



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

## Fact Sheet 9 – Loss of Property

### Loss of Property

In South Australia, an estate or interest held in Torrens land can be lost in one of two ways:

1. Adverse possession; or
2. Compulsory acquisition under the *Land Acquisition Act 1969 (SA)*.

### Adverse Possession

The doctrine of adverse possession, often colloquially referred to as ‘squatters rights’, enjoys a ‘venerable history’ in Australia.<sup>1</sup>

Possessory title is derived through exclusive possession of land, even as a trespasser.<sup>2</sup> The possessor has a proprietary interest or title based upon that possession.<sup>3</sup> That interest is enforceable against the whole world except for any person with a better claim.<sup>4</sup> The possessor is likewise bound by any easement or restrictive covenant affecting the land.<sup>5</sup>

The acquisition of title solely by possession causes some tension with the state guarantee of title enacted by a Torrens system of title by registration.<sup>6</sup> In the Torrens system, immediate indefeasibility is conferred upon registration.<sup>7</sup> This has the effect of making the Torrens title paramount, prioritising it against all unregistered or unregistrable interests.<sup>8</sup> As such, a conflict emerges between a registered proprietor with the potential to lose that government guaranteed title to an adverse possessor or trespasser, whose title is based only upon possession.<sup>9</sup>

In the context of adverse possession, ‘adverse’ means the mere actual possession of land without the permission of the true owner.<sup>10</sup> The true owner is effectively dispossessed of the land. Adverse possession does not need to cover the entirety of a plot of land; it can be claimed over only a part of the land not possessed by the true owner.<sup>11</sup> A co-owner can also be an adverse possessor if they possess the land to the exclusion of all others, including all other co-owners.<sup>12</sup>

To establish adverse possession at common law, there are two required elements: factual possession and intention to possess.<sup>13</sup> The possession must be ‘open, not secret; peaceful, not by force; and adverse, not by consent of the true owner’.<sup>14</sup> The intention

<sup>1</sup> Paul Babie, ‘The Crown and Possessory Title of Torrens Land in South Australia’ (2016) 6(1) *Property Law Review* 46, 52.

<sup>2</sup> Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [12.20].

<sup>3</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.295].

<sup>4</sup> *Ibid* [3.325].

<sup>5</sup> *Ibid* [3.330].

<sup>6</sup> Paul T 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; Moore, Grattan and Griggs (n 3) [3.15], [3.380].

<sup>7</sup> Rohan Havelock, ‘Reconciling Equitable Claims with Torrens Title’ (2019) 41(4) *Sydney Law Review* 455; *Real Property Act 1886 (SA)* s 69; B Paul T Babie, ‘Torrens and Trusts: Weight of Policy versus Protecting the Beneficiary’ (2023) 31 *Australian Property Law Journal* 28, 33.

<sup>8</sup> 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.

<sup>9</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.380].

<sup>10</sup> *Ibid* [3.80].

<sup>11</sup> *Ibid* [3.100].

<sup>12</sup> Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [6.430].

<sup>13</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.80].

<sup>14</sup> *Ibid* [3.85]; *Mulcahy v Curramore Pty Ltd* (1974) 2 NSWLR 464, 475; Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [16.110].



to possess requires the person to intend to use the land to the exclusion of all others.<sup>15</sup> Enclosure (for example, by fencing the land) is considered the strongest evidence of adverse possession.<sup>16</sup> The payment of rates by the possessor is also very significant.<sup>17</sup>

### *Limitation Period*

In South Australia, adverse possession and the principles of possessory title are established by the *Limitation of Actions Act 1936* (SA).<sup>18</sup> The general limitation period for adverse possession in South Australia is 15 years.<sup>19</sup> There is, however, no clearly defined statutory period for adverse possession against the Crown.<sup>20</sup> It seems, based on the antiquated *Crown Suits Act 1769* (Imp), that for Crown land that period is 60 years.<sup>21</sup>

The limitation period operates by diminishing the claim of the person with better title, typically the registered proprietor.<sup>22</sup> Once the limitation period has expired, the person who had better title has their title extinguished.<sup>23</sup> The limitation period begins to accrue from the time a person entitled to possession is dispossessed by another.<sup>24</sup> Where the registered proprietor is under a legal disability (for example, being a child), the limitation period is suspended for the period of that disability.<sup>25</sup> The limitation period may also be stopped if the true owner initiates proceedings for the recovery of the land, or by making effective entry on the land.<sup>26</sup> The Supreme Court additionally has a general power to extend the limitation period.<sup>27</sup>

