphlet in Part 9 – Proofs. If all necessary evidence is not presented when you first apply, your application will be delayed.

If you are not certain that you understand how to gather and present the necessary evidence, you should consider employing a lawyer or other adviser to do the work for you.

If you wish to use a lawyer, the Law Institute of Victoria has a referral service that can refer you to lawyers experienced in this type of work. The Law Institute of Victoria is at 470 Bourke Street, Melbourne 3000, and can be contacted on (03) 9607 9311. Ask the receptionist for a referral to a lawyer for an application at Land Victoria.

2. Introduction

Under Section 62 of the *Transfer of Land Act 1958*, the Registrar may grant an application and make an order vesting land under the operation of the Act in an applicant who makes application under Section 60, if satisfied that the applicant has acquired title by possession.

Part 3 of this guide outlines in general terms the requirements and matters which must be proven to the Registrar's satisfaction before an application for title based on adverse possession will be granted under Section 60. It is intended to be read as a guide only. It is not intended to provide a complete code for all such applications.

3. Requirements which must be proven in an application

- The applicant is presently in exclusive possession.
- The applicant, either alone or together with other persons through whom the applicant claims, has been in exclusive possession continuously for at least fifteen (15) years.

If the application is made for the grant of an unencumbered title, the applicant must also prove that any encumbrances existing over the interest of the dispossessed registered proprietor have been determined or extinguished by the applicant's possession.

Where the encumbrance is an easement (e.g. rights of carriageway, drainage, etc.), proof of non-user for at least thirty (30) years is required to constitute sufficient evidence of abandonment to allow its removal.

The term 'possession' means a visible and effectual dominion or control by a person who intends to act as owner and who holds himself or herself out as owner. This can be shown by an applicant who occupies or uses the land with the intention of acting as owner. The applicant may also demonstrate possession by exercising ownership rights in other ways, such as receiving rents and profits from tenants or licensees or by allowing others to occupy or use the land. 'Possession' does not mean and should be distinguished from 'occupation'.

4. Method of proving adverse possession

Because of the many ways in which an applicant may prove adverse possession, it is difficult to establish guidelines to cover every possible set of circumstances in which the Registrar might be prepared to make a vesting order. In each case, it is up to the applicant and his or her legal advisers how best to present the applicant's case.

If the evidence provided by the applicant does not convince the Registrar that title by adverse possession has arisen, a vesting order will not be made, even

though the applicant may have satisfied the formal requirements of this guide. If, conversely, a practitioner believes that his or her client has acquired title by adverse possession, the practitioner should not be deterred from making out a case for consideration by the Registrar despite the fact that the evidence may not completely satisfy these formal requirements.

For example, where the application pertains to land that has been covered for at least fifteen (15) years by structures, the Registrar may be satisfied with lesser proofs than those usually required.

Despite evidence that would otherwise be insufficient, the Registrar may be prepared to make a vesting order upon payment of a larger contribution to the Consolidated Fund if the circumstances of the applicant's adverse possession demonstrate a clear and incontrovertible intention by the applicant (and those through whom he or she claims) to occupy or use land claimed in the applicant's own right and a public ongoing display of that intention for at least fifteen (15) years.

Initially, an interview with a Land Victoria staff member to discuss the nature of the applicant's case may be of benefit in these circumstances.

Set out under Part 9 – Proofs of this guide are the matters that Land Victoria would ordinarily require for two very common examples of adverse possession. It is hoped that these will provide practitioners with guides and comparisons that they can use when preparing proofs for a client who is claiming title to land by adverse possession.

5. Identification of the land

In almost all applications, a survey plan or aerial photograph will be required. The only exceptions usually made are in the case where the –

- (i) land for which the application is made is wholly enclosed:
 - by land to which the applicant has title, or
 - by government roads, or

- by Crown lands, or
- a combination of any or all of the above

or

(ii) application is made:

- by a mortgagee in possession; or
- by a mortgagor seeking to remove an outstanding mortgage that is statute barred; or
- by one or more co-proprietors against the other co-proprietor(s).

For information regarding the use of aerial photographs, see guidance notes on this subject issued by the Registrar.

