



Review of the *Real Property Act 1886 (SA)*

Fact Sheet 2 - Indefeasibility and the Definition of Registrable Interests

Torrens Title – A System of Title by Registration

The system of Torrens Title, named after Sir Robert Richard Torrens and famously established in South Australia in 1858, is a system of 'title by registration'. The system is presently set out in the Real Property Act 1886 (SA) ('RPA').

The term 'title by registration' means that whatever estate or interest a party holds, it is established not by the execution of a deed or other contract, but by registration of an instrument, being a document registrable in the Land Titles Office,¹ creating that estate or interest in a central registry maintained by the Government. The process of registration distinguishes this form of title from other systems, including the preceding Anglo-Australian and English law, known as the general law system. These systems allowed for the registration of title where the title was created by a deed or other instrument and the registry merely recorded title that already existed, facilitating a central repository where the existence of title could be searched by interested parties.²

The innovation of a system of title by registration revolves around three central principles: curtain, mirror, and assurance.

The 'curtain principle' means that a party only needs to consider the title as noted in the central registry to determine the state of that title. As such, only estates and interests noted in the registry are considered valid and binding on others, as a curtain is brought down around the current title and no other rights outside of that curtain affect that title.

The 'mirror principle' is the consequence of the curtain: a person only needs to examine the state of title found in the registry, which provides an accurate picture, or reflection, of the state of title.

The 'assurance principle' is a necessary adjunct of the curtain and mirror: the title is guaranteed by the state and, as such, if the condition of the title in the register is inaccurate for any reason, and a party suffers loss because of reliance on the register, the assurance fund will be used to compensate the party suffering loss.³

Indefeasibility of Title

The Torrens system allows for both registered and unregistered interests.⁴ By registering an estate or interest in the relevant instrument, title is conferred to the person registering the interest at the moment of registration.⁵ This, in turn, confers 'indefeasibility' of the relevant title upon the registering party.⁶

¹ *Real Property Act 1886 (SA)* s 3 (definition of 'instrument').

² Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 32; Kelvin FK Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melbourne University Law Review* 205, 205.

³ Theodore BF Ruoff published four articles in 1952, one on each of the three principles, and one outlining the operation of the system in New Zealand: Theodore BF Ruoff, 'An Englishman Looks at the Torrens System' (Parts I-IV) (1952) 26 *Australian Law Journal* 118, 162, 194, 228.

⁴ Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 32.

⁵ *Real Property Act 1886 (SA)* s 56(2); Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [11.1690], [12.150], [12.450].

⁶ Rohan Havelock, 'Reconciling Equitable Claims with Torrens Title' (2019) 41(4) *Sydney Law Review* 455; *Real Property Act 1886 (SA)* s 69; Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 33; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [12.460]; Matthew Anibal Fuentes-Jiménez and Paul Babie, 'The Residential Tenancy Agreement as an Exception to the Indefeasibility of Title' (2021) 29 *Australian Property Law Journal* 51, 59.



'Indefeasibility' refers to the paramountcy of title; it takes priority over all unregistered or later registered interests,⁷ and cannot, subject to exceptions (considered in Fact Sheet 6), be impeached, defeated or extinguished by any unregistered or later registered interests.⁸ However, a registered proprietor will lose indefeasible title upon another proprietor being registered, so long as the new registered proprietor has not acted fraudulently.⁹

Although not expressly stated in the RPA, the widely accepted modern position concerning indefeasibility of title is that it attaches to the registered proprietor immediately upon registration (though precisely what this means is unclear in the context of electronic conveyancing). In addition, no unregistered or later registered interest can affect the security of the title registered.¹⁰ The question arises, then, as to which estates and interests recognised at common law are capable of registration under the RPA.

Registerable Legal Estates or Interests

Section 69 of the RPA provides that a registered proprietor of land has an indefeasible interest in the land 'subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title'.¹¹ While the RPA defines 'instrument',¹² it does not expressly state which estates and interests found in instruments are capable of registration and gaining the protection of indefeasibility.¹³

It is widely accepted, in practice, that any estate or interest recognised in law (but not in equity) is capable of registration. Accordingly, it seems probable that the following interests are registerable under the RPA:¹⁴

1. Legal estates (which allow possession of land): fees simple, life estates, fees tail, and leaseholds;¹⁵
2. Legal subsidiary interests or incorporeal hereditaments (which do not allow possession of land): easements,¹⁶ profits-à-prendre,¹⁷ rent-charges,¹⁸ and mortgages; and
3. Statutory interests, such as an interest in a retirement village pursuant to the *Retirement Villages Act 2016* (SA).¹⁹

A mere licence, whether gratuitous or contractual, is incapable of registration and, as such, of gaining the protection of indefeasibility.²⁰ This raises a significant issue with respect to an important, but anomalous subsidiary interest in land.

⁷ Rohan Havelock, 'Reconciling Equitable Claims with Torrens Title' (2019) 41(4) *Sydney Law Review* 455, 459; Les A McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title' (1994) 20(2) *Monash University Law Review* 300, 314.

⁸ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.115]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [12.460]; Land Services SA, 'Glossary of Property Terms', *Land Services SA* (Web Page, 22 November 2018) <<https://www.landservices.com.au/support-materials-and-resources/glossary-of-property-terms>>.

⁹ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.115].

¹⁰ *Ibid* [4.135].

