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The residential tenancy agreement as an exception to the indefeasibility of title

Matthew Anibal Fuentes-Jiménez and Paul Babie[*]

This article argues that Australian residential tenancies legislation creates a sui generis form of property — the residential tenancy agreement — unknown to the common law. In turn, a residential tenancy agreement constitutes an overriding legislation exception to the indefeasibility of Torrens title.

I Introduction

At common law, the leasehold estate represents a major innovation in real property law. Unlike the freehold estates, the leasehold was not a product of feudalism; instead, a sui generis form of landholding known as a chattel real, the term of years was a hybrid in personam right created through contract. In doing so, being concerned with the possession of a 'termor', the term of years, as it was known, avoided the complications of tenure and seisin. It was not until the courts of common law allowed the protection of a termor's possession through the action for ejectment that the rights held passed from an in personam to an in rem, or proprietary right.[1] It remained, though, the only category of chattels real. Thus, not only did the term of years, which would become known as the lease, add a new category of property in land, it also provided for a new remedy for all holders of real property, for it was not long before the feudal tenant came to see the advantages of ejectment over the real rights, demanding, and finally obtaining its protection for the freehold estates.[2]

For over nine centuries, the lease in English law served well both those who granted such interests, lessors, and those who held them, lessees. But as feudalism unravelled from the 16th century on, so too did the nature of landholding. Where once the free and unfree feudal tenures provided both for the productive and residential use of land, as those tenures resolved themselves into their sole remaining form, the fee simple held in free and common socage, the lease, once primarily utilised for the agricultural and commercial use of land, emerged as an important means of providing for a dwelling.[3] In Australia, the leasehold of course formed part of the received

* Adelaide Law School, The University of Adelaide. Thanks to Peter Burdon, Kyriaco Nikias, Philip Page, and Katherine Russell for helpful conversations, comments, and criticisms. This article is written for Simon NL Palk, mentor, colleague, and friend.

1 Sir Robert Megarry and Sir Henry WR Wade, *The Law of Real Property* (Stevens, 5th ed, 1984) 40–4, 628–32, 1155–60.

2 The classic history of the term of years is found in Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol II, § 'The Term of Years'. See also Sir William Holdsworth, *An Historical Introduction to the Land Law* (Oxford University Press, 1927) 71–3, 169–75; AWB Simpson, *A History of the Land Law* (Oxford University Press, 2nd ed, 1986) 43, 71–7, 92–3, 247–56; Megarry and Wade (n 1) 40–4, 628–32, 1155–60.

3 Simpson (n 2) 247–56; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Lawbook, 7th ed, 2020) 759–62.

common law in the 18th century,[4] and survived intact the Torrens innovations of the 19th century[5] to take its place among the pantheon of the Australian *numerus clausus*.[6]

In the commercial setting, lessors and lessees typically enjoyed broadly equal power and knowledge in the negotiation and conclusion of leasehold agreements. Over time, however, in the residential context, concerns arose in many jurisdictions that the playing field was disproportionately tilted towards the power of the lessor. The lessee increasingly was at the mercy of the lessor in both the process of negotiation leading to the conclusion of a lease, and in the security of tenure once one was in place. Thus, legislative intervention was seen as necessary:

> To protect tenants against their landlords. At common law, the matter was in general one of contract: provided a landlord did not contravene the terms of his bargain, he might at will evict his tenant, or under the threat of eviction secure his agreement to pay an increased rent of whatever amount he could exact. Although a number of matters such as fixtures, emblements and the like are of importance, the two crucial matters in any scheme for protecting tenants are protection against eviction, and control of rent.[7]

The first Australian legislation was enacted in the 1970s,[8] and sought:

> A balance of rights of landlords and tenants, improving understanding of their rights and obligations, provision of enforcement mechanisms, ensuring tenants with safe and habitable premises with appropriate security of tenure, and facilitating a fair rent return for landlords.[9]

The Australian residential leasehold is thus doubly innovative. The historical emergence of the leasehold estate itself was a first, common law innovation in the nature of commercial and residential landholding in English real property law. The residential tenancies reforms, designed to balance the rights between landlord and tenant, which meant an increase in the power of the tenant

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4 Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2(1) *Adelaide Law Review* 1; Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of *Continuity Pro-Tempore*' (2004) 27(3) *University of New South Wales Law Journal* 703; Moore, Grattan and Griggs (n 3) 669–758.

5 Moore, Grattan and Griggs (n 3) 691–5.

6 See Bernard Rudden, 'Economic Theory v Property Law: The *Numerus Clausus* Problem' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (Oxford University Press, 1987) 239–63.

7 Megarry and Wade (n 1) 40–4, 628–32, 1085–6. The first such UK reforms came in *Increase of Rent and Mortgage Interest (War Restrictions) Act 1915* (UK) and is currently found in *Rent Act 1977* (UK). For the history of the UK reform see Alan GV Simmonds, 'Raising Rachman: The Origins of the Rent Act, 1957' (2002) 45(4) *Historical Journal* 843. For the experience in other jurisdictions, see Brian Davis, 'The Residential Tenancies Act 1986' (1987) 17(3) *Victoria University of Wellington Law Review* 244; Adrian J Bradbrook, 'Residential Tenancies Law: Lessons from France' (1997) 5(2–3) *Australian Property Law Journal* 107.

8 The seminal history of these reforms is found in the work of the person who led them: see, eg, Adrian J Bradbrook, 'Residential Tenancies Law: The Second Stage of Reforms' (1998) 20(3) *Sydney Law Review* 402 ('Residential Tenancies Law: The Second Stage').

9 Moore, Grattan and Griggs (n 3) 663, citing *Residential Tenancies Act 1999* (NT) s 3.

against the predations of a landlord, comprise a second, 'radical departure in the statutory regulation of the relation of landlord and tenant'.[10]

These reforms are no small matter, affecting as they do a sizeable number of Australians. According to the Australian Bureau of Statistics Survey of Income and Housing, as of 2017–18, 32% of all Australians live under a residential tenancy agreement ('RTAG'), which represents an increase from 30% in 2015–16. Moreover, from 1997–98 to 2017–18, the proportion of Australians that rent their home from all landlord types increased from 27% to 32%, and from a private landlord, from 20% to 27%. Meanwhile, over that same period, those who rented from a state or territory housing authority decreased from 6% to 3%.[11]

To the innovation of the residential tenancy, though, must be added a third, structural change, which affected the totality of real property law in Australia: the Torrens title by registration reforms of the 19th century. While the residential tenancy regime survived Torrens, the interaction of the two processes of innovation has not been entirely clear-cut. Unresolved issues remain. In this article we address one of those uncertainties: Does Australian residential tenancy legislation constitute an overriding statutory exception to the indefeasibility of title as established by Torrens? While our focus is the South Australian residential tenancies and Torrens legislation, our analysis is broadly applicable to any of the Australian state or territory regimes.

