18. Property Rights

Contents

Summary

18.1 The common law has long regarded a person's property rights as fundamental. Jeremy Bentham said that '[p]roperty and law are born together, and die together'.[1] At common law, property rights could be encroached upon 'by the law of the land',[2] so long as any deprivation was not arbitrary and only where reasonable compensation was given.[3]

18.2 This chapter and Chapters 19 and 20 are about the common law protection of vested property rights. This chapter provides the foundation for the two chapters that follow. It considers what is comprised in the concept of 'property' rights and how vested property rights are protected from statutory encroachment. Chapter 19 focuses upon interferences with personal property rights. Chapter 20 considers interferences with real property and the rights of landowners.

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1 Jeremy Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham, Published under the Supervision of His Executor John Bowring* (1843) vol 1 pt I ch VIII 'Of Property', 309a.

2 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol I, bk I, ch 1, 134.

3 Ibid vol I, bk I, ch 1, 135. This passage is cited often in Australian courts, eg, *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41] (French CJ).

18.3 Property and possessory rights are explicitly protected by the law of torts and by criminal laws and are given further protection by rebuttable presumptions in the common law as to statutory interpretation, under the principle of legality. The *Australian Constitution* protects property from one type of interference: acquisitions by the Commonwealth other than 'on just terms'.[4] 'Interference' is a wider notion than 'acquisition' for this purpose: while actions through Commonwealth laws may not amount to an acquisition, so as to come within s 51(xxxi), they may nonetheless be regarded by property owners as an 'interference'.

The common law and private property

18.4 Blackstone observed, in 1773, that the 'right of property' was a deeply rooted idea.[5] In the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission (AHRC) in 2014, the recognition and protection of 'property rights' was one of the four areas identified as being of key concern.[6]

18.5 Almost a century before Blackstone wrote, conceptualisations of property were bound up in the struggle between parliamentary supremacy and the power of the monarch. This conflict resulted in the 'Glorious Revolution' of 1688.[7] John Locke (1632–1704) celebrated property as a 'natural' right, advocating the protection of a citizen in 'his Life, Health, Liberty, or Possessions'.[8] Jeremy Bentham (1748–1832) continued the philosophical argument about property, arguing that rights of 'property' are a matter of law:

> Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.[9]

18.6 Concern with protection of citizens from arbitrary interference by the Crown was reflected, in relation to property, as concerns about the taking of property by government.

18.7 By the period following World War II, the protection of private property rights from interference had become enshrined in the first international expression of human

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4 *Australian Constitution* s 51(xxxi).

5 Blackstone, above n 2, vol II, bk II, ch 1, 2.

6 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 8.

7 The Roman Catholic king, James II, was overthrown in favour of his Protestant daughter, Mary, and her husband, William of Orange, Stadtholder of the Netherlands, as Mary II and William III.

8 John Locke, *Two Treatises of Government* (Cambridge University Press, First Published 1690, 2nd Ed, Peter Laslett Ed, 1967) 289. The timing of the publication relevant to the negotiation of the ascension of William and Mary is explained by Peter Laslett, in ch III of his introduction to the *Two Treatises*.

9 Jeremy Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham, Published under the Supervision of His Executor John Bowring* (1843) vol 1 pt I ch VIII 'Of Property', 309a. One of the main 17th century arguments about property was whether it was founded in 'natural' or 'positive' law. Bentham is representative of the positivist approach that was the foundation of modern thinking about property.

rights, the *Universal Declaration of Human Rights* (UDHR) in 1948,[10] which provided that '[n]o one shall be arbitrarily deprived of his property'.[11]

18.8 In his *Commentaries on the Laws of England*, while calling the right of property an absolute right,[12] Blackstone described the power of the legislature to encroach upon property rights in terms that are still reflected in laws today:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land … The laws of England are … extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.[13]

18.9 Property rights could be encroached upon, in the sense of being taken away,[14] 'by the law of the land', but only when it was not done arbitrarily, and where reasonable compensation was given:

> But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained … All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[15]

18.10 Property rights could be affected by law, controlled or diminished by 'the laws of the land', but an 'alienation' or 'divesting' had to be exercised 'with caution', and in return for a 'reasonable price'. Within the modern parliamentary context, many laws have been made that interfere with property rights. The focus then is upon how far such interference can go, before it may be regarded as unjustified.

