

Legislative Council—No 12

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South Australia

Real Property (Priority Notices and Other Measures) Amendment Bill 2015

A BILL FOR

An Act to amend the *Real Property Act 1886*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Real Property (Priority Notices and Other Measures) Amendment Act 2015*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Real Property Act 1886*

4—Amendment of section 3—Interpretation

- (1) Section 3(1), definition of *Court*, (b)—after "142A," insert:

154I,

- (2) Section 3(1)—after the definition of *land* insert:

legal practitioner has the same meaning as in the *Legal Practitioners Act 1981*;

- (3) Section 3(1)—after the definition of *mortgagor* insert:

participation rules means the participation rules determined by the Registrar-General under section 23 of the *Electronic Conveyancing National Law (South Australia)*;

- (4) Section 3(1)—after the definition of *proprietor* insert:

registered conveyancer means a person registered as a conveyancer under the *Conveyancers Act 1994*;

- (5) Section 3(1)—after the definition of *transmission* insert:

Tribunal means the South Australian Civil and Administrative Tribunal established under the *South Australian Civil and Administrative Tribunal Act 2013*;

verification of identity requirements—see section 273A.

5—Amendment of section 56—Priority of instruments

Section 56—after subsection (1a) insert:

- (1b) Subsections (1) and (1a) operate subject to Part 13A.

6—Amendment of section 57—Effect of registration or recording of instruments

- (1) Section 57—delete "Every instrument shall, when registered," and substitute:

Subject to subsection (2), every instrument will, when registered or recorded,

- (2) Section 57—delete ", and shall have the effect of and be deemed and taken to be a deed duly executed by the parties who have signed the same"

- (3) Section 57—after its present contents as amended by this section (now to be designated as subsection (1)) insert:

- (2) Subsection (1) does not operate to deem an instrument registered or recorded in the Register of Crown Leases part of the Register Book.

- (3) Every instrument registered in the Register Book or the Register of Crown Leases will be deemed to be a deed duly executed by the parties who have signed the instrument.

7—Insertion of section 90G

5 Before section 91 insert:

90G—Interpretation

In this Part—

designated Act means—

- 10 (a) the *Crown Land Management Act 2009*; or
(b) the *Pastoral Land Management and Conservation Act 1989*;
or
(c) a relevant Act within the meaning of Schedule 1 Part 7 of
the *Crown Land Management Act 2009*; or
15 (d) any other Act under which a Crown lease may be granted or
which regulates dealings with Crown leases.

8—Amendment of section 93—Execution and registration of Crown lease

- (1) Section 93(1)—delete "Lease" and substitute:

lease

- (2) Section 93(1)—delete "with the Registrar-General" and substitute:

20 in the Lands Titles Registration Office

- (3) Section 93(3)—delete "Lease" and substitute:

lease

- (4) Section 93—after subsection (3) insert:

- 25 (3a) A Crown lease registered under subsection (3) is able to be (and a
Crown lease so registered is taken to have always been able to be)
transferred, mortgaged and dealt with for the purposes of this Act as
if it were a lease registered in the Register Book (provided that an
entry in respect of a lease that would ordinarily be made in the
30 Register Book must instead be made in the Register of Crown
Leases).
- (3b) If an instrument lodged in the Lands Titles Registration Office
transfers, mortgages or otherwise deals with a Crown lease, the
instrument will be taken to be registered or recorded, as appropriate,
on being entered in the Register of Crown Leases by the
35 Registrar-General.
- (3c) However, the Registrar-General may not register a Crown lease, or
register or record an instrument that transfers, mortgages or
otherwise deals with a Crown lease, unless satisfied that any consent
required under a relevant designated Act has been obtained.

- (5) Section 93(4)—delete "Leases" second occurring and substitute:
leases

9—Amendment of section 94—Forfeiture etc of Crown lease

Section 94—delete "Lease" and substitute:

5 lease

10—Substitution of section 95

Section 95—delete the section and substitute:

95—Indefeasibility of title under Crown lease

- 10 (1) Subject to subsection (2), section 69 applies (and is taken to have always applied) in relation to the title of a person who appears by the Register of Crown Leases to be a proprietor of land as if the person were the registered proprietor of the land and the Crown lease were the certificate of title.
- 15 (2) Subsection (1) does not operate to protect the interests of a party to an instrument if—
- (a) any consent required under any relevant designated Act was not obtained before the instrument was registered; or
 - (b) the instrument is in any way inconsistent with any relevant designated Act.