A possessor who abandons the land before the end of the limitation period loses any interest in the land,<sup>28</sup> restoring the true owner's legal title.<sup>29</sup> However, if the initial possessor is succeeded by another, that second possessor can add the first possessor's period to their own limitation period.<sup>30</sup>

### *Process under the Real Property Act 1886 (SA)*

Part 7A of the *Real Property Act 1886* (SA) (**'RPA'**) provides for title by possession.<sup>31</sup> A person who would have obtained possessory title were the land not subject to the RPA may apply to the Registrar-General for a certificate of title.<sup>32</sup> That application is then advertised, at a minimum, in 'a newspaper circulating in the neighbourhood of the land' and is to be given to any person whom the Registrar-General believes to have an interest in the land.<sup>33</sup> After no less than 21 days and no more than 12 months from the publication of the notice, the Registrar-General may, unless a caveat is lodged by the true owner to halt the possessor's application,<sup>34</sup> grant the application.<sup>35</sup> If no caveat is lodged and the Registrar-General is satisfied that the limitation period has accrued, they may cancel the existing certificate of title and issue a new one, free from all encumbrances, in the possessor's name.<sup>36</sup>

<sup>15</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.115]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [16.120].

<sup>16</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.160].

<sup>17</sup> *Ibid* [3.165].

<sup>18</sup> Don Mackintosh and R J White, Thomson Reuters, *Jessup's Lands Titles Office: Forms & Practice SA* (at Service 10 August 2024) [402] and [402.20].

<sup>19</sup> *Limitation of Actions Act 1936* (SA) s 4.

<sup>20</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.45].

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* [3.35].

<sup>23</sup> *Limitation of Actions Act 1936* (SA) s 28.

<sup>24</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.60]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [16.70].

<sup>25</sup> *Limitation of Actions Act 1936* (SA) s 45.

<sup>26</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.60].

<sup>27</sup> *Limitation of Actions Act 1936* (SA) s 48; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.280].

<sup>28</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.310]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [16.220].

<sup>29</sup> Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [16.220].

<sup>30</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [3.305].

<sup>31</sup> *Real Property Act 1886* (SA) pt 7A, s 251.

<sup>32</sup> *Ibid* s 80A.

<sup>33</sup> *Ibid* s 80E(1).

<sup>34</sup> *Ibid* s 80F(1), (3).

<sup>35</sup> *Ibid* s 80E(2).

<sup>36</sup> *Ibid* s 80G.



The system of adverse possession in South Australia is a hybrid system. The scheme takes a 'radical step'<sup>37</sup> by affording the registered proprietor the opportunity to lodge a caveat which halts the registration process, even if the adverse possessor has been in occupation for the necessary 15 years.<sup>38</sup> This effectively grants the registered proprietor the power to veto any application provided the Registrar-General is satisfied they have an interest in the relevant land. In other models of adverse possession, the ability to lodge a caveat to defeat the adverse possessor's claim at the expiry of the period of occupation is absent.

The rationale of adverse possession is contentious.<sup>39</sup> As one article notes:

Property lawyers are generally viewed as a serious lot, not prone to feverish bursts of excitement as we seek comfort and solace in established legal rules and precepts. In the same way, property law disputes tend to have a fairly low profile and fail to capture the public imagination in the same way as, for example, those involving criminal or human rights law. Such apparent indifference might seem a little strange, given the centrality of property in everyday human life and the significance which legal systems and individuals attach to property rights. However, there is one issue which always inflames passions amongst lawyers and non-lawyers alike: the acquisition of land through the doctrine of adverse possession, often described as 'squatter's rights'. No property-related topic is likely to light up a radio show phone-in switchboard quite like squatting.<sup>40</sup>

Adverse possession has received recent media attention in Australia's current housing market crisis.<sup>41</sup> There are arguments in favour of allowing adverse possession.<sup>42</sup> It is asserted that allowing adverse possession fundamentally undermines the Torrens system by registration.<sup>43</sup> It also appears at odds with the law's general reluctance to permit individuals to profit from apparent wrong doing,<sup>44</sup> a 'legal way to get something for nothing'.<sup>45</sup> Adverse possession has been abolished in Alberta.<sup>46</sup>

## Compulsory Acquisition of Land

The compulsory acquisition of property by a state is justified on the basis that it serves a public interest,<sup>47</sup> noting most private property is acquired for public infrastructure projects, such as the construction of roads, railways, and airports.<sup>48</sup> Under s 51(xxxi) of the *Australian Constitution*, the Commonwealth may establish laws for the acquisition of property on 'just terms'.<sup>49</sup> The concept of 'just terms' requires that reasonable compensation be provided by the Commonwealth.<sup>50</sup> There is, however, no such requirement for acquisitions by the States.<sup>51</sup>

The *Real Property (Commonwealth Titles) Act 1924* (SA) regulates Commonwealth acquisition of land in South Australia, which allows the Registrar-General to issue a certificate to the acquiring authority upon receiving evidence of the acquisition.<sup>52</sup> The *Land Acquisition Act 1969* (SA) ('**LA**A') controls acquisitions by the South Australian government.