18.11 Some protections of property and possessory rights are found in the law of torts and criminal law and in principles of statutory construction, discussed below. The tort of trespass was the principal action against a person who came upon the land of another without authorisation. In the leading case of *Entick v Carrington*, Lord Camden LCJ said:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable

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10 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

11 Ibid art 17(2).

12 Blackstone named two other absolute rights: the right of personal security and the right of personal liberty.

13 Blackstone, above n 2, vol I, bk I, ch 1, 134.

14 The quoted passage refers to the declaration of the *Magna Carta* ('great charter', as Blackstone named it) against a person's being 'disseised' or 'divested' of 'freehold', which implies a taking away—of the 'seisin', the evidence of ownership, or vested rights. See D Farrier, *Submission 126*.

15 Blackstone, above n 2, vol I, bk I, ch 1, 135. This passage is cited in, eg, *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41] (French CJ).

> to an action, though the damage be nothing … If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.[16]

18.12 The tort of nuisance may avail one landowner against another in relation to some enjoyment of land, which in turn may restrict what another may do with neighbouring land.[17]

18.13 Similarly, the common law provides protection against unauthorised interference or detention of chattels. *Entick v Carrington* concerned not just an unauthorised search but also a seizure of private papers. *Wilkes v Wood*[18] set out enduring common law principles against unauthorised search and seizure, later reflected in the Fourth Amendment to the *United States Constitution.*

18.14 Unauthorised interferences with chattels may be a trespass or conversion of the chattels, while unauthorised detention, even if initially authorised by statute, may give rise to tort actions in conversion or detinue once that authority has lapsed. For example, in *National Crime Authority v Flack*, the plaintiff, Mrs Flack, successfully sued the National Crime Authority and the Commonwealth for the return of money found in her house and seized by the Authority. Heerey J noted a common law restriction on the seizure of property under warrant:

> at common law an article seized under warrant cannot be kept for any longer than is reasonably necessary for police to complete their investigations or preserve it for evidence. As Lord Denning MR said in *Ghani v Jones* [1970] 1 QB 693 at 709: 'As soon as the case is over, or it is decided not to go on with it, the article should be returned'.[19]

Definitions of property

What is 'property'?

18.15 The idea of property is multi-faceted. The term 'property' is commonly used to describe types of property, both real and personal. 'Real' property encompasses interests in land and fixtures or structures upon the land. 'Personal' property encompasses tangible or 'corporeal' things—chattels or goods, like a car or a table. It also includes certain intangible or 'incorporeal' legal rights, 'choses in action', such as copyright and other intellectual property rights, shares in a corporation, beneficial rights in trust property, rights in superannuation[20] and some contractual rights, including, for example, many debts.[21] Intangible rights are *created* by law. Tangible

16 *Entick v Carrington* (1765) 19 St Tr 1029. The version of the report included in the English Reports, 95 ER 807, is an abbreviated form and does not include this precise quote.

17 Interferences with real property are considered in Ch 20.

18 *Wilkes v Wood* [1763] 2 Wilson 203; 98 ER 489.

19 *National Crime Authority v Flack* (1998) 86 FCR 16, 27. Heerey J continued: 'Section 3ZV of the *Crimes Act* … did not come into force until after the issue and execution of the warrant in the present case. However it would appear to be not relevantly different from the common law'. For the current law, see *Crimes Act 1914* (Cth) ss 3ZQX–3ZQZB.

20 *Greville v Williams* (1906) 4 CLR 694.