The essay contains four parts. Part II briefly examines the three stages of South Australian residential tenancies reform. Part III explains how the RTAG is a statutorily created sui generis form of property unknown to the common law. Part IV deals with two matters. First, it outlines the nature of the overriding legislation exception to indefeasibility of title. And it considers whether the RTAG constitutes an overriding statutory exception to indefeasibility as established in the *Real Property Act 1886* (SA) ('*RPA 1886*'). We argue that it does. Part V concludes.

II Residential tenancy reform

South Australia and Victoria, largely through the work of Adrian Bradbrook, pioneered residential tenancy reform in Australia.[12] Broadly, the reforms fall

10 Simon NL Palk, 'The Residential Tenancies Act, 1978 (SA) and the Protection of Tenants Against Succession to the Original Landlord' (1978) 6(3) *Adelaide Law Review* 458 ('The Residential Tenancies Act, 1978 (SA)').

11 Australian Bureau of Statistics, *Housing Occupancy and Costs* (Web Page, 17 July 2019) <https://www.abs.gov.au/statistics/people/housing/housing-occupancy-and-costs/latest-release>.

12 Two seminal pieces of research formed the background to the reforms: Law Reform Committee (SA), *Thirty-Fifth Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Standard Terms in Tenancy Agreements* (Report, 1975); Adrian J Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (Australian Government Publishing Service, 1975). In the Second Readings Speech of *Residential Tenancies Bill 1978* (SA): South Australia, *Parliamentary Debates*, Legislative Council, 22 February 1978, 1706 (DHL Banfield):

> The Bill relies upon the recommendations of the report ... entitled 'Poverty and the Residential Landlord-Tenant Relationship' prepared for the Australian Commission of Inquiry into Poverty, and the Law Reform Committee of South Australia in its thirty-fifth report relating to standard terms in tenancy agreements.

into three major stages. In the first, the *Residential Tenancies Act 1978* (SA) ('*RTA 1978*') conferred widespread protection on tenants, marking a radical departure from the balance of rights between the landlord and tenant at that time, providing protection for a tenant's security bond, security of tenure, and against interference with the enjoyment of the tenancy and discrimination against children. Moreover, the reforms sought to streamline the process of negotiating and concluding a tenancy, and to reduce both the financial and the temporal burden on both parties where disputes arise.

The eradication of the common law requirement that a valid residential lease requires a grant of exclusive possession[13] constitutes the most significant modification in the first stage of reform. And while it took nearly a quarter of a century, and notwithstanding minor differences among them, eventually all Australian jurisdictions enacted residential tenancies legislation, with the last, the Northern Territory, doing so in 1999. During that time, both of the pioneering states, South Australia and Victoria, re-enacted modified versions of their initial legislation.

A second stage of reforms began before some jurisdictions had even completed the first. Beginning in the 1990s and lasting through the 2000s, this stage consolidated and extended the tenant (consumer) protection framework and was defined by three key themes. The first involved extending regulation to marginalised places excluded from the first stage, such as boarding and rooming houses, and residential parks. This was achieved either by amending exiting residential tenancies legislation or through the enactment of separate legislation. The second theme concerned the regulation of 'tenant blacklists' so as to limit the circumstances and timeframes for such listings and to provide for dispute resolution through specialist tribunals. The third theme involved amendments aimed at protecting public housing.[14]

The third stage of reform addressed issues left unresolved in the first two stages, broadly related to the consumer protection movement of the 1970s. Reforms included further protection for the term of the tenancy, especially that of periodic tenancies, while simultaneously providing a process for recovery of possession by the landlord.[15]

See also Anthony P Moore, 'Adrian Bradbrook and Residential Tenancy Reform' in Paul Babie and Paul Leadbeater (eds), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014) 139–68. The leading authority on residential tenancy law in Australia remains Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* (Lawbook, 1983).

13 As stated authoritatively in *Radaich v Smith* (1959) 101 CLR 209 ('*Radaich*'). See also *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199; *ICI Alkali (Aust) Pty Ltd (in vol liq) v Federal Commissioner of Taxation* [1977] VR 393.

14 Adrian J Bradbrook, 'The Retail Tenancies Legislation: Stage Two in the Landlord/Tenant Law Reform Saga' (1989) 15(1–2) *Monash University Law Review* 2; Bradbrook, 'Residential Tenancies Law: The Second Stage' (n 8). See also Russell G Smith, 'Extending the Scope of the Residential Tenancies Act 1980 to Include Residential Licensees' (1983) 14(1) *Melbourne University Law Review* 1.

15 See also Moore (n 12) 143; Moore, Grattan and Griggs (n 3) 762–3 [15.25]. See also Chris Martin, 'A Brief History of Australian Residential Tenancies Law Reform: From the Nineteenth Century to Covid-19' (2020) 33(5) *Parity* 4; Jed Donoghue, 'Remixing Bradbrook: Tenancy Legislation Reform' (2009) 22(3) *Parity* 32.

Taken together, the three stages of reform produced a new interest in real property, drawing upon the common law leasehold estate, although neither a legal nor an equitable interest, but instead a sui generis creature of statute known as the 'residential tenancy agreement' ('RTAG'). Novel reform of this sort is nothing new in Australian real property law — other well-known examples of legislatively created interests in land unknown to law or equity include the pastoral lease, strata title, and retirement villages.[16] We turn, then, to a brief consideration of the contours of the residential tenancy agreement as it operates pursuant to the current form of the South Australian legislation, the *Residential Tenancies Act 1995* (SA) ('*RTA 1995*').

III Sui generis statutory property

The residential tenancy regime of each state and territory consists of a suite of legislative enactments and regulations (see Appendix A), the product of the three stages of reform, which act to balance the rights between landlord and tenant, secure the tenure of the latter, and provide mechanisms for dispute resolution, usually through a specialist tribunal. Our focus here, though, is not on the regime as a whole, but rather, the substantive content of the RTAG. We argue that the RTAG is a sui generis form of property created by statute, otherwise unknown to the common law; and, as with any such form of property, the RTAG exhibits features which both draw upon and subvert the common law of property for its substantive content. This is revealed through a consideration of: (i) the nature of the right of occupancy, which emerges from the definitions of the RTAG and of the landlord under the relevant Torrens and residential tenancies legislation; and (ii) the nature of the term of a RTAG, itself a function of the concept of periodicity and of the notice provisions for termination of the RTAG. We examine both in turn, using the South Australian RTAG framework as a representative example.