<sup>37</sup> Fiona Burns, 'Adverse Possession and Title-by-Registration Systems in Australia and England' (2011) 35(3) *Melbourne Law Review* 773, 802.

<sup>38</sup> *Real Property Act 1886* (SA) s 80F(3).

<sup>39</sup> Anthony Gray, 'An Adverse View of Adverse Possession' (2022) 96(1) *Australian Law Journal* 21.

<sup>40</sup> Heather Conway and John Stannard, 'The Emotional Paradoxes of Adverse Possession' 64(1) *Northern Ireland Law Quarterly* 75, 75.

<sup>41</sup> See, eg, Cathy Sherry, 'If you squat in a vacant property, does the law give you the house for free? Well Sort of' *ABC News* (Online, 12 April 2024) <<https://amp.abc.net.au/article/103696464>>.

<sup>42</sup> Martin Dockray, 'Why Do We Need Adverse Possession?' (1985) *Conveyance and Property Lawyer* 272; Fiona Burns, 'Adverse Possession and Title-by-Registration Systems in Australia and England' (2011) 35(3) *Melbourne Law Review* 773, 810. It is said adverse possession encourages the positive use of land and avoids land lying idle and, as SALRI has heard from regional lawyers, allows a system to regulate land when the original owner may have effectively abandoned the land and can't be traced.

<sup>43</sup> See, eg, Anthony Gray, 'An Adverse View of Adverse Possession' (2022) 96(1) *Australian Law Journal* 21; Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement under a Mistake' (2006) 33 *University of Western Australia Law Review* 31.

<sup>44</sup> Anthony Gray, 'An Adverse View of Adverse Possession' (2022) 96(1) *Australian Law Journal* 21.

<sup>45</sup> SL Martin, 'Adverse Possession: Practical Realities and an Unjust Enrichment Standard' (2008) 37 *Real Estate Law Journal* 133.

<sup>46</sup> See Alberta Law Reform Institute, *Adverse Possession and Lasting Improvements to Wrong Land* (Final Report 115) (2020).

<sup>47</sup> Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [17.10].

<sup>48</sup> *Ibid.*

<sup>49</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7<sup>th</sup> edition, 2020) [1.80].

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7<sup>th</sup> edition, 2017) [17.80], [17.290].

<sup>52</sup> *Real Property (Commonwealth Titles) Act 1924* (SA) ss 4-5.



## *The Acquisition Process*

If the acquiring authority wishes to acquire land, they must comply with the following process:

1. The acquiring authority must give a notice of intention to acquire land to each person whose interest in the land is subject to the proposed acquisition.<sup>53</sup>
2. The acquiring authority must serve each notice of intention to acquire land on the Registrar-General.<sup>54</sup>
3. Upon receipt of these notices, the Registrar-General must enter a caveat forbidding any dealings with the land, except when consented to in writing by the acquiring authority.<sup>55</sup>
4. The acquiring authority must give a notice of acquisition, in the form specified in Schedule 1 of the *Land Acquisition Regulations 2019* (SA), to each person whose interest in the land is subject to the proposed acquisition.<sup>56</sup> The notice must describe the land 'as accurately as is reasonably practicable'.<sup>57</sup>
5. Where it is acquired by agreement, the registered proprietor will execute a transfer of the necessary interests in the land.<sup>58</sup>
6. Where land is acquired by compulsion, an interest in the property vests in the acquiring authority when the notice of acquisition is published by the acquiring authority in the *Government Gazette*.<sup>59</sup> This must occur no less than three months and no more than 18 months after the notice of acquisition is first given.<sup>60</sup> The notice of acquisition must also be published in a newspaper circulating in the State.<sup>61</sup>
7. The acquiring authority must serve each notice of acquisition on the Registrar-General.<sup>62</sup>
8. The Registrar-General will withdraw the caveat<sup>63</sup> and issue new certificates of title to the acquiring authority and, where applicable, a balance certificate of title in the name of the original registered proprietor which describes any residual interest held by the original registered proprietor.<sup>64</sup>
9. If the acquiring authority decides not to proceed with the acquisition, it must make an application for the withdrawal of the caveat (rather than serving the notice of acquisition on the Registrar-General). The Registrar-General will then withdraw the caveat, with no further changes made to the certificate of title.<sup>65</sup>

It is important to note that the interest acquired by the acquiring authority will be free of any encumbrances.<sup>66</sup> If, for some reason, the notice of acquisition is void, so long as it is registered, the acquiring authority will still gain an immediately indefeasible interest over the land.<sup>67</sup>

<sup>53</sup> *Land Acquisition Act 1969* (SA) s 10(1).