21 *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243.

things exist independently of law, but law governs rights of ownership and possession in them—including whether they can be 'owned' at all.[22]

Bundle of rights

18.16 In law, the term 'property' is used to describe types of rights—and rights in relation to things. In *Yanner v Eaton*, the High Court of Australia said:

> The word 'property' is often used to refer to something that belongs to another. But … 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'.[23]

18.17 The 'bundle of rights' that property involves, acknowledges that rights in things can be split: for example, between rights recognised at common law ('legal' interests) and those recognised in equity ('equitable' or 'beneficial' interests); and between an owner as lessor and a tenant as lessee. Equitable interests may further be subdivided to include 'mere equities'.[24]

18.18 In *Yanner v Eaton*, Gummow J summarised this complexity:

> Property is used in the law in various senses to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Distinct corporeal and incorporeal property rights in relation to the one object may exist concurrently and be held by different parties. Ownership may be divorced from possession. At common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry. Property need not necessarily be susceptible of transfer. A common law debt, albeit not assignable, was nonetheless property. Equity brings particular sophistications to the subject. The degree of protection afforded by equity to confidential information makes it appropriate to describe it as having a proprietary character, but that is not because property is the basis upon which protection is given; rather this is because of the effect of that protection. Hohfeld identified the term 'property' as a striking example of the inherent ambiguity and looseness in legal terminology.[25]

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22 In *Yanner v Eaton*, the High Court cited the common law example of wild animals, or *ferae naturae*: 'At common law, wild animals were the subject of only the most limited property rights. … An action for trespass or conversion would lie against a person taking wild animals that had been tamed, or a person taking young wild animals born on the land and not yet old enough to fly or run away, and a land owner had the exclusive right to hunt, take and kill wild animals on his own land. Otherwise no person had property in a wild animal': *Yanner v Eaton* (1999) 201 CLR 351, 366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ); 80–1 (Gummow J). See also Blackstone, above n 2, vol II, bk II, ch 1, 14.

23 *Yanner v Eaton* (1999) 201 CLR 351, 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). Citations omitted. 'Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J). O'Connor traces the theoretical development of the 'bundle of rights' approach: Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2011) 36 *Monash University Law Review* 50, 54–6.

24 See, eg, the discussion of the 'enforceability of equities' in Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 401–16.

25 *Yanner v Eaton* (1999) 201 CLR 351, 388–9. Gummow J referred to Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

18.19 As Gummow J suggests in this passage, 'possession' is a distinct and complex concept. Its most obvious sense is a physical holding (of tangible things), or occupation (of land). An example is when goods are in the custody of another, where things are possessed on account of another.[26]

18.20 A 'property right' may take different forms depending on the type of property. When the term 'property' appears in legislation, without further definition, its content 'then becomes a question of statutory or constitutional interpretation'.[27] Implicit in a property right, generally, are all or some of the following characteristics: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.[28]

18.21 For land and goods, property rights in the sense of ownership must be distinguished from mere possession, even though the latter may give rise to qualified legal rights, and from mere contractual rights affecting the property. The particular right may be regarded as 'proprietary' even though it is subject to certain rights of others in respect of the same property: a tenancy of land, for example, gives the tenant rights that are proprietary in nature as well as possessory.

18.22 The 'bundle of rights' approach has presented some contemporary challenges, particularly in relation to land holding—and in the context of native title.[29] Laws that limit what a landowner can do, for example by creating rights in others in the same land, may give rise to arguments about compensability, expressed in the question, when does regulating what someone may do with land become a 'taking' or 'acquisition' of that land in constitutional terms? This is considered later and in Chapters 19 and 20.

Recognising new forms of property

18.23 What may amount to a property right is of ongoing philosophical and practical interest. One clear historical example is the recognition of copyright from the 18th century as a new form of intangible personal property created by statute. Trade marks and registered designs have a similar genesis, as statutory creations.[30]

18.24 Understandings about what amounts to property reveal a certain fluidity when viewed historically. As one stakeholder commented:

> The rights that attach to different objects, be they land, personal or intellectual property are not frozen in time. Just as for all legal rights, the nature and content of property rights will evolve and potentially change quite significantly over time.[31]

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26 See, eg, Edgeworth et al, above n 24, 94–110.

27 *Yanner v Eaton* (1999) 201 CLR 351, 339.