Where a survey plan is used it should be up-to-date. If it is more than two (2) years old, the surveyor may be required to update their observations and re-certify the survey.

6. Consolidated Fund contribution

Where the applicant can provide satisfactory proof of thirty (30) years adverse possession the Registrar will grant an application subject to payment of a contribution. This is usually about one half (½) per cent of the value claimed but may be waived entirely where the Registrar is of the opinion that granting the application would not impose any risk to the Consolidated Fund.

The Registrar will grant an application upon satisfactory proof of fifteen (15) years adverse possession, but will then levy an increased contribution. This will usually be about one half (½) per cent of the value of the land claimed where the registered proprietor is a natural person. This increased contribution recognises the slight risk to the Fund of a claim, which might be made by a proprietor under the disability whose rights are saved by virtue of the *Limitations of Actions Act 1958*.

Where an application pertains to land standing in the name of an incorporated body and satisfactory proof of fifteen (15) years adverse possession can be provided, a contribution of about one

half (½) per cent of the value of the land claimed will be required but may be waived entirely where the Registrar is of the opinion that granting the application would not impose any risk to the Consolidated Fund.

Where the applicant can provide satisfactory proof of adverse possession for a period between fifteen (15) and thirty (30) years and the land stands in the name of a natural person, the Registrar will grant an application subject to payment of an increased contribution to the Fund based on an assessment of the risk involved. This would ordinarily be a contribution of one half (½) per cent of the value of the land claimed where the registered proprietor is a natural person.

In any case, a larger contribution may be required of an applicant where the Registrar perceives an additional risk in making a vesting order.

In all cases where the Registrar perceives some risk to the Consolidated Fund, a minimum contribution of \$50.00 to the Consolidated Fund will be required of the applicant.

7. General Law land

Where the land sought to be claimed by adverse possession is General Law land (i.e. land not under the operation of the *Transfer of Land Act 1958*), application must be made under Section 15 of the Act.

The application must be supported by:

- a survey plan or aerial photograph (see Part 5 – Identification of the land)
- Search of title (Section 26J of the *Transfer of Land Act 1958*)
- Legal Practitioner's Certificate (Schedule 5A of the *Transfer of Land Act 1958*)
- Evidence of Possession (See Part 9 – Proofs)

8. Limitations of expectations

Whatever method is chosen by a practitioner to prove their client's adverse possession, Land Victoria will not process

applications which:

- do not disclose a case for a vesting order to be made; and
- are not accompanied by documentation sufficient to support a case.

Failure to disclose a *prima facie* case or to provide the documentation necessary will result in the application being refused at lodgement or rejected and fees being forfeited pursuant to the provisions of Section 105 of the *Transfer of Land Act 1958*.

To prevent applications being refused at lodgement, practitioners seeking to have the Registrar consider their client's application on the basis of lesser proofs than would usually be the case should ensure that they support the application by a letter detailing the basis of the applicant's claim.

9. Proofs

Proofs and items ordinarily required by the Registrar in the case of:

A. Whole parcels (or substantial part/s)

(i) Evidence of applicant and prior possessors

Statutory declaration/s by the applicant and (if necessary to provide evidence for at least the last fifteen (15) years) by each prior adverse possessor for their respective periods of possessions to:

- explain the circumstances in which possession commenced;
- establish that such possession was exclusive and continued subsequently without interruption;
- describe the use made of the land and state who occupied or used it and whether their occupation or use was continuous, uninterrupted and exclusive;
- **either** show that the land was completely enclosed (either by itself or together with other land), by fences, walls or buildings which

remained on the same lines as shown on the survey plan or aerial photograph used to identify the land and which were adequately maintained to exclude people other than those in occupation;

or indicate, where the land is unfenced or only partly enclosed, how exclusive possession was demonstrated and maintained;

- indicate the means of access to the land;
- describe any improvements on the land and circumstances in which these improvements were made;
- indicate who paid the rates; and
- state no acknowledgment of ownership in respect of the claimed land or any part thereof has been given.

The applicant's declaration must:

- state the value of the land being claimed and the basis upon which this value is calculated;
- give the postal address of the land claimed, or the property of which it forms part; and
- give the name and address of the municipality of the district in which the land is located.