A Right of occupancy

The RTAG subverts both aspects of the hallmark of the common law leasehold — exclusive possession is replaced by a 'right of occupancy', while the requirement of certainty of term is replaced by the concept of periodicity and alterations to the notice that must be given for termination. Here we consider the former. In *Radaich v Smith*,[17] Windeyer J wrote that

> [w]hether when one man is allowed to enter upon the land of another pursuant to a contract he does so as licensee or as tenant must, it has been said, 'be in the last resort a question of intention', per Lord Greene MR in *Booker v Palmer* .... But intention to do what? Not to give the transaction one label rather than another. Not to escape the legal consequences of one relationship by professing that it is another. Whether the transaction creates a lease or a licence depends upon intention, only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land. When they have put their transaction in writing this intention is to be ascertained by seeing what, in

16 Paul Babie, 'Completing the Painting: Legislative Innovation and the "Australianness" of Australian Real Property Law' (2017) 6(3) *Property Law Review* 157.

17 *Radaich* (n 13). See also *Street v Mountford* [1985] AC 809.

> accordance with ordinary principles of interpretation, are the rights that the instrument creates. If those rights be the rights of a tenant, it does not avail either party to say that a tenancy was not intended. And conversely if a man be given only the rights of a licensee, it does not matter that he be called a tenant; he is a licensee. What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with a grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long-established law.[18]

Thus, at common law, exclusive possession distinguishes a leasehold from a licence.[19] Yet, s 3(1) of the *RTA 1995* contains two important definitions circumscribing the nature of the possession enjoyed by a tenant pursuant to a RTAG, and circumventing what Windeyer J referred to as 'long-established law'. First, it defines a 'right of occupation', contained in the definition of the RTAG, which is:

> [a]n agreement (other than a rooming house agreement) under which a person grants another person, for valuable consideration, a right (which may, but need not, be an exclusive right) to occupy premises for the purpose of residence ...[20]

A footnote to this definition provides further:

> However, it should be noted that the Act confers certain protections against intrusion on the premises by the landlord. Hence, even if the agreement does not, in its terms, confer an exclusive right to occupation, the Act will (at least in some respects) assimilate the right of occupation to the exclusive right conferred by a lease.

The tenant's possession is bolstered by s 64, which ensures vacant possession from the commencement of the RTAG, and s 65, which protects the tenant's quiet enjoyment of the premises against the landlord. The landlord retains a right of entry, however, in a limited range of circumstances, as enumerated in s 72. Section 74 confers upon the tenant a right of assignment of the interest created by a RTAG.

In addition to this fundamental substantive content of the RTAG, s 49 contains an extensive list of the matters which the contract establishing the RTAG between the parties must contain; these include the terms of the

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18 *Radaich* (n 13) 222 (Windeyer J) (citations omitted).

19 Megarry and Wade (n 1) 633–5.

20 'Premises' and 'Residential premises' are defined in the *Residential Tenancies Act 1995* (SA) s 3(1) ('*RTA 1995*').

agreement, found in s 49(1)(b)(vi), and include:

(A) the amount of rent payable; and
(B) the interval between rental payment times; and
(C) the method by which rent is to be paid; and
(D) the amount of the bond; and
(E) any agreement reached as to responsibility for rates and charges for water supply; and
(F) responsibility for insurance of the premises and the contents of the premises; and
(G) any other terms of the agreement (including, for example, terms in relation to pets or responsibility for repairs);

Of course, it is well-known that at common law the payment of rent does not constitute one of the essential elements of a leasehold. Part IV div 3 of the *RTA 1995*, however, contains extensive provisions relating to the rent payable by the tenant. It also sets out in detail the mutual rights and obligations of the landlord and tenant.[21]

In addition to the 'right of occupation', s 3(1) also defines a landlord as:

(a) the person who grants the right of occupancy under a residential tenancy agreement; or
(b) a successor in title to the tenanted premises whose title is subject to the tenant's interest,

and includes a prospective landlord and a former landlord;

And a tenant as:

[t]he person who is granted a right of occupancy under a residential tenancy agreement or a person to whom the right passes by assignment or operation of law and includes a prospective tenant or a former tenant;

These definitions eliminate exclusive possession as necessary for the existence of a leasehold, and replace it with a right of occupancy as the *sine qua non* of a RTAG. But more importantly, the effect of these definitions is to make clear that the RTAG is proprietary, in the sense that it binds not merely the original grantor, but also the successor in title to the grantor of the tenanted premises.

B Term

As with the nature of possession, the RTAG also subverts the common law rule in *Lace v Chantler*,[22] which provides that 'leases may be of any length, provided that, at the time the agreement is entered into, the exact date of termination is either known or ascertainable by the parties'.[23] Two aspects of the *RTA 1995* abrogate this rule. First, the concept of periodicity, contained in s 4, and, second, the extensive provisions which allow both landlords and tenants to terminate a RTAG. These latter provisions interact with the definition of the RTAG contained in s 3(1).

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21 See also Moore, Grattan and Griggs (n 3) 768–72 [15.65]–[15.90].
22 [1944] KB 368; see also *Bishop v Taylor* (1968) 118 CLR 518.
23 Moore, Grattan and Griggs (n 3) 673–4 [14.25].

Section 4 of the *RTA 1995* provides that

> (1) If a residential tenancy agreement is entered into for a short fixed term, the agreement is taken to be an agreement for a periodic tenancy with a period equivalent to the length of the fixed term unless the landlord establishes that —
>
> (a) the tenant genuinely wanted a tenancy ending at the end of the short fixed term and the term was fixed at the tenant's request; or
>
> (b) before the residential tenancy agreement was entered into —
>
> (i) the landlord gave the tenant a notice containing a warning in the form required by regulation; and
>
> (ii) the tenant signed a statement in the form required by regulation acknowledging that the tenant did not expect to continue in possession of the premises after the end of the term stated in the agreement.
>
> (2) A *short fixed term* is a term of 90 days or less.

Part 5 of the *RTA 1995* sets out the provisions with respect to termination of a RTAG. Generally, '[t]ermination of a [RTAG] can occur through expiry of a fixed term, notice without grounds in respect of a periodic tenancy or notice on the basis of breach'.[24] Sections 79 and 79A establish the general principles with respect to termination of a RTAG. The former provides that a residential tenancy terminates if:

> (b) the landlord or the tenant terminates the tenancy by notice of termination given to the other (as required under this Act); or
>
> (c) the Tribunal terminates the tenancy; or
>
> (d) a person having title superior to the landlord's title becomes entitled to possession of the premises under the order of the Tribunal or a court [see s 96]; or
>
> (e) a mortgagee takes possession of the premises under a mortgage; or
>
> (ea) the tenancy terminates by force of a notice to vacate issued in respect of the premises; or
>
> (f) the tenant abandons the premises; or
>
> (g) the tenant dies without leaving dependants in occupation of the premises; or
>
> (h) the tenant gives up possession of the premises with the landlord's consent; or
>
> (i) the interest of the tenant merges with another estate or interest in the land; or
>
> (j) disclaimer of the tenancy occurs.