28 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). See discussion in Edgeworth et al, above n 24. See also Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252. Some property rights may however be unassignable: see Edgeworth et al, above n 24, 6.

29 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, [95].

30 Patent rights were held to be property rights that attracted the presumption against divesting by legislation or delegated regulations: *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, [89].

31 Environmental Justice Australia, *Submission 65*.

18.25 Arguments concerning rights over one's person, for example claims over bodies and body parts, including reproductive material, often involve lively contests over the recognition of new forms of intangible property.[32] There is also the assertion of a new wave of property rights generated by information technology.[33]

18.26 Similarly, with respect to land, Professor Peter Butt noted that the 'categories of interests in land are not closed' and they 'change and develop as society changes and develops'.[34]

18.27 The recognition and classification of Aboriginal and Torres Strait Islander rights and interests in land and waters has proved a challenge for the common law of Australia. In the first claim for customary rights to land, the 1971 case of *Milirrpum v Nabalco*, Blackburn J found that 'there is so little resemblance between property, as our law … understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests'.[35]

18.28 However, in *Mabo v Queensland [No 2]*, the High Court found that pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples—native title—survived the assertion of sovereignty by the Crown.[36] Such rights and interests were not of the common law, but could be recognised by it. In *Fejo v Northern Territory*, the High Court stated:

> Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.[37]

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32 See, eg, Margaret Davies and Ngaire Naffine, *Are Persons Property?* (Ashgate, 2001); Rosalind Croucher, 'Disposing of the Dead: Objectivity, Subjectivity and Identity' in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324; Donna Dickenson, *Property in the Body: Feminist Perspectives* (Cambridge University Press, 2007); Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2007); Muireann Quigley, 'Property in Human Biomaterials—Separating Persons and Things' (2012) 32 *Oxford Journal of Legal Studies* 659; Muireann Quigley, 'Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials' (2014) 77 *Modern Law Review* 677. The issue was tested, for example, in *Roblin v Public Trustee for the Australian Capital Territory* [2015] ACTSC 100. The case concerned whether cryogenically stored semen constitutes property which, upon the death of the person, constitutes property in his estate. See also *D'Arcy v Myriad Genetics Inc* (2015) 89 ALJR 924. In this case, the High Court considered whether the genetic coding for the BRCA1 protein was patentable.

33 Philip Catania and Sarah Lenthall, 'Facebook: Emerging Intellectual Property Issues' (2011) 87 *Journal of the Intellectual Property Society of Australia and New Zealand* 39, [35].

34 Peter Butt, 'Carbon Sequestration Rights—A New Interest in Land?' (1999) 73 *Australian Law Journal* 235. The particular example Butt cited was of 'the slow emergence of an interest not previously known to the law, the "carbon sequestration right"', which has been given statutory force: in New South Wales within the well-known common law interest in land, the profit à prendre; in Victoria within a specific legislative framework, the *Forestry Rights Act 1996* (Vic).

35 *Milirrpum v Nabalco* (1971) 17 FLR 141, 273. See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Chs 4, 6.

36 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J). The history of the recognition of native title in Australia is discussed in Ch 2.

37 *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

18.29 Because its content is defined by the traditional laws and customs of the relevant Aboriginal or Torres Strait Islander peoples, native title rights and interests 'may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer'.[38]

18.30 Some have argued that the 'traditional knowledge and traditional cultural expressions' of Aboriginal and Torres Strait Islander people should be recognised as a form of intellectual property. In this Inquiry, the Arts Law Centre argued for recognition of cultural knowledge as intellectual property and subject to appropriate protection, noting that the *Native Title Act 1993* (Cth) did not do so.[39] Similar intellectual property issues were raised in the AHRC Rights and Responsibilities consultation.[40]

18.31 The significance of acknowledging cultural knowledge was identified by the ALRC in the report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*. While this issue lay outside the Terms of Reference for that Inquiry, the ALRC concluded that

> the question of how cultural knowledge may be protected and any potential rights to its exercise and economic utilisation governed by the Australian legal system would be best addressed by a separate review. An independent inquiry could bring to fruition the wide-ranging and valuable work that has already been undertaken but which still incompletely addresses the protection of Aboriginal and Torres Strait Islander peoples' cultural knowledge.[41]

'Vested' property rights

18.32 The ALRC's Terms of Reference refer to 'vested property rights'. In property law 'vested' is primarily a technical legal term used to differentiate a presently existing interest from a contingent interest.[42] In this Inquiry the ALRC uses the phrase 'vested property rights' in a broad sense, not a technical one.[43]

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38 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [40] (Gleeson CJ, Gummow and Hayne JJ). For further discussion, see Ch 20.