20 **95A—Evidentiary**

Subject to this Part, a document that purports to have been certified by the Registrar-General to be a correct copy of a Crown lease is to be accepted in legal proceedings—

- 25 (a) as conclusive evidence of title to any estate or interest in land that it records; and
- (b) as evidence (which may be rebutted) of any other information that it records.

95B—Operation of Part in relation to Crown leases and other instruments subject to other Acts

- 30 (1) Nothing in this Part overrides any designated Act, and, to the extent of any inconsistency between this Part and a designated Act, the designated Act will prevail.
- 35 (2) To avoid doubt, registration or recording under section 93, and indefeasibility under section 95, do not prejudice or alter any right or remedy that the Crown would otherwise possess or validate any instrument, or provision of any instrument, that would not be valid under a designated Act.

11—Insertion of Part 13A

After Part 13 insert:

Part 13A—Priority notices

154—Interpretation

In this Part—

instrument means any document capable of registration in the Lands Titles Registration Office, or in respect of which a record is under an Act directed, required, or permitted to be made in the Register Book, and includes a document that may be registered or recorded in the Register of Crown Leases under section 93.

154A—Person who intends to lodge instrument may lodge priority notice

- (1) A person who intends to lodge an instrument may, on payment of the prescribed fee, lodge in the Lands Titles Registration Office a notice (a *priority notice*) for the purpose of giving priority to 1 or more instruments relevant to the same conveyancing transaction.
- (2) A priority notice must—
 - (a) be in the appropriate form; and
 - (b) identify the instruments to which priority is to be given; and
 - (c) specify the order in which priority is to be given to the instruments identified in the notice; and
 - (d) identify the land to which the notice relates; and
 - (e) include any other information, or be accompanied by any other document, required by the Registrar-General.
- (3) A priority notice may give priority to an instrument to be lodged by the person who lodged the notice or by another person.
- (4) If a priority notice identifies more than 1 instrument, priority under this Part will only be given to an instrument identified in the notice if all of the identified instruments are lodged in the Lands Titles Registration Office at the same time.
- (5) Subject to subsection (13), a priority notice comes into force when it is lodged and remains in force until it ceases to have effect in accordance with this Part.
- (6) If a priority notice is lodged in the Lands Titles Registration Office in relation to land, nothing prevents the lodgement of a further priority notice in relation to the same land by the person who lodged the earlier notice or by a different person.
- (7) A second or subsequent priority notice lodged in relation to land—
 - (a) may identify 1 or more of the same instruments as identified in an earlier notice (even if the earlier notice is in force); and

- (b) may identify instruments that have not been identified in an earlier notice.
- 5 (8) If 2 or more priority notices are in force in relation to particular land, the notices are entitled to priority according to the order in which they were lodged in the Lands Titles Registration Office.
- 10 (9) A person lodging a priority notice is not required to provide evidence in support of the content of the notice or his or her eligibility to lodge the notice (but the Registrar-General may require verification of the person's identity in accordance with the verification of identity requirements).
- (10) The Registrar-General is not required to inquire into the content of a priority notice in order to determine whether that content is correct.
- (11) If a priority notice is lodged, the Registrar-General—
- 15 (a) must—
- (i) record on the notice the time of receipt of the notice; and
- (ii) make a record of lodgement of the notice in the Register Book or, if appropriate, the Register of Crown Leases; but
- 20 (b) is not required to advise the registered proprietor of the land to which the priority notice relates, or any other person, that the notice has been lodged.
- (12) The Registrar-General may determine that a person is a vexatious lodger of priority notices.
- 25 (13) A priority notice lodged by a person in relation to whom a determination has been made by the Registrar-General under subsection (12) may be rejected by the Registrar-General and, in that case, the notice is of no effect.
- (14) A priority notice may be lodged in relation to—
- 30 (a) land wholly comprised in a single certificate of title; or
- (b) land comprised in more than 1 certificate of title; or
- (c) a portion of the land comprised in a certificate of title.

