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| Guide to evidence supporting an adverse possession claim |
| Section 60 *Transfer of Land Act 1958* |

This guide outlines the evidence required to lodge an adverse possession application under sections 15, 26P and 60 of the *Transfer of Land Act 1958*.

Please read this guide in conjunction with *Guide to adverse possession* and *Guide to Request to waive survey for an adverse possession application* (see ‘Further information’ later in this guide).

Proving an adverse possession claim

Because of the many ways in which an applicant can prove adverse possession, it is difficult 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 their legal adviser to present the applicant’s case.

Even though the applicant may satisfy the formal requirements for the application, if the evidence provided by the applicant does not convince the Registrar that title by adverse possession has arisen, the application will not be granted.

If, conversely, a lawyer believes their client has genuinely acquired title by adverse possession, but the evidence does not completely satisfy formal requirements, the legal practitioner should not be deterred from making a case for the Registrar’s consideration. For example, if the application pertains to land covered by structures for at least 15 years, the Registrar may be satisfied with less proof than usually required.

Land Use Victoria has outlined the requirements that must be addressed when completing a typical adverse possession application.
Regardless of the way in which the lawyer chooses to prove their client’s adverse possession claim, Land Use Victoria will not process applications that:

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

Failure to disclose prima facie evidence or provide the necessary documentation will result in the application being refused at lodgement; or, after examination, rejected and fees forfeited pursuant to section 105 of the *Transfer of Land Act 1958*.

Evidence from applicant and prior possessors

Statutory declaration(s) are required from the applicant and, if necessary, to provide evidence for at least the last 15 years, by each prior adverse possessor for their respective periods of possession. The declarations need to:

* explain the circumstances in which possession commenced
* establish that 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 (by itself or together with other land), by fences, walls or buildings that 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 how exclusive possession was demonstrated and maintained if the land is unfenced or only partly enclosed
* indicate the means of access to the land
* describe any improvements to the land and the circumstances in which these improvements were made
* state the value of the land being claimed and the basis upon which this value was calculated
* indicate who paid the rates for whole parcels or large parts of parcels
* state that the applicant has not acknowledged the title of the registered proprietor in respect of all or part of the land claimed.

Note: a copy of the applicant’s statutory declaration may be sent to the State Revenue Office (SRO) for duty assessment after the application is registered.

Evidence from disinterested witness(es)

A statutory declaration from at least one disinterested witness needs to:

* identify the land claimed by referencing the plan of survey or aerial photograph as an exhibit
* establish that he or she has known the land (or the property of which it forms part) for at least 15 years and explains how the witness has acquired that knowledge (e.g. by describing his or her opportunities to observe it during that time)
* cover, at a minimum, the parts of the evidence required in the applicant’s statutory declaration pertaining to occupation, use, enclosure, access and improvements.

If an assignment or a chain of assignments of possessory rights (see ‘Assignment of possessory rights’ below) is available, but the applicant cannot provide statutory declarations from all previous possessors, a lawyer can provide 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 in the applicant’s application that are within the additional disinterested witness’s knowledge.

Rating evidence

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

* identifies the land claimed (e.g. including a copy of the plan of survey)
* gives particulars of the person or people who during the last 15 years have been recorded in the municipal records as the rated owner/s.

In some instances, the council will be unable to provide this information and a letter from the appropriate council officer stating why this is the case should be lodged.

Evidence from the applicant’s lawyer

If the period of possession relied upon is less than 30 years and the registered owner is a natural person, include a statutory declaration from the applicant’s lawyer stating that he or she has made diligent and thorough enquiries, and:

* is satisfied that the applicant and (if applicable) any other people through whom the applicant claims, has or have been in adverse possession of the land for at least the last 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 15 years
* give details of any dispute or contact with the registered owner or any other person claiming an interest in the land.

Assignment of possessory rights

If the applicant has not been in possession for at least 15 years, the applicant must produce an assignment or chain of assignments of the possessory rights of the person or people through whom the applicant claims. Each assignment should be by deed, which is no longer required to be stamped or denoted by the State Revenue Office (SRO) because the duty will be assessed by the SRO after the application is granted

Additional evidence

There are many other types of evidence that can be lodged with an adverse possession application. Photos of the land may be useful in illustrating enclosure of the subject land. Contracts of sale may be useful; however, these do not fulfil the role of Deeds of Assignment of Possessory Rights. The circumstances of the possession will dictate the evidence required. Applications that seek to remove encumbrances from the subject land will often require additional information – see ‘Dealing with encumbrances’ below.