39 Arts Law Centre of Australia, *Submission 50*.

40 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 44–5.

41 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) [8.176]–[8.177]. The ALRC noted extensive work on the topic: eg, IP Australia, *Australia's Indigenous Knowledge Consultation* <www.ipaustralia.gov.au>; World Intellectual Property Organization, *Protection of Traditional Cultural Expressions and Traditional Knowledge–Gap Analyses* <http://www.wipo.int/tk/en/igc/gap-analyses.html>.

42 That is, contingent on any other person's exercising their rights: 'an immediate right of present or future enjoyment': *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 496, 501. See also *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30. The term 'vested' has been used to refer to personal property, including a presently existing and complete cause of action: *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

43 For example: 'vested in interest', 'vested in possession'. See, eg, Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [612]. In the United States, the term has acquired rhetorical force in reinforcing the right of the owner not to be deprived of the property arbitrarily or unjustly by the state or, in disputes over land use, to reflect the confrontation between the public interest in regulating land use and the private interest of the owner—including a developer—in making such lawful use of the land as they desire: Walter Witt, 'Vested Rights in Land Uses—A View from the Practitioner's Perspective' (1986) 21 *Real Property, Probate and Trust Journal* 317. A right is described as immutable and therefore 'vested' when the owner

The reach of property rights

Priorities

18.33 Complex interactions of property rights of different forms fill chapters of books on property law under the generic heading of 'priorities', where rules of law and equity, including statute law, have over the centuries established what property interest takes priority over another in given circumstances, regulating competing property interests. Each circumstance may involve a 'loser' in the sense of someone losing out in a contest of proprietary rights (rights *in rem*), and being relegated in such circumstances to whatever rights may be pursued against the individuals concerned (rights *in personam*). Some examples, expressed in very general terms, suffice to illustrate:

- the priority of the bona fide purchaser of a legal estate for value without notice of a prior equitable interest;[44]
- the indefeasibility of registered interests under Torrens title land systems;[45]
- the effect of registration on priority of registered security interests in personal property;[46] and
- the doctrine of fixtures, in which items of personal property—chattels—may lose their quality as personal property and become part of the land.[47]

Limitations

18.34 A further illustration of property rights being lost may come through the operation of statutory limitation over time. So, for example, a person may be held to acquire title to land by long 'adverse' possession. The adage 'possession is nine-tenths of the law' is reflected in the acquisition of title by possession in the limitation of actions legislation.[48] Under such legislation, the claim of a person may be barred after a designated period, generally between 12 and 15 years.[49] There is authority that even under Torrens title systems, title may be gained by adverse possession.[50] In the context

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has made 'substantial expenditures or commitments in good faith reliance on a validly issued permit': Terry Morgan, 'Vested Rights Legislation' (2002) 34 *Urban Lawyer* 131.

44 See, eg, Edgeworth et al, above n 24, ch 4.

45 See, eg, Ibid ch 5.

46 Under the *Personal Property Securities Act 2009* (Cth). The system is explained on the website of the Australian Financial Security Authority, which administers the legislation: <https://www.afsa.gov.au/>.

47 See, eg, Edgeworth et al, above n 24, [1.79].

48 See, eg, Ibid 139–72. Gummow J noted that '[o]wnership may be divorced from possession', giving the example that, '[a]t common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry': *Yanner v Eaton* (1999) 201 CLR 351, 388. Actual possession may give the possessor better rights than others whose interest does not derive from the true owner: see *Newington v Windeyer* (1985) 3 NSWLR 555 (land) or *National Crime Authority v Flack* (1998) 86 FCR 16 (goods). Possession may, in effect, give the possessor rights akin to proprietary rights. It has been noted that, 'Not only is a right to possession a right of property but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).