154B—Effect of priority notice

- 35 (1) If an instrument affecting land is lodged in the Lands Titles Registration Office or served on the Registrar-General while a priority notice is in force in relation to the land, the instrument may not be registered or recorded in the Register Book or the Register of Crown Leases until the priority notice ceases to have effect.

- (2) However, a priority notice in force in relation to land does not prevent the Registrar-General from registering, recording or giving effect to the following in relation to the land:
- (a) an instrument identified in the priority notice as an instrument to which priority is to be given (provided the instruments identified in the notice are lodged in accordance with section 154A(4));
 - (b) any other instrument with the written consent of the person who lodged the priority notice;
 - (c) the receipt, removal, extension or withdrawal of a caveat;
 - (d) a statutory order or the cancellation of a statutory order;
 - (e) a statutory authorisation or the cancellation of a statutory authorisation;
 - (f) an order of a court;
 - (g) a warrant of sale;
 - (h) a transfer consequential on a statutory charge, order or authorisation, a warrant of sale or the exercise of a statutory power of sale by a statutory body or officer;
 - (i) an instrument lodged by the Crown;
 - (j) an instrument relating to an interest in land that, in the opinion of the Registrar-General, would not affect the interest to which the priority notice relates;
 - (k) a statutory charge or the discharge, removal or cancellation of a statutory charge;
 - (l) a heritage agreement, or the variation or termination of a heritage agreement, under the *Heritage Places Act 1993* or the *Native Vegetation Act 1991*;
 - (m) an agreement, or the rescission or amendment of an agreement, under Part 5 of the *Development Act 1993*;
 - (n) an alteration to the South Australian Heritage Register under the *Heritage Places Act 1993*;
 - (o) a worker's lien, or the cessation or withdrawal of a worker's lien, under the *Worker's Liens Act 1893*;
 - (p) a notice or acquisition under the *Land Acquisition Act 1969*;
 - (q) an environment performance agreement, or the termination of an environment performance agreement, under the *Environment Protection Act 1993*;
 - (r) an Aboriginal heritage agreement, or an agreement varying or terminating an Aboriginal heritage agreement, entered into under the *Aboriginal Heritage Act 1988*;

- 5
- (s) an access agreement, or the variation of an access agreement, entered into under the *Recreational Greenways Act 2000*;
- (t) a management agreement, or the rescission or amendment of a management agreement, entered into under the *River Murray Act 2003*;
- (u) the amendment or rescission of, or any other dealing with, a statutory encumbrance (within the meaning of Part 19AB) not otherwise mentioned in this subsection;
- 10 (v) an application under this Act by a person to whom land has been transmitted for registration as proprietor of the land;
- (w) any other prescribed instrument, order, agreement or matter or instrument, order, agreement or matter of a prescribed class.
- 15 (3) If, in the opinion of the Registrar-General, it is apparent from the information included in a priority notice that the notice is intended to give priority to a particular instrument, but the instrument is not accurately identified in the notice, the Registrar-General may nevertheless give priority to the instrument as if it had been so identified.
- 20 (4) Lodgement of a priority notice in relation to a portion of the land comprised in a certificate of title where the land is the subject of a plan of division or a plan of community division that has not been deposited by the Registrar-General does not prevent the
- 25 Registrar-General from dealing with the application for the division of the land to which the plan relates.

154C—Registration of instruments identified in priority notice

30 Instruments identified in a priority notice are to be registered in the order in which they are given priority in the notice unless the Registrar-General considers there is good reason for registering the instruments in a different order.

154D—Lodging party need not be informed that instrument cannot be registered or recorded

35 The Registrar-General is not required to inform a person who lodges an instrument affecting land in relation to which a priority notice is in force that the instrument cannot be registered or recorded in the Register Book or the Register of Crown Leases.

154E—Withdrawal of priority notice

40 The person who lodged a priority notice may withdraw the notice by lodging in the Lands Titles Registration Office a notice of withdrawal in the appropriate form.

