POS-01 Adverse Possession

Version 1 - 18/12/2017

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1 How Claims Arise

Land which is already under the operation of the Act may be made the subject of an application for a title by possession. The applicant must be able to show possession for a period of:

- twelve years, where it can be proved that the registered proprietor was under no legal disability at the time of possession commenced

or

- thirty years, where it cannot be proved that the registered proprietor was under no legal disability at the time possession commenced

Where the rights of a registered proprietor have lapsed by adverse possession, the subsequent strata titling of the land cannot defeat the adverse possessors interest (Murray J, Nickola Petkov v Lucerne Nominees Pty Ltd (unreported) Supreme Court of Western Australia No 1060 of 1989).
A person may not acquire Crown land by adverse possession (s.36 of the Limitation Act 1935).

2 How to Apply

It is recommended that a Blank Instrument Form be used to prepare the application in the form of the Fourth Schedule to the Act. A modified version of the form is set out below. It should be noted that the form incorporates a declaration and the signing and witnessing requirements are similar to those required for applications under s.20 (see policy and procedure guide TYP-04 Bringing Land Under the TLA.)

3 Form of Application

The application should be made in the following form:

WESTERN AUSTRALIA

TRANSFER OF LAND ACT 1893 (4th Schedule)

Application to be registered as Proprietor by Possession of Land already under the Transfer of Land Act 1893.

To the Registrar of Titles.

I (insert Name and Address) do hereby apply to be registered as proprietor of All that land being (insert description of land according to the existing certificate or if a part only of the land in a title is to be applied for, state the fact and refer to a fully dimensioned sketch). I claim to have acquired an estate in fee simple in possession in such land under the circumstances and on the grounds following:

(Here set out a brief narration of the circumstances and grounds of claim, e.g. I claim to have acquired the rights to be registered as the proprietor of the land by virtue of thirty years’ continuous possession adverse to the legal owner).

and I declare:

1. That such land including all buildings and other improvements thereon is of the value of (number of dollars in words) dollars and no more.

2. That there are no documents or evidences of title affecting such land in my possession or control other than those included in the Schedule hereto.

3. That the said land is occupied. (If unoccupied, prefix "un" to occupied. If occupied, add by whom and state the name and address of the occupant and the nature and period of the occupancy).

4. That the names and addresses so far as known to me of the occupants of all lands contiguous to the said land are as follows: (Here list the contiguous Lots and their Occupants).

5. That the names and addresses so far as known to me of the owners of all lands contiguous to the said land are as follows: (Here list the contiguous Lots and their Owners).

Made and subscribed at ) (Signature of Applicant)
in the presence of
(Signature of Witness)

Qualification of Witness

Schedule of documents referred to

(Here list the documents referred to above produced with the application.)

The applicant, if in the State, to sign before the Registrar of Titles, an Assistant Registrar of Titles or any person who, under the Oaths, Affidavits and Statutory Declarations Act 2005, is an authorised witness for an affidavit made in the State; if out of the State, to sign before any person who, under the Act, is an authorised witness for an affidavit made out of the State.

4 Proving Possessory Title

The proof required to establish title by possession is the same whether the land under possession is not under the Act or is already registered under the Act.

The following considerations are or may be material:

- The possession of land must be considered in every case with reference to its peculiar circumstances. The acts implying possession in one case may be wholly inadequate to prove it in another.

- The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his or her own interests are all matters, greatly varying as they must under various conditions, which are to be taken into account.

- When possession or dispossession has to be inferred from equivocal acts, the intention with which acts are done is all important.

- The nature of the property must be looked at and the person alleging rights accruing from possession must show that acts were done which were inconsistent with the enjoyment of the land by the true owner for the purpose for which he or she intended to use it.

- Acts done may be given a more limited effect than otherwise may have been the case if they may be taken in the circumstances, not as indicating an intention to exclude the true owner but as indicating an intention merely to produce a special benefit to the person doing them (for instance, the registered proprietor may have given the applicant occupation rights rent free on the basis of the maintenance of stock or premises— the evidence provided must negate any such circumstances).