<sup>54</sup> *Ibid* s 14(2).

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* s 10(1).

<sup>57</sup> *Ibid* s 16(4); *Land Acquisition Regulations 2019* (SA) sch 1.

<sup>58</sup> Don Mackintosh and R J White, Thomson Reuters, *Jessup's Lands Titles Office: Forms & Practice SA* (at Service 10 August 2024) [901] and [901.2].

<sup>59</sup> *Land Acquisition Act 1969* (SA) s 16(2).

<sup>60</sup> *Ibid* s 16(1).

<sup>61</sup> *Ibid* s 16(5).

<sup>62</sup> *Ibid* s 17.

<sup>63</sup> *Ibid* s 17(1).

<sup>64</sup> Don Mackintosh and R J White, Thomson Reuters, *Jessup's Lands Titles Office: Forms & Practice SA* (at Service 10 August 2024) [901], [901.19.1] and [902.8.2].

<sup>65</sup> *Land Acquisition Act 1969* (SA) s 14(3).

<sup>66</sup> *Ibid* s 16(2)(b).

<sup>67</sup> Don Mackintosh and R J White, Thomson Reuters, *Jessup's Lands Titles Office: Forms & Practice SA* (at Service 10 August 2024) [901] and [901.8.1].



## Compensation

A person is entitled to compensation for land acquired under the *LAA* where the person's interest or enjoyment in the land is diminished or adversely impacted by the acquisition of the land.<sup>68</sup> Section 25 establishes that the compensation 'shall be such as adequately to compensate him for any loss that he has suffered by reason of the acquisition of the land'.<sup>69</sup> The compensation amount is to be arrived at by considering the actual value of the land and the loss occasioned by its 'severance, disturbance or injurious affection'.<sup>70</sup> It does not matter if the acquisition is without the consent of any person.<sup>71</sup>

## Issues with Loss of Property

The rationale of adverse possession is contentious.<sup>72</sup> Given the Torrens system is one of title by registration, it is questionable whether it is consistent with adverse possession, given that title by possession seems to undermine the principles of Torrens title. There are also queries regarding whether the notice requirements for adverse possession are sufficient, given the better title is extinguished upon the limitation period's expiration.

There may also be questions about whether, in circumstances where a notice of acquisition is void, the acquiring authority's indefeasible interest should be excluded, given the void notice.

There are arguments both for and against allowing adverse possession, especially under the *RPA*.<sup>73</sup> Adverse possession has been abolished in Alberta.<sup>74</sup> If the doctrine were to be abolished in South Australia, a number of consequential issues would arise. Further, it appears that, due to the present stringent requirements to prove adverse possession, the current model of adverse possession is challenging and impractical, leading to few successful adverse possession claims.

## Consultation Questions

1. Should adverse possession continue to exist pursuant to the *Real Property Act 1886* (SA)? Why or why not? If yes, in what circumstances should adverse possession be allowed?
2. If Torrens land may be adversely possessed, what process should be established by the *Real Property Act 1886* (SA) for that purpose?
3. If adverse possession is abolished, should the change to the law be retrospective or prospective? Why?
4. If a person, in the process of adversely possessing a property, makes improvement to the land, should this be recognised even if the land is not, ultimately, adversely possessed? If yes, how should this interest in the land be protected?

Should the operation of compulsory acquisition pursuant to the *Land Acquisition Act 1969* (SA) be integrated with the *Real Property Act 1886* (SA)? Why or why not?

**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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SOUTH AUSTRALIAN  
LAW REFORM  
INSTITUTE

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<sup>68</sup> *Land Acquisition Act 1969* (SA) s 22B(1).

<sup>69</sup> *Ibid* s 25(1)(a).

<sup>70</sup> *Ibid* s 25(1)(b).

<sup>71</sup> *Ibid* s 25(1)(g).

<sup>72</sup> Anthony Gray, 'An Adverse View of Adverse Possession' (2022) 96(1) *Australian Law Journal* 21.

<sup>73</sup> Fiona Burns, 'Adverse Possession and Title-by-Registration Systems in Australia and England' (2011) 35(3) *Melbourne Law Review* 773.

<sup>74</sup> See Alberta Law Reform Institute, *Adverse Possession and Lasting Improvements to Wrong Land* (Final Report 115) (2020).