



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

Fact Sheet 6 – Exceptions to Indefeasibility

Express Exceptions in the *Real Property Act 1886 (SA)*

All systems of Torrens title generally provide that prior registered rights and inconsistent statutes constitute exceptions to the indefeasibility of title established by registration.¹ In South Australia, ss 69, 71, and 249 of the *Real Property Act 1886 (SA)* ('RPA') also provide primary express exceptions to indefeasibility of title.

Section 69

Section 69 of the *RPA*, the provision which establishes indefeasibility of title, contains eight exceptions to the indefeasibility obtained by the registered proprietor upon registration, being:

1. fraud (s 69(a));
2. forgery or disability (s 69(b));
3. erroneous inclusion of land (s 69(c));
4. omission of easement (s 69(d));
5. several certificates of title for the same land (s 69(e));
6. adverse possession (confined to an incomplete adverse possessory interest which relates to the time the land was brought under the *RPA*) (s 69(f));
7. lease or letting for not more than one year (s 69(h)); and
8. failure of a mortgagee to comply with verification of identity requirements (s 69(i)).

Of these exceptions, the most significant are fraud and forgery. There have been recent concerns (including relayed to SALRI in past projects) of the apparent prevalence of fraud in transactions involving land in such contexts as acting under a Power of Attorney or financial elder abuse.²

While not defined by the *RPA*,³ it is clear something more than mere notice of an adverse interest (being an unregistered or unregistrable estate or interest) is necessary to constitute fraud for the purposes of the *RPA*.⁴ Judicial interpretation of the fraud provision in s 69(a) requires 'actual fraud' to enliven the exception.⁵ It remains unclear whether the fraud must have occurred before or after registration, though case law indicates that the exception applies only to fraud which occurred **prior** to registration.⁶

Unique among Torrens systems statutes, South Australia separates forgery from fraud and creates a separate exception to indefeasibility. This means that, pursuant to s 69(b), any title obtained by forgery of a registrable instrument, typically forgery of

¹ David Wright, 'Forgery and the *Real Property Act 1886 (SA)*' (1994) 16 *Adelaide Law Review* 227, 228.

² See David Plater, Divya Narayan, Anita Brunacci, Holly Nicholls, Jemma Holt, Michaela Okninski, Olga Pandos, Taylor Portelli, Rachel Tan, Kim Tran, Sylvia Villios and John Williams, '*Autonomy and Safeguarding are not Mutually Inconsistent: A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)*' (South Australian Law Reform Institute, 2022).

³ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.610].

⁴ *Real Property Act 1886 (SA)* s 72.

⁵ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.610].

⁶ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.230].



the registered proprietor's signature, is an express exception to indefeasibility of title.⁷ It is not entirely clear why 'forgery' is singled out from 'fraud'.

Section 71

Section 71 of the *RPA* contains six express exceptions to indefeasibility, being:

1. the power of the Sheriff to sell the land of a judgement debtor (s 71(a));
2. the power of a court to order the sale of land (s 71(b));
3. upon the registered proprietor's bankruptcy, the right of the Official Receiver or of any trustee to the land (s 71(c));
4. the rights of a person with whom the registered proprietor has made a contract relating to the land (s 71(d));
5. the rights of a beneficiary in a trust (whether express, implied or constructive) (s 71(e)); and
6. the rights of promoters (the authorised persons) who are to vest land in themselves as part of a compulsory acquisition (s 71(f)).

Of these, the most significant are sub-sections (d) and (e), which provide exceptions for equitable interests, created *in personam* (that is against a person) by a registered proprietor. These exceptions ensure that equitable rights arising from a contractual relationship involving an estate or interest in land, through the doctrine of conversion or the equitable doctrine of part performance, or by way of trust, are enforceable against the registered proprietor and, crucially subject to the 'proviso' (explained below and in Fact Sheet 3), any successor in title to the registered proprietor who created such equitable interests.

Section 249

Section 249 of the *RPA* is unique to the South Australian Torrens system. The section effectively provides that, notwithstanding the other provisions of the *RPA*, 'all contracts and other rights arising from unregistered transactions' may be enforced against the relevant proprietors 'in the same manner as [they] may be enforced against proprietors in respect of land not under the [*RPA*]'.

This is, however, qualified by the proviso that no unregistered estate, interest, contract or agreement will prevail over the interests of a subsequent *bona fide* (good faith) registered proprietor.

The full scope of this provision has never been judicially considered or subject to academic attention and it is unclear what it adds to ss 69(a), 69(b), 71(d) and 71(e). It is possible s 249 covers a wider range of equities and equitable interests than the other provisions, but it is unknown, in practice, how it would interact with the earlier exceptions.