Dealing with encumbrances

If an application is made for an unencumbered title, the applicant must also prove that any encumbrances existing over the subject land have been extinguished by the applicant’s possession.

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

Encumbrances that are able to be removed in an adverse possession application

Encumbrances that can be removed include, but are not limited to:

* easements including road status (if the subject land is known as a road on Land Use Victoria’s records, the applicant should obtain a letter from council stating that the land is not (part of) a road as defined by the *Road Management Act 2004)*
* section 12(2) *Subdivision Act 1988* easements and rights under specific circumstances – see section 12(2), Easements and rights*, Subdivision Act 1988*
* reserve status
* restrictive covenants
* agreements under section 173 of the *Planning and Environment Act 1987*
* caveats
* statutory charges
* mortgages.

In each case, the applicant's possession must be considered to have defeated the existence of the encumbrance.

Encumbrances that cannot be removed

Encumbrances that cannot be removed include:

* rights saved by section 207D of the *Local Government Act 1989*
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* Notices of Acquisition under section 57 of the *Transfer of Land Act 1958*
* section 12(2) *Subdivision Act 1988* easements and rights cannot be removed in specific circumstances – See section 12(2), Easements and rights, *Subdivision Act 1988*
* conditions or reservations in Crown Grants.

Easements and how they affect land in the application

An easement is a right attached to one piece of land, which allows the owner of that land to use the land of another person for a stated purpose. In the context of an adverse possession application, the use for this purpose has been prevented because of the applicant's possession, e.g. a fence has prevented use of the land as a carriageway. If this is not proven, the easement will be carried forward onto the vested folio.

Proof of easement extinguishment

The removal of easements in an adverse possession application relies on the standard of proof required by section 73(3) *Transfer of Land Act 1958*, which states that if ‘…such easement has not been used or enjoyed for a period of not less than thirty years, such proof shall constitute sufficient evidence that such easement has been abandoned’.

Section 73A of the *Transfer of Land Act 1958* provides specific guidance regarding the extinguishment of easements of carriageways in adverse possession applications. Removal of carriageway easements will require consent of council – See below ‘Roads, carriageway/way/footway/access etc.’ – the standard required relies on 30 years of possession.

Section 12(2) *Subdivision Act 1988* – Easements and rights

Removal

Section 12(2) easements can only be removed in an adverse possession claim when the possessory interest existed before the plan that created the Section 12(2) easement. Any implied rights that came into existence upon registration of the plan could not have existed prior to the plan; therefore, its removal may be possible.

Carry forward

Attempting to remove 12(2) easements that pre-exist possession would be problematic. Since they are implied, not expressed, evidence would be required proving that each of the possible types of 12(2) rights had been extinguished. Under the *Subdivision Act 1988,* these include:

‘…support, shelter or protection, passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission), rights of way, full, free and uninterrupted access to and use of light for windows, doors or other openings, maintenance of overhanging eaves…’

Evidence to disprove these rights would become particularly complicated.

Roads/carriageway/way/footway/access etc.

The *Road Management Act 2004* prohibits adverse possession of any land it defines as a road. Therefore, if any title or plan held by Land Use Victoria indicates the land may be a road, advice from council stating that they do not consider the land to be a road is required. This also applies to land that is shown encumbered by carriageway, passageway, footway etc.

Section 73B of the *Transfer of Land Act 1958* states that the Registrar must not register a dealing that creates or surrenders a carriageway easement unless council consents to its creation or surrender. This has also been interpreted to include easements of footway, way, passageway, pedestrian way, access, ingress, egress, and shopping malls, i.e. easements to do with ‘movement’ in general.

Further information

Additional information is available on the [Transfer of Land Act](http://www.delwp.vic.gov.au/property-and-land-titles/forms%2C-guides-and-fees/transfer-of-land-act) page at [www.delwp.vic.gov.au/property-forms](http://www.delwp.vic.gov.au/property-forms)>Transfer of Land Act>Adverse possession.

See also:

* *Adverse possession Section 60 checklist*
* *Guide to adverse possession*
* *Guide to a request to waive survey for an adverse possession application*.

Contact us

For [location and contact details](http://www.dtpli.vic.gov.au/property-and-land-titles/contact-us), refer to [www.delwp.vic.gov.au/property](http://www.delwp.vic.gov.au/property)>Contact us.

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