Where the period of possession relied upon is less than thirty (30) years and the registered owner is a natural person, the applicant's statutory declaration must also:

- state that the applicant has no knowledge of any circumstances or disability on the part of the registered proprietor or any other person previously entitled to bring any action for recovery of the land which might have extended the limitation period for doing so beyond fifteen (15) years; and
- give details of any dispute by, or contract with, the registered owner or any other person claiming an interest in the land.

The declaration/s must identify the land claimed by reference to the plan of survey or aerial photograph as an exhibit (see Part 5 – Identification of the land).

(ii) Evidence of disinterested witness(es)

A statutory declaration by one disinterested witness which:

- identifies the land claimed by reference to the plan of survey or aerial photograph as an exhibit (see Part 5 – Identification of the land);
- establishes that he or she has known the land or the property of which it forms part for at least fifteen (15) years and explains how the witness has acquired that knowledge (e.g. by describing his or her opportunities of observing it during that time);
- covers, at a minimum, those parts of the evidence pertaining to occupation, use, enclosure, access and improvements required of the applicant in *(i) Evidence of applicant and prior possessors*.

Where an assignment or a chain of assignments of possessory rights (see *(iv) Assignment of possessory rights*) is available but the applicant cannot provide statutory declarations from all previous possessors, practitioners may overcome this difficulty by providing evidence from an additional disinterested witness that satisfies, at a minimum, those parts of the evidence pertaining to occupation, use, fencing, access, improvements and identification referred to above that are within the witness' knowledge.

(iii) Evidence by applicant's solicitor

Where the period of possession relied upon is less than thirty (30) years and the true owner is a natural person, a statutory declaration by the applicant's solicitor that he or she has made diligent and thorough inquiries

and:

- is satisfied that the applicant and (if applicable) any other persons through whom the applicant claims, has or have been in adverse possession of the land for at least the last fifteen (15) years;
- has no knowledge of any circumstances or disability on the part of the registered proprietor or any other person previously entitled to bring an action for recovery of the land which might have extended the period of limitation for doing so beyond fifteen (15) years; and
- has given details of any dispute by, or contact with, the registered owner or any other person claiming an interest in the land.

(iv) Assignment of possessory rights

Where the applicant has not been in possession for at least fifteen (15) years an assignment or chain of assignments of the possessory rights of the person or persons through whom the applicant claims should be produced. Each assignment should be by deed and be duly stamped or denoted by the State Revenue Office.

(v) Rating evidence

A letter from the rate collector (or other appropriate officer) of the municipality in which the land is situated which:

- identifies the land claimed (e.g. by annexure of a copy of the plan of survey); and
- gives particulars of the person or persons who during the last fifteen (15) years has been recorded in the municipal records as the rated owner/s.

(vi) Roads and reserves

Where the subject land is known to Land Victoria records as being either a road or a reserve, evidence of thirty (30) years of non-use will need to be

supplied if the land is to issue free from encumbrance. For example:

If the land forms part of a drainage reserve and it is required that the new title issue free from encumbrances, then thirty (30) years evidence on non-use for drainage would need to be supplied. If this cannot be supplied then a new title will issue subject to the reserve status and be fully encumbered for drainage.

Where the land is a road, evidence is required from the council that it has not been declared or proclaimed as public highway nor has it vested in any body pursuant to any statute. If council is unable to provide this advice then the applicant should supply a statutory declaration after inquiring from appropriate sources.

B. Strips and slivers

In the case of small pieces of land enclosed with other land owned by the applicant where there is no inconsistency between the chain of possession to the strip or sliver and descent of title to the land owned, no formal assignments of possessory rights will be required. In these cases the proofs and items required are –

(i) Evidence of applicant and prior possessors

Statutory declaration(s) by the applicant and (if necessary to provide evidence for at least the last fifteen (15) years) by each prior adverse possessor for their respective periods of possession to –

- explain the circumstances in which possession commenced;
- describe the use made of the land;
- describe the position, nature and (where known) the age of the fencing, walls or buildings enclosing the outer boundary or boundaries of the land claimed;
- state the value of the land claimed and the basis on which that value is calculated; and

- state that no acknowledgment of ownership in respect of the claimed land or any part thereof has been given.