The Proviso, or the Exception to the Exceptions: The In Personam Exception

Rights *in personam* (that is rights enforceable against a person, such as contractual rights), when recognised as an exception, allow personal claims to be enforced against the registered proprietor, as a result of the registered proprietor's conduct.⁸ This exception applies to contracts, as well as trusts relating to the land.⁹

The *RPA* is the only Torrens statute that legislatively provides for the *in personam* exception. In all other jurisdictions this exception has been judicially created.¹⁰

In South Australia the *in personam* exception is found in the overlap between ss 71(d), 71(e) and 249, as well as in a clause contained in each of the exceptions provisions noted earlier (known as the 'proviso' or the 'exception to the exceptions').¹¹ The

⁷ See David Wright, 'Forgery and the *Real Property Act 1886* (SA)' (1994) 16 *Adelaide Law Review* 227.

⁸ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.870].

⁹ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.350]; *Real Property Act 1886* (SA) s 71(d), 71(e).

¹⁰ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.350].

¹¹ *Ibid* [4.355].



'proviso' is found in multiple sections of the *RPA* which effectively provide that the exceptions will not apply where there is a registered proprietor who has taken the property *bona fide* (in good faith) for valuable consideration.¹²

The essential elements of the 'proviso' are always the same: indefeasibility under the *RPA* is denied to those who are not registered proprietors, or who became registered without paying valuable consideration¹³ or who did so lacking *bona fides* (having committed fraud).¹⁴ In every case, except for s 69(b), the effect of the 'proviso' is the same: the party registered has a title which is *prima facie* indefeasible, but subject to the exception—fraud or some other equitable interest. In the case of s 69(b), however, the title of the party who is registered as a result of forgery is void.

Considerable debate exists regarding the operation of the 'proviso' in respect of s 69(b), the question being whether the 'proviso' operates to confer immediate indefeasibility of title on a party who satisfies the elements of the 'proviso', or deferred indefeasibility to one transaction removed from that tainted by forgery. The accepted view now seems to be that immediate indefeasibility results.¹⁵

Other Exceptions to Indefeasibility

Three other anomalous forms of exception may also arise, two as a result of the operation of provisions in the *RPA*, being adverse possession and correcting errors on the Register, and one from the operation of overriding legislation outside the *RPA*.

Adverse Possession

The doctrine of adverse possession may operate as an exception to indefeasibility. Adverse possession is the actual possession of land without the consent of the true owner. Under Part 7A of the *RPA*, a person who would have obtained possessory title by adverse possession were the land not subject to the *RPA*, may apply to the Registrar-General for a certificate of title.¹⁶ Where the 'trespasser' adversely possesses the land for the limitation period of 15 years (or 60 years for Crown land) and all requirements of Part 7A are complied with, and where the party who is (or claims through) the registered proprietor does not object, the Registrar-General may cancel the existing certificate of title and issue a new one, free from all encumbrances, in the possessor's name.¹⁷ For further information on adverse possession, see Fact Sheet 9.

Correcting Errors on the Register

The Registrar-General has the power to correct any errors in the Register, which can have the effect of acting as an exception to an indefeasible estate or interest.¹⁸

Overriding Legislation

It is possible that a later statute can operate in a way that overrides the *RPA* and all indefeasible interests created under its provisions.¹⁹ For example, under s 49 of the *Residential Tenancies Act 1995 (SA)*, a residential tenancy agreement, as a statutory form of property, does not rely on Torrens registration for its establishment, nor on indefeasibility for its enforceability.²⁰ In this way, the *Residential Tenancies Act 1995 (SA)* may override legislative exceptions to indefeasibility established under the *RPA*.

¹² *Real Property Act 1886 (SA)* ss 69(b), 71, 249.

¹³ *Ibid* s 69; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.320].

¹⁴ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.560].

¹⁵ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.250]; David Wright, 'Forgery and the *Real Property Act 1886 (SA)*' (1994) 16 *Adelaide Law Review* 227; *Arcadi v Whittem* (1992) 59 SASR 51.

¹⁶ *Real Property Act 1886 (SA)* s 80A.

¹⁷ *Ibid* s 80G.

¹⁸ *Ibid* s 220(f); Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.450].

¹⁹ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [4.325]; Pamela O'Connor, 'Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title' (1994) 19(3) *Melbourne University Law Review* 649.

²⁰ See 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.



Consultation Questions

1. Are the current exceptions to indefeasibility sufficient for modern needs? Why or why not?
2. Should the existing exceptions be consolidated in one provision within the *Real Property Act 1886* (SA)? Why or why not?
3. Should forgery remain a separate exception or be brought within the ambit of the fraud exception? Why or why not?
4. Is the proviso or the exception to the exception a concept that should be retained? Why or why not?
5. Are there new exceptions that should be added to the current list?

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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