¹¹ *Real Property Act 1886* (SA) s 69.

¹² *Ibid* s 3 (definition of 'instrument').

¹³ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.490].

¹⁴ Matthew Anibal Fuentes-Jiménez and Paul Babie, 'The Residential Tenancy Agreement as an Exception to the Indefeasibility of Title' (2021) 29 *Australian Property Law Journal* 51, 60.

¹⁵ *Ibid* 55, 60; *Real Property Act 1886* (SA) ss 77, 93.

¹⁶ Brendan Grigg and Hossein Esmaili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 239 ('Protecting a View in Australia'); Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [17.240].

¹⁷ *Real Property Act 1886* (SA) ss 3 (definition of 'easement'), 81, 96.

¹⁸ *Ibid* ss 77, 128B.

¹⁹ *Retirement Villages Act 2016* (SA) s 56(1); Office for Ageing Well and Department for Health and Wellbeing, *Retirement Villages Register* (Information Sheet, July 2022).

²⁰ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [12.490].



An Anomalous Interest: Restrictive Covenant

A restrictive covenant is an undertaking given through an agreement²¹ which prohibits the use of a parcel of land for a purpose which would otherwise be permitted, for the benefit of another parcel of land²² (for example, the protection of a view).²³

While a restrictive covenant is a well-established subsidiary (non-possessory) interest in Anglo-Australian real property law, it is anomalous as it is only enforceable in equity. As such, because only legal estates and interests are registrable under the *RPA*, the restrictive covenant is not registrable in South Australia, and therefore cannot gain the protection of indefeasibility.²⁴ At best, a restrictive covenant may be protected through the lodgement of a caveat (considered below).²⁵

Noting the above, there exists ongoing debate as to whether a restrictive covenant can, in its own right, be registered as an encumbrance.²⁶ Historically in South Australia, such interests have been registered by treating them as a rent-charge, thus allowing their registration as though they are a legal subsidiary interest.²⁷ In this way, it is the rent-charge, rather than the restrictive covenant itself, which gives rise to an interest in the land.²⁸ This approach was affirmed in 2020 by the High Court of Australia in *Deguise v Lynn*.²⁹ For further information regarding restrictive covenants, see Fact Sheet 4.

Caveats

As noted above, many interests are incapable of registration and, as such, cannot gain the protection of indefeasibility. This may lead to parties lodging caveats to protect their interests.

A caveat, from the Latin word for 'beware',³⁰ is a document which can be lodged with the Registrar-General to protect an unregistered interest in Torrens title land.³¹ Importantly, the relevant interest must attach to the land in question.³² The unregistered or unregistrable interests are typically those recognised in equity or unregistered mortgages or leases.³³ A caveat is the only means of protecting an equitable interest (for example, a restrictive covenant or equitable easement).³⁴ A caveat is not 'registered' as such, but is to be noted in the Register Book.³⁵ For further information regarding caveats, see Fact Sheet 8.

²¹ Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, 6th edition, 2021) 169, 582; *Jaggumantri v Registrar-General* [2023] SASC 74, [38]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [10.10].

²² Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, 6th edition, 2021) 582; Department of Transport and Planning, 'Restrictive Covenants', *Department of Transport and Planning* (Web Page, 1 November 2023) <<https://www.planning.vic.gov.au/guides-and-resources/guides/all-guides/restrictive-covenants>>; Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 239, 243.

²³ Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 239, 243.

²⁴ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [18.25]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [10.700]; Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 239, 243, 252-253; *Jaggumantri v Registrar-General* [2023] SASC 74 [43].

²⁵ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [18.40].

²⁶ *Ibid* [18.30]; Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 239, 252.

²⁷ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [18.35]; *Blacks Ltd v Rix* (1962) 161 SASR 164; Brian Hunter, 'Equity and the Torrens System' (1964) 2(2) *Adelaide Law Review* 208.

²⁸ Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 239, 253.

²⁹ (2020) 268 CLR 638.

³⁰ Legal Services Commission South Australia, 'Caveats', *Legal Services Commission South Australia* (Web Page, 23 January 2019) <<https://www.lawhandbook.sa.gov.au/ch23s08s01s04.php>>.

³¹ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [12.980]; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [5.25]; Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, 6th edition, 2021) 96.

³² Legal Services Commission South Australia, 'Caveats', *Legal Services Commission South Australia* (Web Page, 23 January 2019) <<https://www.lawhandbook.sa.gov.au/ch23s08s01s04.php>>.

³³ *Ibid*; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [7.470], [11.1480], [12.990]. There are a wide range of equitable interests which could arise. Regional lawyers and Dr Mark Giancaspro have raised to SALRI such interests as moiety titles and interests arising from a 'granny flat'.

³⁴ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [12.1030], [12.1190].

³⁵ *Real Property Act 1886* (SA) s 191(1)(b).



Consultation Questions

1. Should the Torrens system explicitly adopt immediate indefeasibility in the *Real Property Act 1886* (SA)? Why or why not?
2. Should indefeasibility apply to historical implied/unregistered easements (i.e. when they are no longer shown on title but have not been extinguished)?
3. How should the assurance fund operate to provide compensation for those parties who suffer loss because of reliance on the Register?
4. Should the *Real Property Act 1886* (SA) contain a provision which defines a registrable estate or interest? Why or why not?
5. What types of estates or interests should be registrable?

SALRI's consultation process will open on 8 July 2024 and close on 4 October 2024.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.

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