While the latter provides that

> (1) If a residential tenancy agreement for a fixed term has not terminated before the end of the fixed term or at the end of the fixed term by notice of termination under section 83A or 86A, the agreement continues —
>
> (a) as a residential tenancy agreement for a periodic tenancy with a tenancy period equivalent to the interval between rental payment times under the agreement; and
>
> (b) with terms of agreement that in other respects are the same as those applying under the agreement immediately before the end of the fixed term.
>
> (2) This section does not apply in relation to a residential tenancy agreement to which section 4 applies.

Sections 80–86B detail the statutory requirements for the termination of a

24 Ibid 772–3 [15.95]; see also 772–4 [15.95]–[15.105].

RTAG by either the landlord or the tenant. The key to pt 6 generally is that there are instances in which either the landlord or the tenant may terminate a tenancy prior to the running of a fixed term, and in which the landlord may recover possession for a tenant's breach. The legislation also provides for those instances in which the RTAG may continue beyond the initial fixed term as a periodic tenancy, if it is not already such a tenancy through the operation of periodicity in s 4. Termination itself must comply with ss 91–92A.

It is here that we must return to the definition of landlord contained in s 3(1). The language used — 'a successor in title to the tenanted premises whose title is subject to the tenant's interest, and includes a prospective landlord and a former landlord' — ensures that both the nature of the RTAG as a right of occupancy and the provisions for termination and recovery of possession bind *any* landlord, whether the original grantor of the RTAG or a successor in title to that grantor, including prospective and former landlords.

What the RTAG creates, then, is a new proprietary interest in land, the principle relationship of which is distinguished from other rights found in the *numerus clausus*, including the common law leasehold, by the protection of a tenant's residence.[25] This concern represents the core motivation behind the residential tenancy reforms, and the resulting statutory 'new property'[26] creates a bundle of rights that allow the tenant to use the residential premises and to exclude others from that use, with those rights being enforceable against others, including successors in title to the original grantor, or landlord. Yet, this interest, characterised by the 'right of occupancy', while proprietary, is entirely unknown to the common law. The question, to which we turn now, then, is how this interest interacts with the Torrens system of title by registration.

IV Exception to indefeasibility

We do not propose to review the concept of title by registration and its adjunct, indefeasibility of title, as established by the Torrens system in Australia. It is well-established that in order for an interest in land to exist in Torrens, the process of registration must be completed, and that doing so confers indefeasibility of title on that interest.[27] Every Torrens system in existence recognises that the common law category of estates and interests in land found in the *numerus clausus* — the freehold estates of fee simple and life estate (and perhaps the fee tail, to the extent that it may still exist in Australian land),[28] the leasehold estate, and the incorporeal interests, the easement, the profit-à-prendre, the mortgage, and the rent charge[29] — are the only such interests that may be created through registration, and so enjoy the protection

25 Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10).

26 See Charles A Reich, 'The New Property' (1964) 73(5) *Yale Law Journal* 733, 733–4.

27 See Paul Babie and John Orth, 'The Troubled Borderlands of Torrens Indefeasibility: Lessons from Australia and the United States' (2017) 7(1) *Property Law Review* 33.

28 It may still exist, and may be capable of creation in Torrens land, in South Australia: see Moore, Grattan and Griggs (n 3) 5–6 [2.120].

29 Ibid 61 [1.25]. On the registrability of the rent charge, see also 894 [17.480]; *Real Property Act 1886* (SA) s 128B ('*RPA 1886*').

of indefeasibility.[30] Only the restrictive covenant — added to the *numerus clausus* comparatively recently, and only in equity — constitutes an anomaly for which this general rule must account, although at least in South Australia, there is a means of ensuring that the protection of indefeasibility is attached to such an interest.[31] Otherwise, specific statutory provision must be made for the registrability of new interests and for their protection by indefeasibility. While general provision is made for an exception protecting a certain form of unregistered lease typically known as a 'short lease' — one taking effect in possession usually for a limited duration — within the Torrens legislation of every state and territory,[32] it is clear that no such express provision has been made for the RTAG, either in the *RTA 1995* or in the *RPA 1886*. Nothing in the latter provides for registration or other express protection of the RTAG, while nothing in the former requires that this sui generis interest be registered pursuant to the latter legislation in order to gain the substantial protections conferred upon the holder of the RTAG.[33]

Protection within the Torrens system for interests which are not registrable and so do not enjoy the protection of indefeasibility must, then, follow from an exception to indefeasibility. These fall into four categories: (i) other registered rights;[34] (ii) express statutory exceptions contained in the *RPA 1886*;[35] (iii) unregistered rights which continue to be recognised by the *RPA 1886* and which may be caveated;[36] and (iv) a general exception created by overriding legislation.[37] Again, as with registrability itself, no exceptions exist for the RTAG in the first three categories.[38] This leaves only the

30 See Douglas J Whalan, *The Torrens System in Australia* (Lawbook, 1982) 97–127; Thomas W Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (Alberta Law Review, 1978) 60–2; Moore, Grattan and Griggs (n 3) 5–6 [1.25]. On the *numerus clausus* in Australian Torrens land, see Brendan Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32(2) *Monash University Law Review* 387.

31 See Brian Hunter, 'Equity and the Torrens System' (1964) 2(2) *Adelaide Law Review* 208. The High Court recently considered this issue in *Deguisa v Lynn* (2020) 384 ALR 209.

32 See *Land Titles Act 1925* (ACT) ss 58(1)(d)–(e); *Real Property Act 1900* (NSW) s 42(1)(d); *Land Title Act 2000* (NT) ss 4, 189(1)(b)–(f), (2); *Land Title Act 1994* (Qld) ss 185(1)(b)–(j), (1A)–(2); *Real Property Act 1886* (SA) s 69(h); *Land Titles Act 1980* (Tas) s 40(3)(d); *Transfer of Land Act 1958* (Vic) s 42(2)(e); *Transfer of Land Act 1893* (WA) s 68(3)(f). An extensive body of authority exists in relation to the Victorian legislation, which allows the statutory exception for *any* tenant in possession to stand paramount: see *Black v Poole* (1895) 16 ALT 155 (life tenants); *National Trustees, Executors and Agency Co of Australasia Ltd v Boyd* (1926) 39 CLR 72 (agreements for a lease); *Downie v Lockwood* [1965] VR 257 (right of renewal and option to renew; equity of rectification). On the issue of priority generally, see *Perpetual Trustee Co Ltd v Smith* (2010) 186 FCR 566, citing *Burke v Dawes* (1938) 59 CLR 1; *Barba v Gas & Fuel Corporation of Victoria* (1976) 136 CLR 120. On the application of the short lease exception to a RTAG, see Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10).