154F—Cancellation of priority notice by Registrar-General

- 5
- (1) Subject to subsection (2), if the Registrar-General is satisfied, on application by a person with an interest in land in relation to which a priority notice is in force, that the priority notice purports to protect the priority of an instrument that is unlikely to be registered or recorded within 90 days of the day on which the notice was lodged, the Registrar-General may cancel the notice.
- (2) The Registrar-General must, before cancelling a priority notice under subsection (1)—
- 10
- (a) give the person who lodged the priority notice written notice of the application and invite the person to provide written submissions in response to the application within a specified period (being a period of not less than 10 days from the day on which notice is given to the person); and
- 15
- (b) have regard to any submissions provided in response to the application within the specified period.

154G—Cessation of priority notice

- 20
- (1) A priority notice ceases to have effect if it is withdrawn under section 154E or cancelled under section 154F.
- (2) If the instruments identified in a priority notice that has not been withdrawn or cancelled are lodged in accordance with section 154A(4) before the end of the applicable period following the day on which the notice was lodged, the notice ceases to have effect when each of those instruments has been registered, recorded, withdrawn from registration or rejected by the Registrar-General.
- 25
- (3) If the instruments identified in a priority notice that has not been withdrawn or cancelled are not lodged in accordance with section 154A(4) before the end of the applicable period following the day on which the notice was lodged, the notice ceases to have effect at the end of that period.
- 30
- (4) Subsections (1) to (3) operate subject to any order of the Tribunal under section 221.
- (5) For the purposes of this section, the *applicable period* is—
- 35
- (a) 60 days; or
- (b) if the Registrar has extended the duration of the priority notice under subsection (6)—90 days.
- (6) The Registrar-General may, on application made by the person who lodged a priority notice, extend the duration of the notice for 30 days.
- (7) However, the duration of a priority notice may not be extended—
- 40
- (a) on an application made after the notice ceases to have effect; or
- (b) more than once.

154H—Registration of instruments after priority notice is no longer in force

- 5
- (1) If an instrument lodged in the Lands Titles Registration Office cannot be registered or recorded because it affects land in relation to which a priority notice is in force, the instrument is to be dealt with when the priority notice ceases to have effect.
 - (2) If there are 2 or more such instruments, section 56 applies (despite section 56(1b)) for the purpose of determining the priority of the instruments as between themselves.

10 **154I—Civil liability**

- 15
- (1) If—
 - (a) a person (the *defendant*) lodges a priority notice in the Lands Titles Registration Office; and
 - (b) another person (the *plaintiff*) suffers loss or damage as a consequence of the notice having been lodged; and
 - (c) the defendant—
 - (i) was not entitled to lodge the notice; or
 - (ii) unreasonably refused or failed to withdraw the notice,

20 the defendant is liable to compensate the plaintiff for the loss or damage.

 - (2) The Court may, in proceedings under this section, require the defendant to pay an amount, determined by the Court, in the nature of exemplary damages.
 - (3) The defendant in proceedings under this section bears the onus of proving that he or she was entitled to lodge the priority notice or that he or she did not unreasonably refuse or fail to withdraw the notice.

12—Amendment of section 191—Caveats

Section 191—delete "with the Registrar-General" and substitute:

30 in the Lands Titles Registration Office

13—Insertion of section 220A

After section 220 insert:

220A—Registrar-General may require production or verification of documents or information

