



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

Fact Sheet 8 – Encumbrances (including Caveats)

What is an Encumbrance?

An encumbrance includes any prior registered interest that affects the indefeasibility of a title or the existence of an unregistered or unregistrable prior estate or interest, usually an equitable estate or interest created *in personam* (that is against other persons) by a registered proprietor. In the case of prior registered interests, the process of registration and indefeasibility of those interests ensures their protection, as each interest is registered on the relevant title according to the date it was received by the Lands Titles Office.¹ Unregistered or unregistrable interests, however, either depend on the interest holder satisfying one of the exceptions to indefeasibility found in ss 69, 71, or 249 of the *Real Property Act 1886 (SA)* ('*RPA*'), or upon some other notation on the relevant title. That notation typically comes through the lodgement of a caveat.

What is a Caveat?

A caveat is a document which can be lodged with the Registrar-General to protect an unregistered or unregistrable interest in Torrens title land.² Those interests are typically equitable interests, such as a restrictive covenant, equitable easement, or unregistered mortgages or leases.³

A caveat is a vital means to protect the interests of a party with some form of claim to the land. Other than the express exceptions in ss 69, 71, and 249, a caveat is the only means of protecting an equitable interest.⁴ A mere contractual right or some lesser interest (such as the equitable right to set aside a fraudulent transaction) are not in, and of themselves, sufficient to establish a caveatable interest.⁵ A question that arises is what precise interests should be the subject of a caveat as the *RPA* is presently silent on this.

A party with a caveatable interest is not required to lodge a caveat to establish or protect their right.⁶ It is important to note that lodging a caveat will not advance the caveator's priority over an unregistered interest. This said, depending on circumstances, failure to lodge a caveat can lessen a party's priority over the particular interest,⁷ potentially contributing to a finding that it is inequitable for the prior equitable owner to retain their priority.⁸

Lodging a Caveat

A person with an interest in law or in equity, or a beneficiary claiming under a will or settlement of a trust, can lodge a caveat with the Lands Titles Registration Office.⁹ A caveat can either prohibit the registration of any dealings with the relevant land (an absolute caveat), or require that any registration be subject to the caveator's claim (a permissive caveat).¹⁰ The caveat must accord with the form approved by the Registrar-General,¹¹ which will vary depending on its purpose.¹²

¹ *Real Property Act 1886 (SA)* s 56.

² 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.

³ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [7.470], [11.1480], [12.990]. The range of equitable interests that could arise are wide. Granny flats have been widely raised to SALRI as has moiety title.

⁴ *Ibid* [12.1030], [12.1190].

⁵ *Ibid* [12.990]-[12.1000]; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [5.35].

⁶ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.1190].

⁷ *Ibid*. See also *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

⁸ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.1190].

⁹ *Real Property Act 1886 (SA)* s 191(1).

¹⁰ *Ibid* s 191(1)(a); Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [5.65].

¹¹ *Real Property Act 1886 (SA)* s 191(1)(ac); s 3(1) (definition of 'appropriate form').

¹² See, for example, *ibid* sch 3; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [16.330].



The caveator is the person lodging the caveat,¹³ while the caveatee is the person against whom the caveat is lodged.¹⁴ It is possible for a registered proprietor to act as a caveator and lodge a caveat in respect of their own land, which might, for example, be done where a registered proprietor caveats a claim against adverse possession (discussed in Fact Sheet 9).¹⁵ Any caveat must be completed by the caveator or their agent and must contain a South Australian address for service of any notices.¹⁶ Once the Registrar-General receives the caveat, they must record it in the Register Book.¹⁷

Effect of a Caveat

While in force, a caveat prevents the Registrar-General from registering any instrument which would affect the land in issue.¹⁸ The caveat serves to maintain the status quo until the relevant issues have been resolved, whether by the Supreme Court or the parties themselves.¹⁹ The caveat operates as a statutory injunction preventing registration of further dealings in the land.²⁰ The registered proprietor, or any person with a relevant interest in the land, can seek removal of the caveat and require the caveator to explain, before a Court, why the caveat should not be removed.²¹

Removal and Withdrawal of Caveats

A caveat lodged under s 191 of the *RPA* remains in force until a dealing inconsistent with the caveator's claim arises, or if the caveatee seeks that the caveat be removed.²² Other caveats, depending on their nature, lapse after a defined period. For example, a caveat against bringing land under the *RPA* will lapse one month after it is lodged.²³

A caveatee may apply to the Registrar-General to have a caveat removed.²⁴ Following such an application, the Registrar-General must give the caveator 21 days' notice for the withdrawal of the caveat.²⁵ After this period has lapsed, the Registrar-General must remove the caveat from the Register Book.²⁶ The specific date can be identified through a search of the State Integrated Land Information System (SAILIS).²⁷ The caveator can, if they wish to keep the caveat in place, seek an extension of time from the Supreme Court²⁸ and may also initiate Supreme Court proceedings to establish the claim to the land made by the caveat.²⁹

By giving the Registrar-General notice, the caveator can withdraw the caveat at any time.³⁰ The court can also order that the caveator pay the caveatee for any costs incurred as a result of the caveat.³¹ Any removal, withdrawal, or lapse of a caveat must be recorded in the Register Book by the Registrar-General.³²

Further Caveats

Any caveator, other than the Registrar-General, cannot lodge a further caveat over the same land unless permitted by the Supreme Court.³³ Where a caveat is lodged 'wrongfully and without reasonable cause', the caveator, with the exception of the Registrar-General, becomes liable to compensate any person who sustained damage as a result of the wrongful lodgement.³⁴

¹³ *Real Property Act 1886* (SA) s 3 (definition of 'caveator').

¹⁴ *Ibid* s 3 (definition of 'caveatee').

¹⁵ *Ibid* s 191(3).

¹⁶ *Ibid* s 191(1)(ac).

¹⁷ *Ibid* s 191(1)(b).

¹⁸ *Ibid* s 191(1)(c).

¹⁹ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.1040].

²⁰ *Ibid*; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [5.65].

²¹ *Real Property Act 1886* (SA) s 191(1)(d).

²² Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th edition, 2020) [5.30].

²³ *Real Property Act 1886* (SA) ss 39, 45.

²⁴ *Ibid* s 191(1)(e).

²⁵ *Ibid*; Land Services SA, *Removal and Withdrawal of Caveats* (Fact Sheet, Land Services SA) 1.

²⁶ *Real Property Act 1886* (SA) s 191(1)(f).

²⁷ Don Mackintosh and R J White, Thomson Reuters, *Jessup's Lands Titles Office: Forms & Practice SA* (at Service 10 August 2024) [522] and [522.23].

²⁸ *Real Property Act 1886* (SA) s 191(1)(g).

²⁹ *Ibid* s 191(1)(fa).

³⁰ *Ibid* s 191(1)(h).

³¹ *Ibid*.

³² *Ibid* s 191(1)(i).

³³ *Ibid* s 191(1)(k).

³⁴ *Ibid* s 191(1)(j); Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th edition, 2017) [12.1120].



Consultation Questions

1. Should the *Real Property Act 1886* (SA) define what can be a caveatable interest? If so, what interests should be included in this definition and why?
2. Are the current caveating provisions appropriate for the protection of unregistered or unregistrable interests?
3. Should the role of the caveat be expanded to operate as a lesser form of registration, providing greater protection to the interest claimed than currently exists?
4. Should the range of interests which may be caveated be expanded?

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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