33 See Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10) 460–1.

34 See *RPA 1886* (n 29) ss 56, 56A, 67, 69, 70.

35 See ibid ss 69, 71, 249.

36 See ibid ss 71(d)–(e), 191, 249.

37 See Moore, Grattan and Griggs (n 3) 229–74 [4.190]–[4.415].

38 In an important piece of scholarship, Simon NL Palk considered the possibility of a RTAG constituting one of the express exceptions contained in the *RPA 1886* (n 29): see Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10). Nevertheless, our concern here is not with those exceptions, which, Palk concluded, have minimal applicability.

overriding legislation exception which, we argue, can be established in the case of the RTAG. In this part, therefore, we first briefly review the nature of this fourth category of exception, before turning to a consideration of its potential operation in the case of the RTAG.

A Overriding legislation

As a matter of statutory interpretation, and based upon the constitutional principle of parliamentary sovereignty,[39] the Latin maxim *leges posteriores priores contrarias abrogant* ('later laws abrogate prior, inconsistent laws') governs a conflict between earlier enactments and subsequent legislation, resulting in the implied repeal of the preceding Act by the later.[40] Applied to Torrens, this maxim has sometimes been referred to as 'the greatest legal enemy of the Torrens system', and makes significant inroads on the principle of indefeasibility.[41] It does so through creating the overriding legislation exception to indefeasibility through the potential for its express override in terms, or implied repeal through judicial interpretation or construction of a later statute.[42] Moore, Grattan and Griggs summarise the exception this way:

> Rights, charges and interests relating to land which are created pursuant to a later statute may be enforceable against the title of the registered proprietor even though the registered proprietor did not know of them and in some instances had no means of finding out about them.[43]

In short, the overriding legislation exception renders fragile the concept of indefeasibility, 'pos[ing a] ... threat to confidence in the Torrens system. So

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39 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 ('*South-Eastern Drainage Board (SA)*').

40 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130.

41 GA Jessup, 'The House That Torrens Built' (1945) 18(11) *Australian Law Journal* 302; Lynden Griggs, 'Overriding Statutes and Torrens: Developing a Response to Torrens's "Greatest Legal Enemy"' (2018) 7(3) *Property Law Review* 175; Brendan Edgeworth, 'Planning Law v Property Law: Overriding Statutes and the Torrens System after *Hillpalm v Heaven's Door* and *Kogarah v Golden Paradise*' (2008) 25(2) *Environmental and Planning Law Journal* 82 ('Planning Law v Property Law'); Lynden Griggs, '*Hillpalm Pty Ltd v Heaven's Door Pty Ltd*' (2005) 11(3) *Australian Property Law Journal* 244. But see Ben McEniery, 'A Dedicated Means of Giving Notice of the Existence of Unregistered Interests under Torrens' (2006) 12(3) *Australian Property Law Journal* 244.

42 Moore, Grattan and Griggs (n 3) 253–4 [4.325]. For leading examples, see *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 ('*Travinto Nominees*'); *British American Cattle Co v Caribe Farm Industries Ltd (in receivership)* [1998] 1 WLR 1529 ('*British American Cattle Co*'); *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* (2008) 37 WAR 498 ('*East Fremantle Shopping Centre*'). An extensive body of secondary literature surrounds the exception, see, eg, Peter Radan, 'Indefeasibility and Overriding Statutes' (2003) 41(6) *Law Society Journal* 66; Brendan Edgeworth, 'Overriding Statutes and the Torrens System (Again)' (2007) 81(9) *Australian Law Journal* 713, 715; Brendan Edgeworth, '"Very High Bar to Clear": Implied Repeal of Torrens Legislation after *City of Canada Bay Council v Bonaccorso Pty Ltd*' (2008) 82(7) *Australian Law Journal* 436; Brendan Edgeworth, 'Indefeasibility and Overriding Statutes: An Attempted Solution' (2009) 83(10) *Australian Law Journal* 655, 658 ('Indefeasibility and Overriding Statutes').

43 Moore, Grattan and Griggs (n 3) 253–4 [4.325] (footnotes omitted). See *Pratten v Warringah Shire Council* (1969) 90 WN (Pt 1) (NSW) 134 ('*Pratten*').

substantial are their inroads into indefeasibility of title that it is quite unsafe to rely upon the Register as an accurate mirror of the registered proprietor's title'.[44]

The exception can apply both when a later Act creates an interest in land which it expressly declares to be effective despite non-compliance with the Torrens registration provisions, or when such later legislation fails expressly to repeal part(s) of the Torrens statute.[45] The result of the exception is to render the indefeasible title of a registered proprietor subject to a statutorily-endorsed interest or qualification which the register does not disclose.[46] The point of the exception, then, is simply this: adherence to the principle of indefeasibility in the face of conflicting legislation would prevent the fulfilment of the social and policy objectives of that putatively overriding legislation.[47]

In applying the exception, following close scrutiny of both enactments, courts are typically reluctant to find that indefeasibility is defeated by a later statute,[48] preferring instead to attempt a reconciliation of the text of the two statutes which would allow them to coexist.[49] This may be achieved in at least two ways. First, a statute with a specific subject matter may prevail over a statute on a general subject matter,[50] as where a statute creating public rights prevails over a statute creating private rights,[51] or where a statute which regarded a transaction as void or beyond power operates up until a Torrens title dealing arising out of the transaction is registered.[52] Second, a subsequent statute may create an interest in land incapable of registration or recording within the Torrens system,[53] such as where the Torrens system lacks a procedure by which the interest can be registered or recorded,[54] or due to the interest being non-proprietary in nature.[55] But where a court finds it

44 Peter Butt, 'Conveyancing' (1996) 70(3) *Australian Law Journal* 167, 168–9.

45 See *South-Eastern Drainage Board (SA)* (n 39).

46 *House of Peace Pty Ltd v Bangladesh Islamic Centre of New South Wales Inc* (2009) 73 ACSR 446, 461–2 [79] (Nicholas J).

47 See Edgeworth, 'Planning Law v Property Law' (n 41).

48 Penelope Jane Carruthers, 'The Australian Torrens System Principle of Immediate Indefeasibility: Is It "Fit for Purpose" for the 21st Century?' (PhD Thesis, University of Western Australia, 2018) ch 5.