- 5 (1) The Registrar-General may, for a purpose connected with the
administration or enforcement of this Act or the *Electronic*
Conveyancing National Law (South Australia), or to protect the
10 integrity of the Register Book or the Register of Crown Leases, by
notice in writing, require a person to do 1 or more of the following
within a period, or at a time, specified in the notice:
- (a) produce to the Registrar-General an instrument, document or
other item in the person's custody or control;
 - (b) provide information to the Registrar-General;
 - 15 (c) verify the execution of an instrument or document in any
manner the Registrar-General thinks fit.
- (2) A person who, without reasonable excuse, refuses or fails to comply
with a requirement of the Registrar-General under subsection (1) is
guilty of an offence.
Maximum penalty: \$10 000.
- 20 (3) An instrument, document or other item produced to the
Registrar-General may be retained for the purpose of enabling the
instrument, document or item to be inspected and enabling copies of,
or extracts or notes from, the instrument, document or item to be
made or taken by or on behalf of the Registrar-General.
- 25 (4) However, if the instrument, document or item is required by the
Registrar-General as evidence for the purposes of legal proceedings,
the instrument, document or item may be retained until the
proceedings are finally determined.
- 30 (5) The Registrar-General must permit a person who would be entitled to
inspect the instrument, document or item if it were not in the
possession of the Registrar-General to inspect the instrument,
document or item at any reasonable time.
- (6) Nothing in this section prejudices a lien a person has on the
instrument, document or item.
- 35 (7) A person is not excused from providing information or producing an
instrument, document or item, when required to do so under this
section, on the ground that to do so might tend to incriminate the
person or make the person liable to a penalty.

(8) However, if the person objects to providing the information or producing the instrument, document or item on that ground, the information, instrument, document or item is not admissible against the person in any criminal proceedings other than—

- 5 (a) a proceeding about the false or misleading nature of anything in the information, instrument, document or item; or
- 10 (b) a proceeding in which the false or misleading nature of the information, instrument, document or item is relevant evidence; or
- (c) a proceeding regarding failure to retain documents or records as required by this Act; or
- (d) a proceeding regarding provision of a certification in contravention of this Act.

15 **14—Substitution of sections 221 and 222**

Sections 221 and 222—delete the sections and substitute:

221—Reviews

(1) If a person is dissatisfied with a decision of the Registrar-General in relation to an application by the person—

- 20 (a) to have an instrument registered or recorded; or
- (b) to have a foreclosure order issued; or
- (c) to have the Registrar-General do or perform an act or duty under this Act,

the person may seek a review of the decision by the Tribunal.

25 (2) If the Registrar-General decides under section 154A(12) that a person is a vexatious lodger of priority notices, the person may seek a review of the decision by the Tribunal.

30 (3) If the Registrar-General rejects a priority notice lodged by a person in relation to whom a determination has been made under section 154A(12), the person may seek a review by the Tribunal of the decision to reject the notice.

(4) If the Registrar-General refuses an application under section 154F for the cancellation of a priority notice, the applicant may seek a review by the Tribunal of the decision to refuse to cancel the notice.

35 (5) If the Registrar-General cancels a priority notice under section 154F, a person affected by the cancellation may seek a review by the Tribunal of the decision to cancel the notice.

40 (6) A decision subject to review by the Tribunal under this section will be reviewed by the Tribunal within its review jurisdiction under section 34 of the *South Australian Civil and Administrative Tribunal Act 2013*.

- 5
- (7) Subject to subsection (9), an application for review of a decision must be made within 21 days of the day on which the applicant receives notice of the decision.
- (8) The Registrar-General must, if so required by a person affected by a decision of the Registrar-General that is, or may be, the subject of a review, state in writing the reasons for the decision.
- 10
- (9) If the reasons of the Registrar-General are not given in writing at the time the applicant receives notice of the decision and the applicant (within 21 days of receiving notice of the decision) requires the Registrar-General to state the reasons in writing, the time for making an application for review of the decision runs from the time at which the applicant receives the written statement of those reasons.
- 15
- (10) Without derogating from section 37 of the *South Australian Civil and Administrative Tribunal Act 2013*, the Tribunal may, on an application under this section, make any 1 or more of the following orders:
- 20
- (a) an order prohibiting a person from lodging a priority notice in the Lands Titles Registration Office;
 - (b) an interim order extending the duration of a priority notice until the determination of the application or until a date specified by the Tribunal or until further order;
 - (c) an interim order preventing the Registrar-General from registering or recording a specified instrument until the determination of the application.
- 25

15—Substitution of section 232

Section 232—delete the section and substitute:

232—Certifying incorrect documents

- 30
- (1) If a person falsely or negligently provides a certification under section 273(1), the person is guilty of an offence.
Maximum penalty: \$10 000.
- (2) If a person who is an employee of a body corporate that is a mortgagee that is required to provide a certification under section 273(1)—
- 35
- (a) provides the certification on behalf of the body corporate; but
 - (b) does not, at the time of providing the certification, have personal knowledge of the matters to which he or she is certifying,
- 40
- the person and the body corporate are each guilty of an offence.
Maximum penalty: \$10 000.