49 See, eg, Edgeworth et al, above n 24, 144–5.

50 See, eg, Ibid 517–20.

of personal property, the right of the possessor may be defended against all but the rightful owner—expressed in the adage, 'finders keepers'.[51]

Airspace and subterranean rights

18.35 The extent of property rights of a landowner includes how far the title extends in the air above and the earth below. The early common law doctrine is expressed in the maxim '*cujus est solum ejus est usque ad coelum et ad inferos*': 'to whom belongs the soil, his is also that which is above it to heaven and below it to hell'.[52] As Sir William Blackstone explained:

> no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but every thing under it, or over it.[53]

18.36 If a landowner 'owned' land in this extended sense, intrusions upon it may amount to a trespass. Such a simplified approach was readily modified in the modern era, where cases involving scaffolding, overflying and cranes, have tested airspace rights.[54] Professor Adrian Bradbrook commented that, '[w]hile the maxim correctly indicates that the ownership of land is not confined to the land surface; its accuracy beyond this is highly questionable';[55] and Young CJ in Eq stated that 'the old adage … is not to be taken literally'.[56]

18.37 The modern common law doctrine is expressed in the principle that the rights of a land owner in the air space above the land are limited 'to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it'.[57] Cases involving intrusions on privacy have also raised questions concerning the extent of land owners' rights: for example concerning unmanned surveillance devices flying over land and cameras overlooking land.[58]

18.38 Cases involving subterranean caves, treasures and minerals have tested the limits below the surface of land.[59] In *Di Napoli v New Beach Apartments Pty Ltd*, a case involving whether rock anchors projecting into the plaintiff's land constituted a

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51 This is expressed as the defence of *jus tertii*. See, eg, Ibid [2.3]–[2.45].

52 Adrian Bradbrook suggests that the origin of the maxim may be in Roman or Jewish law. Its earliest appearance in English law was in *Bury v Pope* in 1586: Adrian J Bradbrook, 'Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land' (1987) 11 *Adelaide Law Review* 462, 462.

53 Blackstone, above n 2, vol II, bk II, ch 2, 18.

54 See, eg, Edgeworth et al, above n 24, 66–7. See also LexisNexis, *Halsbury's Laws of Australia*, Vol 22 (at 2 December 2013) 355 Real Property, '14115 Trespass to Airspace'.

55 Bradbrook, above n 52, 462.

56 *Di Napoli v New Beach Apartments Pty Ltd* (2004) 11 BPR 21,493, [17].

57 *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479, 488; [1977] 2 All ER 902, 907 (Griffiths J).

58 The ALRC touched on some of these issues in: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) [3.39]–[3.44], [3.49]. Ch 14 of that report, for example, considers surveillance devices.

59 See eg, *Bulli Coal Mining Co v Osborne* [1899] AC 351; *Edwards v Sims* (1929) 24 SW 2D 619; *Elwes v Brigg Gas Co* (1883) Ch D 33 562. See also Bradbrook, above n 52.

trespass, Young J stated that, with respect to subterranean rights, 'a person has substantial control over land underneath his or her soil for considerable depth'.[60]

18.39 The examples of water and minerals involve both classification issues: is it property and, if so, whose is it? They also involve constitutional issues: is the property owner entitled to compensation if property rights are affected by government action? Both aspects are considered below.

The example of water

18.40 Water is an example of something that is regarded as common (*publici juris*),[61] or a 'public asset',[62] like air or light, not itself the subject of ownership,[63] but in which certain rights may exist. The nature of those rights has changed over time: from common law to statutory rights. In Australia, those statutory rights have involved an increasing shift towards Commonwealth involvement, particularly in relation to waterways that cross state boundaries, as in the Murray-Darling Basin.

