



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

Fact Sheet 3 - Equitable Interests

What is an Equitable Interest

The Torrens system, being a system of title by registration, confers immediate indefeasibility of title upon registration of a relevant instrument creating a legal estate or interest.¹ This has the effect of making the title paramount, prioritising it against all unregistered or unregistrable interests.²

The policy of the Torrens system, from its introduction, has been to exclude equitable estates or interests from the Register, making these interests unregistrable. As such interests exist as a matter of equitable legal principles, they are recognised and enforced outside of the Register and can gain no validity, or enforcement, under the Torrens system itself.³

The common law position is that an equitable interest cannot be enforced against a *bona fide* (good faith) purchaser⁴ unless that purchaser had notice of the prior equitable interest (whether the notice is actual, constructive or imputed).⁵ For example, an equitable mortgagee cannot enforce the security interest against a subsequent purchaser of the legal fee simple who purchases *bona fide* without notice, as the purchaser was unaware of the equitable mortgage when making their good faith purchase.⁶ However, if the *bona fide* purchaser did have notice of the equitable mortgage, they would be bound by it. This principle, known as the *bona fide* purchaser doctrine, protects only a 'purchaser'; thus, a person taking a legal interest in real property as a gift (sometimes called a 'volunteer') is not protected against prior equitable interests.⁷

The Torrens system undermines this common law position, requiring more than mere notice to bind a subsequent registered proprietor to a prior equitable interest, such as actual fraud.⁸ This places equitable interests in a potentially vulnerable position.

This said, equitable interests relating to real property can gain protection in two ways:

1. Under one of the exceptions to indefeasibility created for equitable interests in ss 69, 71, and 249 of the *RPA*; and
2. By lodgement of a caveat protecting the equitable interest.⁹

Express Exceptions

In all jurisdictions except South Australia, the courts have interpreted Torrens systems statutes to include an exception to indefeasibility for rights created *in personam* (against other persons) by the registered proprietor. Such rights include equitable estates and interests.¹⁰

¹ 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.

² 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; Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 32.

³ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [4.70]; *Real Property Act 1886 (SA)* s 249.

⁴ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [2.460]; *Real Property Act 1886 (SA)* s 249(2).

⁵ *Law of Property Act 1936 (SA)* s 117; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [2.490].

⁶ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [2.390].

⁷ *Ibid* [2.460]-[2.465].

⁸ *Real Property Act 1886 (SA)* s 72.

⁹ Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 34.

¹⁰ There are various categories of equitable interests. Regional lawyers and Dr Mark Giancaspro have raised to SALRI such interests as moiety titles and interests arising from a 'granny flat'.



In South Australia, the *RPA* contains an express exception to indefeasibility for equitable interests.¹¹ This exception covers equitable interests that arise through contractual dealings involving the relevant Torrens land, trusts (whether express, implied or constructive), and all other equitable interests, including restrictive covenants.¹² The exception recognises a registered proprietor's personal obligations towards the equitable interest holder.¹³

The effect of the exception is that the equitable interest may be enforceable pursuant to the equitable doctrines of duress, undue influence, and unconscionable dealing so as to prevent fraudulent dealings from having a legal effect.¹⁴ This allows the equitable interest holder to enforce their interest.

The 'Proviso', or the 'Exception to the Exception'

The express statutory exception to indefeasibility is subject to a further qualification or exception, known as the 'proviso' or the 'exception to the exception'.

The 'proviso' is found in multiple sections of the *RPA* which effectively provide that the exception to indefeasibility will not apply where there is a registered proprietor who has taken the property *bona fide* (in good faith) for valuable consideration.¹⁵ This 'proviso' applies against any registered proprietor, including successors in title (subsequent registered proprietors) to the registered proprietor who created the equitable interest.¹⁶ This leaves equitable interest holders in a precarious position with respect to successors in title. As such, a caveat may provide greater protection than reliance on the exceptions to indefeasibility alone, as discussed below.

Trusts

Trusts fall into two categories: express or non-express. The express trust is the most common equitable interest encountered within the Torrens system.¹⁷ Established through a written instrument signed by the settlor (the party creating the trust, typically, the registered proprietor), it creates a set of obligations binding upon a trustee, who may be the settlor or some other party, to the benefit of third party, known as the beneficiary or equitable interest holder.¹⁸ The substance of the trust lies in the beneficiary's equitable right to compel the trustee to use the land in accordance with the trust's terms.¹⁹

Non-express trusts, however, are either resulting or constructive.²⁰ The resulting trust arises where a settlor does not dispose of the entire beneficial interest, or where a person purchases property in another's name.²¹ The constructive trust arises by operation of law, where it would be unconscionable for one party to hold and thus deny any interest in the land to some other party.²² For example, a constructive trust may arise where a party was promised a share of land if they contributed to its improvement.²³

In addition to the express exceptions to indefeasibility in ss 71(e) and 249, a trust in South Australia can also be protected in two additional ways:

1. Through the notice of a trust document itself.²⁴ While an instrument evidencing a trust can be deposited with the Registrar-General for 'safe custody and reference', such an instrument cannot form an entry in the Register Book;²⁵ and
2. A 'no survivorship' notation. This is available where there are two or more trustees who hold property as joint tenants.²⁶ The notation using the words 'no survivorship' is to be recorded by the Registrar-General in the Register Book.²⁷ This

¹¹ In the convergence or overlap of *Real Property Act* ss 71(d), 71(e), and 249.

¹² *Ibid*.

¹³ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.350].

¹⁴ *Ibid* [4.375].

¹⁵ *Real Property Act 1886* (SA) ss 69(b), 71, 249.

¹⁶ *Ibid*.

¹⁷ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) 28.