- Any act or series of acts showing the open, notorious, exclusive and hostile possession of one who claims to be the owner of the land may be proved as evidence of adverse possession, but it is considered that acts of dominion over the land must be so notorious, exclusive and hostile as to put any ordinary prudent owner, having the opportunity of observing such acts, on notice of the fact that the lands are in the adverse possession of another.

- Where one joint tenant claims against another he or she must prove possession for his or her own
benefit. See Paradise Beach and Transportation Co Ltd and others v Cyril Price Robinson and others- 1968 [AC] 1072.

4.1 Limitation Periods Under the Limitation Act 2005

From 16 November 2017, Applications to the Commissioner of Titles seeking to establish a claim of adverse possession under section 222 of the Transfer of Land Act 1893 (TLA) can provide evidence to address legal disability under the Limitation Act 2005, or the Limitation Act 1935. For many cases this will be more straightforward under the 2005 Act. This determines the relevant limitation period for a claim to adverse possession.

Applicants and other parties with an interest in land subject to of a claim to adverse possession should seek legal advice to determine the best course of action for them. The key provisions to address legal disability under the Limitation Act 2005 are:

- Adverse possession is described and outlined based on limitation periods, section 3(6);
- A 12-year limitation period applies generally to an action to recover land, section 19(1);
- Section 35(2) provides a maximum 12-year limitation period where a person subject to a mental disability did not have a guardianship or administration order made for them;
- Section 41 provides for a possible extension of a limitation period with a person under 18;
- Section 42 provides for an extension of a limitation period by a Court where a person suffering a mental disability has a guardian; and
- Section 36 provides for an extension of a limitation period where there is a person in a close relationship with a person subject to a mental disability.

If the Applicant provides sufficient evidence to establish:

- there was no guardianship or administration order for the owner of the claimed land during the period of the claim;
- the true owner of the claimed land was over 18 during the period of the claim; and
- the applicant has not been in a close relationship, as defined at section 36 of the 2005 Act, with the owner of the claimed land;

the relevant limitation period under the Limitation Act 2005 is 12 years from when the cause of action first accrued. If sufficient evidence is not provided to the satisfaction of the Commissioner of Titles, further evidence will be required and a limitation period greater than 12 years may apply.

Evidence to address these matters is required for all of the true owners of the claimed land, including a personal representative, remainder-man, beneficiary and other subsequent owners, shown on the title during the period of an adverse possession claim. If the registered proprietor was deceased, but the title not amended during the period of the claim, the relevant limitation period is 12 years from when the cause of action first accrued (see section 78(1) of the Limitation Act 2005).
5 Evidence in Support

The application must be supported by a statutory declaration of the applicant in which should be set out, in as much detail as possible, the history of the acts of possession.

All of the following points should be covered:

- the date at which possession commenced
- the circumstances under which possession was taken
- the use, in detail, to which the land was put during the period of possession
- whether the occupation was exclusive
- whether the occupation was continuous
- whether the land was completely enclosed by fencing or otherwise, the location and nature of the fencing, what repairs have been effected and when
- how entry to and from the land is made and where gates are situated (incorporate a sketch by a surveyor showing the position of gates and fences)
- the nature of any improvements on the land, when erected and by whom
- no payments of rent were made nor was any acknowledgment of ownership given to any other person
- where other persons have been in possession of the land, the period and nature of their possession
- who has paid the rates and taxes levied on the land (annexing to the declaration as an exhibit a certificate of the rating authority covering the whole period or as close to the whole period as the records maintained permit)
- whether there has been any claim or action at law to recover possession of the land
- the nature and extent of any easements or covenants affecting the land (conveyancers should note that the presence of an easement on the land claimed is not necessarily fatal to the claim, especially where the easement does not extend over the whole of the land claimed, e.g.: where a right of way exists over part of an area of the land used by the applicant for grazing purposes);
- where there has been a series of trespassers and the sum of their possessory rights is relied upon assignments of those possessory rights must be produced. The assignment may take the form of a devise in a will in those circumstances where the applicant is the heir of a deceased trespasser
- the nature and extent of any encumbrance over the land and the effect of the claim on the encumbrancer’s rights.