49 *Kogarah Municipal Council v Golden Paradise Corporation* (2005) 12 BPR 23,651, 23,670 [100] (Basten JA) ('*Kogarah*').

50 *Miller v Minister for Mines* [1963] AC 484 ('*Miller*') (mining legislation overriding Torrens legislation); *Epworth Group Holdings Pty Ltd v Permanent Custodians Ltd* [2011] SASCFC 32 ('*Epworth Group Holdings*') (retail leases legislation overriding Torrens legislation).

51 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, 505 [100] (Kirby J in dissent) ('*Hillpalm*'). See Pamela O'Connor, 'Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title' (1994) 19(3) *Melbourne University Law Review* 649.

52 See *Kogarah* (n 49); *City of Canada Bay Council v F & D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424 ('*City of Canada Bay Council*'); *Koompahtoo Local Aboriginal Land Council v KLALC Property Investment Pty Ltd* [2008] NSWCA 6 ('*Koompahtoo*'); *Miller* (n 50) 498; *Bank of Western Australia v Connell* (1996) 16 WAR 483; *British American Cattle Co* (n 42) 1534; *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643 ('*Horvath*').

53 See *Miller* (n 50).

54 *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354; *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98; *Pratten* (n 43) 137.

55 *Linden v Wigg* (1968) 88 WN (Pt 1) (NSW) 109, 112–15.

impossible for the two enactments to co-exist because there is a sufficient inconsistency between the two,[56] and provided that the legislature has demonstrated a 'clearly expressed intention in a subsequent enactment [to] qualify or override rights and powers which a registered proprietor would otherwise have', then a court may allow the later legislation to prevail.[57]

The interpretive method used by Australian courts to assess conflicting pieces of legislation for a possible exception to indefeasibility may produce one of two outcomes. The first, and older result of a conflict between Torrens indefeasibility and a later piece of legislation is known as conflict and implied repeal. This occurs where it can be shown that the legislature's intention and purpose in the subsequent Act was to verify an interest or a procedure, and such verification is directly inconsistent with the indefeasibility provisions of the Torrens statute and cannot be reconciled — in that case, there operates an implied repeal giving priority to the later statute over the earlier.[58] The High Court established this approach in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* ('*South-Eastern Drainage Board (SA)*'),[59] in which it found that s 6 of the *RPA 1886*, which attempts to confer retroactive and prospective priority upon the *RPA 1886*,[60] was insufficient to prevent the operation of the *South Eastern Drainage Act 1931* (SA) from taking priority. The High Court found that s 6 was not a law respecting the constitution, powers or procedure of the legislature within the meaning of the *Colonial Laws Validity Act 1865* (Imp) and so could not deprive legislation of effect which upon the construction of its terms enacts provisions inconsistent with the *RPA 1886*.[61] A recent example of this approach occurred in *Brown v Commonwealth Bank of Australia* ('*Brown*'),[62] in which the South Australian Supreme Court applied conflict and implied repeal to find that a charge created under the *Retirement Villages Act 1987* (SA) ('*RVA 1987*') was in conflict with and therefore impliedly repealed the relevant provisions of the Torrens system in respect of a mortgage pursuant to the *RPA 1886*.

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56 See especially Patrick J Lewis and Samuel Bluman Schroeder, 'Indefeasibility of Title and Overriding Statutes: Determining which prevails in the event of an inconsistency' (2008) 16(2) *Australian Property Law Journal* 147.

57 *East Fremantle Shopping Centre* (n 42) 508 [29] (Buss JA).

58 *Suatu Holdings Pty Ltd v Australian Postal Corporation* (1989) 86 ALR 532, 546 (Gummow J); *Travinto Nominees* (n 42).

59 *South-Eastern Drainage Board (SA)* (n 39).

60 *RPA 1886* (n 29) s 6, provides:

> No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply 'notwithstanding the provisions of the *Real Property Act 1886*'.

On this, see *Real Property Act 1900* (NSW) s 42(3); Edgeworth, 'Indefeasibility and Overriding Statutes' (n 42).

61 *South-Eastern Drainage Board (SA)* (n 39), citing *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63. See also Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10) 462. This has subsequently been applied in *Butler v A-G (Vic)* (1961) 106 CLR 268, 276 (Fullagar J), 290 (Windeyer J); *Travinto Nominees* (n 42) 33–5 (Gibbs J); *Saraswati v The Queen* (1991) 172 CLR 1; *Hillpalm* (n 51) 503–6 [93]–[104] (Kirby J); *Quach v Marrickville Municipal Council [No 2]* (1990) 22 NSWLR 55, 61; *Calabro v Bayside City Council* [1999] 3 VR 688; *Kogarah* (n 49) 23,670 [100] (Basten JA).

62 (1994) 63 SASR 188 ('*Brown*').

The second, and more recent approach to such conflicts, known as sequential assessment, arises where the legislature's intention and purpose in enacting a subsequent piece of legislation is to verify an interest or a procedure, and such verification is directly inconsistent with the indefeasibility of title provisions in the earlier Torrens statute. In such cases, the canons of statutory interpretation justify a finding that both Acts have a sequential operation within their independent spheres of enforceability. Where possible, then, each provision is read as subject to the other.[63] The Full Court of the South Australian Supreme Court ruled in *Epworth Group Holdings Pty Ltd v Permanent Custodians Ltd* ('*Epworth Group Holdings*')[64] that a retail shop lease created pursuant to the *Retail and Commercial Leases Act 1995* (SA) did not create an exception to indefeasibility because nothing in the legislation allowed the conclusion that the later Act was intended to confer upon a lessee rights that would take priority to registered interests under the *RPA 1886*. As such, there was no relevant inconsistency between the statutory right of security and tenure of the *Retail and Commercial Leases Act* and the indefeasible title granted by the provisions of the *RPA 1886*.

It seems that the two possible outcomes of conflict may not necessarily be mutually exclusive, but rather, may be the simultaneous result of the interaction of the two pieces of legislation. Of course, in some cases conflict may be irreconcilable, and thus result in an implied repeal of, or exception to indefeasibility. In other cases, the conflict may be resolved by allowing the two pieces of legislation to co-exist, and take effect in their respective spheres, and thus result in a partial exception to indefeasibility. While the sequential assessment outcome remains controversial, and has yet to be accepted by the High Court,[65] choosing between the two may not be necessary. Rather, it may be that in both cases an exception arises and it is merely a matter of the degree to which it operates — either full repeal of indefeasibility or its possible limitation within the terms of a later statute. Either way, it is not our purpose here to determine the outcome of the potential conflict between indefeasibility and a RTAG. Rather, we merely seek to demonstrate that conflict does *indeed* exist, and that this may, in turn, result in an exception to the indefeasibility of title conferred by the *RPA 1886*. We turn, then, to an assessment of the conflict in the case of the RTAG.