The declaration/s must identify the land claimed by reference to the plan of survey or aerial photograph as an exhibit (see Part 5 – Identification of the land).

Where the applicant cannot provide statutory declarations from any of the prior adverse possessors, the Registrar may require an increased contribution to the Consolidated Fund or further evidence from disinterested witnesses or a combination of both.

(ii) Surveyor's report

The plan of survey must be accompanied by a report by the surveyor as to the position, nature and age of the fencing, walls or buildings enclosing the outer boundary or boundaries of the land claimed. A surveyor's report should accompany field records.

(iii) Descent of title

The descent of title, as shown by the certificate of title or the chain of title or a search of title (as the case may be), to the remaining land within the boundaries enclosing the claimed land must be consistent with the chain of possession shown in the other evidence produced by the applicant.

(iv) Consent of registered proprietor or optional alternative proofs

Either a consent and acknowledgment under seal by the registered proprietor of the claimed land stating that the applicant or prior adverse possessors through whom the applicant claims have possessed the land adversely to the title of the registered proprietor and his, her or their predecessors in title during at least the last fifteen (15) years and that the title of the registered proprietor to the claimed land has been extinguished by the applicant.

Or a statutory declaration by one disinterested witness, which identifies the land, claimed and establishes the witness' means of knowledge (in the same way as required in *(ii) Evidence of disinterested witness(es)* above) and describes the position, nature and (where known) the age of the fencing, walls or buildings enclosing the outer boundary or boundaries of the land claimed.

(v) Evidence by applicant's solicitor

Where the period of possession is less than thirty (30) years and the true owner is a natural person, a statutory declaration by the applicant's solicitor must be produced, stating that he or she has made diligent and thorough inquiries and he or she:

- is satisfied that the applicant and (if applicable) any other persons through whom the applicant claims, has or have been in adverse possession of the land for the last fifteen (15) years; and
- has no knowledge of any circumstances or disability on the part of the registered proprietor or any other person previously entitled to bring an action for recovery of the land which might have extended the period of limitation for doing so beyond fifteen (15) years.

Where strips and slivers are concerned, the applicant will not be required to produce rating evidence.

10. Lodging requirements

Name:

APPLICATION FOR A VESTING ORDER
BASED ON TITLE POSSESSION SECTION 60
(1) TRANSFER OF LAND ACT 1958

Fee:

As stated for Section 60 of the Transfer of Land (Fees) Regulations

Stamp Duty:

May be payable when vesting order is made

Form:

Form 24 – Transfer of Land (General)
Regulations 1994

Lodging:

Application

Requirements:

Survey Plan, field notes and surveyor's report unless waived or aerial photograph accepted.

Certificate of title is required if it is in the possession of the applicant.

Evidence of possession by applicant, prior possessors, disinterested witness and rate collector (if applicable).

Any assignments of possessory rights.

Note: A survey pre-lodgement check is made prior to application being lodged with the Applications Clerk who will allocate an application number.

A checklist is available online at www.dse.vic.gov.au/property > Forms, Guides and Fees.

Sample Form

Application for a vesting order based on title by possession

Section 60(1) Transfer of Land Act 1958

Lodged by

Name:

Phone:

Address:

Reference:

Customer Code:

Privacy Collection Statement

The information from this form is collected by the Registrar of Titles under statutory authority and is used for the purpose of maintaining publicly searchable registers and indexes.

The applicant applies for an order vesting the land in the applicant for the estate specified free of encumbrances.

Land: *(sufficient description to identify the land including volume and folio)*

Applicant: *(full name and address including postcode)*

Estate: *(an estate in fee simple in possession or otherwise specify)*

Date:

Signature of applicant

or

Signature of Australian Legal Practitioner
under the *Legal Profession Act 2004* for applicant

or

Signature of agent

Further Information
Land Registration Services
Land Victoria
Level 9
570 Bourke Street
Melbourne, 3000
Telephone (03) 8636 2010
Office Hours 8:30am – 4:00pm
www.dse.vic.gov.au/property