6 Encumbrances on Land Claimed
Conveyancers should consider the effect of registered encumbrances on the land claimed by adverse possession. The presence of an easement over land claimed is as been previously stated not necessarily fatal to the claim and it may be that the applicant claims the land subject to the easement and the application should make that clear.

In cases where the adverse possession is claimed by virtue of an encroachment by a building on land encumbered by an easement it would seem obvious that the intention of the applicant is to obtain a title free of the easement. In such cases the application should include elements referring to the abandonment of the rights of the grantees.

In a similar manner, without attempting to set out how such circumstances may arise, the claimant for a title for adverse possession of land encumbered by a mortgage may make the claim subject to (and with the consent of) the mortgagee.

Consideration would have to be given to the extent of coverage of the mortgage over the resultant land parcel should the claim be accepted. An application for adverse possession must also give a clear indication of the applicant’s desire regarding any caveats or memorials over the land claimed and how they are to be dealt with.

7 Confirmation of Possession

The application must be supported by the statutory declaration of at least two disinterested persons setting out their knowledge of the nature and extent of the acts of possession upon which the applicant relies.

The declarant should state, preferably in his or her own words, all of the following:

- his or her age
- his or her means of knowledge of the land
- how he or she identifies the land with the land the subject of the application- a sketch by which he or she identifies the land should be made an annexure to the declaration
- how long he or she has known the applicant
- what acts of ownership he or she has observed and over what period?
- the nature of the fencing and its maintenance
- that he or she is not a relative or business associate of the applicant
- whether he or she has heard of any other claim being made or litigation being entered into as to ownership of the land.

As a last resort, when no other person(s) can be found to provide the required declaration(s), evidence from a business associate or relative may be accepted but the weight of their evidence will be given limited value.

8 Whether a Survey is Required
In most cases an application for a title based on adverse possession must be supported by a survey carried out by a licensed surveyor to clearly establish the relative positions of improvements and the boundaries of the land claimed. An exception may be made in cases where the land is bounded on all sides by a public road, or by other land owned by the applicant and requests for exemption from the policy should be made in writing to the Commissioner of Titles.

Where the application is for a whole parcel of land, or the remaining balance of the land in a certificate of title, a re-establishment survey of that parcel of land must be effected, field notes lodged and a sketch of the survey presented with the application.

Where the application is for a portion of an adjoining land parcel a survey of only that portion being claimed is required, with a sketch of the survey presented with the application. If the claim is proven, then a Deposited Plan of survey (with field notes) will need to be lodged amalgamating the claimed portion with the adjoining land of the applicant.

The sketch to be presented with the application for whole or part parcels must show the true legal land description, the boundary dimensions and positions of improvements and fencing (including an estimation of their age and comment about their condition). It is preferable that the sketch be on A4 size paper.

9 Examination of Application

The application is submitted to the Commissioner who may make requisitions if not satisfied with the evidence submitted. If the Commissioner is satisfied that the application may be granted, a notice of intention to grant the application is published in a newspaper circulating in the City of Perth or in the neighbourhood of the land. The period of advertising is not less than two weeks nor more than twelve months.

A copy of the advertisement usually is sent by certified mail to the registered proprietor of the land the subject of the application and to owners, occupiers and encumbrancers of contiguous land but this is at the discretion of the Commissioner. If at the end of the advertising period no caveat against the application is lodged, a title for the land is created and registered and a duplicate certificate of title (if required) is issued to the person entitled to receive it.

10 Caveat Against Application

Section 223 of the TLA provides that a caveat may be lodged against the application. The subject is fully treated in CAV-03 Caveats - types of, but also see s.223A as to the lapsing of the caveat.

11 Searching an Application for Adverse Possession

When an adverse possession application is lodged the relevant title is marked subject to dealing. It is possible to obtain a copy of the following items from Landgate upon payment of the prescribed search fee:

- the adverse possession application
and

- the accompanying statutory declaration of the applicant(s).

Landgate will not provide a copy of the following:

- Statutory declarations of disinterested persons that may be filed with the application.

- The re-establishment survey lodged with the application.

- Any letters, requisitions and other correspondence between Landgate and the applicant or the applicant's solicitor.