B Applied to residential tenancy agreement

As we have seen, the significance of the overriding legislation exception is to prevent the operation of indefeasibility from subverting the social and policy objectives of later legislation. This point cannot be gainsaid in respect of the RTAG. The radical reforms to the common law leasehold as it operated in the residential setting was to balance the rights of landlord and tenant. The very point of those reforms sought to ensure that the tenant had enforceable rights against a landlord, and to ensure that those rights would survive the conveyance of the landlord's interest to a third party; this was achieved

63 *Horvath* (n 52); *F & D Bonaccorso Pty Ltd v City of Canada Bay Council* [2007] NSWLEC 159; *City of Canada Bay Council* (n 52); *Koompahtoo* (n 52).

64 *Epworth Group Holdings* (n 50).

65 See O'Connor (n 51).

through a radical alternation to the real property landscape in the form of the RTAG.[66] At the outset, then, if indefeasibility were to operate unchecked in respect of the RTAG, the very point of the reforms that produced this sui generis form of property would be undone. The simple act of conveyance of the leasehold reversion — the landlord's interest in the residential premises — to a third party who had no notice of the RTAG would defeat the tenant's interest. Intuitively, that cannot have been the intention of the Parliament in enacting the *RTA 1995*.[67] But intuition is not enough to protect the RTAG within the Torrens system. Achieving that requires something more, and that something more is the overriding legislation exception to indefeasibility. Here we consider the application of that exception to the RTAG. We conclude that the tenant's interest under a RTAG is protected against the unchecked operation of indefeasibility by the overriding legislation exception.

Consider, first, *Brown* which, as we have seen, examined whether a charge created by the *RVA 1987* took priority over a Torrens mortgage registered pursuant to the *RPA 1886*. There the South Australian Supreme Court relied upon s 19(4) of the *RVA 1987* (now s 27(11) of the *Retirement Villages Act 2016* (SA) ('*RVA 2016*')), which provides: 'Despite the *Real Property Act 1886*, the charge referred to above ranks in priority to any other mortgage, charge or encumbrance over the land to which the charge relates.' On the basis of this clear language, the Supreme Court applied conflict and implied repeal to find that the later Act had the effect of giving priority to the charge and thus found that the interests of the chargee should prevail over those of the mortgagee.[68]

Section 61(1) of the first South Australian residential tenancies enactment, the *RTA 1978*, contained somewhat analogous wording to that of s 27(11) of the *RVA 2016* with respect to the termination of a RTAG, as follows: 'Notwithstanding any Act or law to the contrary, a residential tenancy agreement shall not terminate or be terminated except [the section enumerates the grounds upon which termination is possible].' It is arguable that this language may have had the effect of an implied repeal, thus allowing the RTAG, at least as concerned termination, to take priority over the protections given a successor in title to an original landlord through the indefeasibility conferred by the *RPA 1886*.[69] Nevertheless, that applied only to termination and, more importantly, that language is no longer found anywhere in the *RTA 1995*.

Still, while the relevant language of s 61(1) has been repealed, the broader framework of the RTA remains the same throughout the three stages of reform from 1978 to 1995 ('*RTA 1978–RTA 1995*'). Thus, while a tenant pursuant to a RTAG *could* register pursuant to the *RPA 1886*, the question remains: what would that add to what the RTAG already provides? As we have seen, the *RTA 1978–RTA 1995* constitutes a radical protection provided to residential

66 See Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10).

67 Ibid.

68 See *Brown* (n 62).

69 See Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10) 460–2. For more on the *Residential Tenancies Act 1978* (SA) ('*RTA 1978*') generally, see Simon Palk, 'The Courts v The Residential Tenancies Tribunal: Judicial Review by Any Other Name' (1987) 11(2) *Adelaide Law Review* 215.

tenants, and a form of protection that goes well beyond that provided by indefeasibility pursuant to the *RPA 1886*. This is clear from the language of the *RTA 1978–RTA 1995*; and it is the words of the statute which matter, rather than any extraneous material, such as speeches introducing the legislation in Parliament or explanatory memoranda.[70] What Parliament intended must be found in the words it uses in the enactment in question. Here, an assessment of the provisions we have examined earlier suggests that Parliament's intention in enacting the *RTA 1978–RTA 1995*, as exhibited by the language of the legislation — especially the definition of landlord in s 3(1) and the notice provisions for termination in pt 5 — was to override the position both at general law and at Torrens.

Even to suggest that registration is necessary to secure the protections conferred by the *RTA 1978–RTA 1995*, both against the original landlord and against successors in title, would be to suggest that there was something imperfect in the status of the RTAG, which only registration and indefeasibility could cure. The language of the definition of landlord and the notice provisions certainly do not lend themselves to such an interpretation. Instead, that language suggests that the protection of the tenant pursuant to a RTAG exists from the moment the contract which gives rise to it is concluded, and that those protections continue beyond the title of the original grantor to bind successors in title. Indeed, the definition of the landlord has changed between 1978 and 1995, with the addition of the words 'or ... a successor in title to the tenanted premises whose title is subject to the tenant's interest, and includes a prospective landlord and a former landlord'. Those additional words may, in fact, obviate the language removed from s 61(1) of the 1978 Act, making it clear that the RTAG binds both original grantor and successor in title, removing any need for Torrens registration and the protection of indefeasibility.

Similarly, does the *failure* to register or to caveat pursuant to the *RPA 1886* demote the RTAG in priority to other successors in title to the original landlord who do hold registered interests pursuant to Torrens? A requirement that the holder of the RTAG register to gain the protections of the *RTA 1978–RTA 1995* seems very unlikely, both as a matter of policy as found in the history of the reforms and as a matter of law by virtue of statutory interpretation. Rather, it seems much more likely that the intention of Parliament in enacting the *RTA 1978–RTA 1995* was a radical override of general law and Torrens, and that there exists an irreconcilable difference between the two, and thus an implied repeal of indefeasibility. Allowing, then, even for the *possibility* of registration would clearly subvert the purpose of the residential tenancies legislation, and seems a very unlikely outcome based upon the language of the legislation. In this regard, Palk argues:

> The purpose of the legislation is to give tenants a measure of security in their home. Surely a tenant should not be deprived of this security merely because his landlord chooses to sell his freehold reversion. He is still a tenant who deserves protection. Moreover it is submitted that it is no answer to say that the tenant should register or caveat his lease. Many leases are not in registrable form, and few tenants, having

70 The debates and speeches may tell us little in any case: see Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10) 465.