232A—Offences relating to verification of identity

- (1) If a person falsely states that another person's identity has been verified in compliance with the verification of identity requirements or the participation rules, the person is guilty of an offence.

Maximum penalty: \$1 500 or imprisonment for 3 months.

- (2) If—

(a) a person falsely states that another person's identity has been verified in compliance with the verification of identity requirements or the participation rules; and

(b) the person knows the statement is false,

the person is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

- (3) If a person makes a false or misleading statement in connection with the verification of the identity of the person, or another person, for the purposes of the verification of identity requirements or the participation rules, the person is guilty of an offence.

Maximum penalty: \$1 500 or imprisonment for 3 months.

- (4) If—

(a) a person makes a false or misleading statement in connection with the verification of the identity of the person, or another person, for the purposes of the verification of identity requirements or the participation rules; and

(b) the person knows the statement is false or misleading,

the person is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

- (5) A person who, in connection with the verification of the identity of the person, or another person, for the purposes of the verification of identity requirements or the participation rules, produces a document or record that he or she knows, or ought to know, is false or misleading in a material particular, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

- (6) A person who is required under the verification of identity requirements or the participation rules to retain a document or record produced in connection with the verification of another person's identity must retain and safely and securely store the document or record, or a clearly legible copy of the document or record, for the period during which retention of the document or record is required under the requirements or rules as in force when the document or record was produced.

Maximum penalty: Imprisonment for 2 years.

16—Amendment of section 267—Witnessing of instruments

Section 267(4)—delete subsection (4)

17—Amendment of section 273—Authority to register

Section 273—after subsection (1) insert:

- 5
- (1a) Certification under subsection (1) may only be provided by a natural person who has personal knowledge as to the matters to which he or she is certifying.
- (1b) If the party required to provide certification under subsection (1) is a body corporate that is a mortgagee, the certification may be given by an employee of the body corporate who has personal knowledge as to the matters to which he or she is certifying.
- 10
- (1c) If an instrument is lodged electronically under the *Electronic Conveyancing National Law (South Australia)*, certification required under subsection (1) in respect of the instrument will be taken to be in the appropriate form if it complies with the participation rules.

18—Insertion of section 273A

15 After section 273 insert:

273A—Verification of identity requirements

- 20
- (1) The identity of a party to an instrument, or a person executing a document for the purposes of this Act, must be verified in accordance with any prescribed requirements (the *verification of identity requirements*).
- (2) A regulation made for the purposes of prescribing verification of identity requirements under subsection (1) may adopt or apply requirements determined, in writing, by the Registrar-General, as in force at a particular time or from time to time.
- 25
- (3) If requirements determined by the Registrar-General are adopted or applied by the regulations—
- 30
- (a) the Registrar-General must ensure that the following are publicly available on a website maintained by the Registrar-General and in any other manner the Registrar-General considers appropriate:
- (i) the current verification of identity requirements;
- (ii) all superseded versions of the verification of identity requirements; and
- 35
- (b) if the regulations adopt or apply the requirements as in force from time to time, any new version of the requirements will come into force—
- (i) on the day on which the version is published on a website maintained by the Registrar-General; or
- 40
- (ii) on a subsequent day specified by the Registrar-General in the requirements.

- 5
- (4) The verification of identity requirements may (without limitation)—
- (a) require verification of identity in relation to all, or specified classes of, instruments or documents; and
 - (b) include a requirement for a person to retain a document or record produced in connection with the verification of another person's identity for a period, specified in the requirements, not exceeding 10 years.
- 10
- (5) A reference in this Act to the verification of identity requirements, in relation to an instrument or other document, is a reference to the verification of identity requirements in force under this section at the time the identity of a party to the instrument or other document is verified (or purportedly verified).
- 15
- (6) In this section—
- instrument* has the same meaning as in Part 13A;
- party to an instrument* includes a person executing an instrument on behalf of another (whether pursuant to a power of attorney or otherwise).