¹⁸ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [4.100].

¹⁹ *Ibid* [4.110].

²⁰ *Ibid* [4.150].

²¹ *Ibid* [4.160].

²² *Ibid* [4.180].

²³ *Ibid* [4.190].

²⁴ Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 38.

²⁵ *Ibid*; *Real Property Act 1886* (SA) s 162.

²⁶ Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 43.

²⁷ *Ibid* 42; *Real Property Act 1886* (SA) s 163(b).



notation has the effect of protecting the beneficiary by preventing any fewer than all of the joint tenants from dealing with the estate or interest without a court order.²⁸

Both of the above means are a form of protection, though imperfect, relative to the protection gained through registration of legal estates or interests.

Restrictive Covenants

A restrictive covenant is a covenant (that is, an undertaking given through an agreement),²⁹ which prohibits the use of a parcel of land, for a purpose which would otherwise be permitted, for the benefit of another parcel of land.³⁰ For a covenant to be restrictive and annexed to the relevant land, it must be negative in nature (that is, not allowing a certain action or circumstance) and it must affect (expressed in the common law as to 'touch and concern') the benefited land.³¹ Crucially, a restrictive covenant is recognised and enforceable only in equity—it has never been recognised in law as one of the subsidiary proprietary interests.

In South Australia, a restrictive covenant is, as a product of the rules of equity, technically an unregistrable interest. There is no means of either registering the interest created or even a power to give notice of its existence on a certificate of title.³² As an equitable interest, it can gain the protection of the express statutory exceptions to indefeasibility.³³ However, the anomalous nature of this subsidiary interest has resulted in much debate as to the means of best protecting it.³⁴ This debate, in turn, has given rise to a now well-established method of registration, not in its own right as a restrictive covenant, but rather as a rent charge, which, as a legal subsidiary interest, is capable of registration.³⁵ In this way, it is the rent charge, rather than the restrictive covenant itself, which creates an interest in the land.³⁶ This approach, though not without its critics, has been adopted as a matter of practice across South Australia.³⁷

Caveats

Both a trust and the restrictive covenant remain in an uncertain position, the former due to the absence of any means of registration, and the latter due to the need to treat it as rent charge for the purposes of registration. Both can be protected through the lodgement of a caveat.³⁸

A caveat, from the Latin word for 'beware',³⁹ is a document, allowed by statute, which can be lodged with the Registrar-General to protect an unregistered or unregistrable interest in Torrens title land.⁴⁰ The relevant interest must attach to the land on which

²⁸ Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 34–35, 43; *Real Property Act 1886* (SA) ss 71, 165, 249.

²⁹ 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].

³⁰ 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>>.

³¹ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [18.10]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [7.1270], [10.150]; *Jaggumantri v Registrar-General* [2023] SASC 74, [39]–[40].

³² 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* 243, 252; *Jaggumantri v Registrar-General* [2023] SASC 74, [43].

³³ *Jaggumantri v Registrar-General* [2023] SASC 74, [42].

³⁴ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [18.30].

³⁵ *Ibid* [18.35]; *Blacks Ltd v Rix* (1962) 161 SASR 164.

³⁶ 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* 243, 253.

³⁷ *Ibid* 252–253; 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; *Deguisa v Lynn* (2020) 268 CLR 638; *Reyo & Anor* [2024] SASC 3.

³⁸ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [18.40].

³⁹ Legal Services Commission South Australia, 'Caveats', *Legal Services Commission South Australia* (Web Page, 23 January 2019) <<https://www.lawhandbook.sa.gov.au/ch23s08s01s04.php>>.

⁴⁰ 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; *Real Property Act 1886* (SA) s 191(1).



the caveat is lodged⁴¹ and must exist, in its own right, under the rules of equity, as a caveat does not affect the existence of such interest.⁴²

There is no requirement that a party holding an equitable interest lodge a caveat for its protection; it is entirely discretionary.⁴³ If lodged, the caveat maintains the status quo until the relevant issues have been resolved, whether by the Supreme Court or the parties themselves.⁴⁴

The caveat operates as a statutory injunction to prevent the registration of further dealings in relation to that real property.⁴⁵ That is, the caveat provides temporary, rather than permanent, protection.⁴⁶ The practical effect of this is that some parties, typically those holding a mortgage, will be more likely to be aware of the need to caveat, while others, typically beneficiaries under a resulting or constructive trust, will have little, if any, understanding of the importance of doing so.⁴⁷ This means that the 'proviso' does not operate to the advantage of the holder of such an interest; if that interest is uncaveated, it will be left unprotected within the Torrens system.⁴⁸

Consultation Questions

1. Should historic Torrens policy concerning the place of equity with the *Real Property Act 1886* (SA) be reconsidered? Why or why not?
2. How should equitable interests be treated within the Torrens system pursuant to the *Real Property Act 1886* (SA)?
3. Should some equitable interests be admitted to the class of registrable interests under the *Real Property Act 1886* (SA)? Why or why not?
4. What role should a caveat play in protecting the interests of equitable estate or interest-holders?

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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⁴¹ See Legal Services Commission South Australia, 'Caveats', *Legal Services Commission South Australia* (Web Page, 23 January 2019) <<https://www.lawhandbook.sa.gov.au/ch23s08s01s04.php>>.

⁴² Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 37.

⁴³ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [12.1190].

⁴⁴ *Ibid* [12.1040]; Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 36; Les A McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title' (1994) 20(2) *Monash University Law Review* 300, 305.

⁴⁵ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Edition, 2017) [12.1040]; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [5.30].

⁴⁶ Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 37.

⁴⁷ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [5.140].

⁴⁸ Paul Babie, 'Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary' (2023) 31 *Australian Property Law Journal* 28, 38.