> signed a lease, will take advantage of the caveat system (even assuming they are aware of its existence) in case the landlord should decide to sell.[71]

If, then, the intention was that Torrens registration was necessary, surely Parliament would have said so in clear and unequivocal language, rather than leaving it to supposition whether registration was necessary to bring into effect the protections conferred by the RTAG. Thus, based upon an assessment of the language used by Parliament in the *RTA 1978–RTA 1995*, what has been created, as we demonstrated above, is a sui generis form of property, unknown to law or equity, and so not within the *numerus clausus* of interests in land at common law. As we have shown, this new form of statutory property is the RTAG and its content is derived solely from the *RTA 1995*. Conversely, as we argued, neither of the two hallmarks of the common law lease — exclusive possession and certainty of term — form the content of the RTAG. For that reason, the RTAG depends neither on Torrens registration for its existence nor on indefeasibility for its enforceability. Why? Because it is not one of the interests found in the common law *numerus clausus* and so it is *incapable* of registration. The fundamental assumption of every Torrens system is that the *numerus clausus*, as accepted at common law, contains the estates and interests in land that may be registered. That is considered so fundamental that no Torrens legislation even states it, although it is implied by the maintenance of equity to protect those interests that do not satisfy the legal *numerus clausus*, or for which express provision is made in the Torrens legislation, such as that made in the *RPA 1886* for the restrictive covenant. To subvert that principle and its attendant assumptions *would* require a clear and plain legislative intention, based upon the words of the legislation. Neither the *RTA 1995* nor the *RPA 1886* contains such an intention.

Therefore, it seems that the RTAG and Torrens indefeasibility are fundamentally irreconcilable. Moreover, rather than the two operating in their respective spheres, as would be possible in a sequential assessment approach to such conflict, in this case, it seems very likely that the conflict must produce an implied repeal of indefeasibility. In short, an exception to indefeasibility for the RTAG — a sui generis form of statutory property — has been created by the *RTA 1978–RTA 1995*.

V Conclusion

The RTAG represents a radical reform of the common law leasehold. Indeed, rather than a leasehold interest, the effect of the residential tenancies reforms that began in the 1970s and continued through to the 2000s, and of the legislative language used by the Australian states and territories, was to create a new, statutory, sui generis form of property. The RTAG operates as a relationship which depends upon residence of the tenant, not the hallmarks of the common law leasehold. As such, this new form of property exists, operates, and gains its protection not from its being counted among the estates and interests which comprise the *numerus clausus*, but on the operation of the relevant legislation found in each state and territory. The South Australian version is found in the *RTA 1978–RTA 1995*.

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71 See Palk, 'The Residential Tenancies Act, 1978 (SA)' (n 10) 461.

A question left unanswered by the reforms and by the *RTA 1995* is the effect of the RTAG in the Torrens setting: does it require registration for its existence and the indefeasibility conferred by that process for its enforceability against both its grantor and successors in title to the grantor? We argue in this article not only that it does not require registration for its existence and enforceability, but also that it is *incapable* of such registration. For that reason, it is very unlikely that Parliament intended its work in protecting the residential tenant through the operation of the RTAG to be undone by the simple conveyance of the landlord's interest to a successor in title. To conclude otherwise would require a clear and plain legislative intention. Because that cannot be found, we argue, the RTAG creates an irreconcilable difference with Torrens indefeasibility, and an implied repeal of the relevant provisions of the Torrens legislation. Put another way, the RTAG operates as an overriding legislation exception to the indefeasibility of title of both the original grantor and successors in title to that grantor.

Appendix A

Australian Residential Tenancy Regimes

Jurisdiction	Statute	Form	Interest	Administration	Dispute Resolution
ACT	***Residential Tenancies Act 1997* (ACT)** ***Residential Tenancies Regulation 1998* (ACT)** ***Land Titles Act 1925* (ACT)** ***Civil Law (Property) Act 2006* (ACT)**	N/A	Standard Tenancy Agreement	Commissioner for Fair Trading	ACT Civil and Administrative Tribunal

NSW	***Residential Tenancies Act 2010* (NSW)** ***Residential Tenancies Regulation 2019* (NSW)** ***Real Property Act 1900* (NSW)**	*Residential Tenancies Regulation 2010* (NSW) sch 1 Standard Form Agreement (cl 4(1))	Standard Form Residential Tenancy Agreement	NSW Fair Trading	NSW Civil and Administrative Tribunal
NT	***Residential Tenancies Act 1999* (NT)** ***Residential Tenancies Regulations 2000* (NT)** ***Land Title Act 2000* (NT)** ***Law of Property Act 2000* (NT)**	*Residential Tenancies Regulations 2000* (NT) sch 2, reg 10	Residential Tenancy Agreement	NT Consumer and Business Affairs; and NT Department of Justice	NT Civil and Administrative Tribunal

Qld	***Residential Tenancies and Rooming Accommodation Act 2008* (Qld)** ***Residential Tenancies and Rooming Accommodation Regulation 2009* (Qld)** ***Land Title Act 1994* (Qld)** ***Property Law Act 1974* (Qld)**	Form 18a	General Tenancy Agreement	Residential Tenancy Authority	Queensland Civil and Administrative Tribunal; Magistrates Court
SA	***Residential Tenancies Act 1995* (SA)** ***Residential Tenancies Regulations 2010* (SA)** ***Real Property Act 1886* (SA)**	N/A	Residential Tenancy Agreement	Consumer and Business Services	SA Civil and Administrative Tribunal

Tas	***Residential Tenancy Act 1997* (Tas)** ***Residential Tenancy Regulations 2015* (Tas)** ***Land Titles Act 1980* (Tas)** ***Conveyancing and Law of Property Act 1884* (Tas)**	N/A	Residential Tenancy Agreement	Consumer Affairs and Fair Trading	Residential Tenancy Commissioner; Magistrates Court
Vic	***Residential Tenancies Act 1997* (Vic)** ***Residential Tenancies Regulations 2019* (Vic)** ***Transfer of Land Act 1958* (Vic)** ***Property Law Act 1958* (Vic)**	*Residential Tenancies Regulations 2008* (Vic) sch 1, Form 1	Residential Tenancy Agreement	Consumer Affairs Victoria	Victorian Civil and Administrative Tribunal

WA	***Residential Tenancies Act 1987* (WA)** ***Residential Tenancies Regulations 1989* (WA)** ***Transfer of Land Act 1893* (WA)** ***Property Law Act 1969* (WA)**	Form 1AA	Residential Tenancy Agreement	WA Department of Consumer and Employment Protection	Magistrates Court