18.41 Blackstone said that 'water is a moveable, wandering thing, and must of necessity continue common by the law of nature'; and any rights to water are only 'temporary, transient, usufructuary'.[64] At common law, while the water itself was not capable of ownership, a landowner had certain rights in relation to it, depending on whether the water was under the land ('percolating' water), or in a watercourse that flowed through or adjoined the property.

18.42 In the case of percolating water, the landowner was permitted to draw any or all of it without regard to the claims of neighbouring owners.[65] It was treated 'as a feature of the land itself and the landowner was entitled to appropriate the resource without limitation'.[66] In the case of water flowing through land, the 'riparian' owner had certain valuable, but limited, rights: to fish; to the flow of water, subject to ordinary and reasonable use by upper riparian owners and to a corresponding obligation to lower riparian owners;[67] and to take and use ('abstract') all water necessary for ordinary purposes and other reasonable uses.

18.43 In *Embrey v Owen*, Parke B explained that 'each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it … [I]t is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the

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60 *Di Napoli v New Beach Apartments Pty Ltd* (2004) 11 BPR 21,493, [178]. Young CJ in Eq held that the placing of the rock anchors did amount to a trespass and should be removed within a specified time, such entry not to amount to a trespass.

61 *Embrey v Owen* (1851) 6 Exch 353.

62 Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

63 *Chasemore v Richards* (1859) 7 HLC 349, 379; 11 ER 140, 152 (Lord Cranworth).

64 Blackstone, vol II, bk II, ch 2, 18. Roman law origins of the doctrines in relation to water are described in *Mason v Hill* (1833) 5 B & Ad 1, 24; 110 ER 692, 700–1 (Denman CJ).

65 *Bradford Corporation v Pickles* [1895] AC 587.

66 Samantha Hepburn, 'Statutory Verification of Water Rights: The "Insuperable" Difficulties of Propertising Water Entitlements' (2010) 19 *Australian Property Law Journal* 1, 4.

67 *Embrey v Owen* (1851) 6 Exch 353, 369; 155 ER 579, 585–6 (Parke B).

proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence'.[68]

18.44 The common law principles applied to Australia at colonisation, but from an early stage it was clear that 'the driest inhabited Continent'[69] needed a different approach.[70] Water management regimes based on the assertion of state control and the grant of a range of licences were introduced.[71] Limits were also set on the amount of water that may lawfully be taken.[72]

18.45 Where the common law focused on individual rights in water, which was otherwise *publici juris*, the statutory regimes 'saw the re-emergence of the recognition of water as a "public responsibility"'.[73] All levels of government 'now recognise that water must be managed in a manner which allocates water to users without compromising the environment'.[74]

> Consequently, the introduction of statutory schemes which set up regulatory bodies capable of distributing water resources in a more equalised and efficient manner became a crucial step in the trajectory of Australian water management.[75]

18.46 The control of water, through statutory intervention, is traditionally a state responsibility in Australia.[76] The Commonwealth has more limited scope to legislate in relation to water.[77] There is also the constraint in s 100 of the *Constitution*:

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

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68 Ibid. See also *Mason v Hill* (1833) 5 B & Ad 1, 24; 110 ER 692, 700–1 (Denman CJ).

69 Thomas Garry, 'Water Markets and Water Rights in the United States: Lessons from Australia' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law* 23, 28. Garry describes the variations in flowing and percolating water: at 28–30. See also Lee Godden, 'Water Law Reform in Australia and South Africa: Sustainability, Efficiency and Social Justice' (2005) 17 *Journal of Environmental Law* 181, 182–4.

70 In relation to the history of water rights in Australia, see: Michael McKenzie, 'Water Rights in NSW: Properly Property?' (2009) 31 *Sydney Law Review* 443; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [50]–[80] (French CJ, Gummow and Crennan JJ). A summary of reforms as of July 2009 is provided in: Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

71 In relation to the application of the principle of legality to the question of extinguishment of common law rights, see Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths, 2009) [9.22], citing *Commonwealth v Hazeldell* (1918) 25 CLR 552, 556–7, 562–3 (Griffith CJ and Rich J), 567–8 (Gavan Duffy J). See also Bradbrook, above n 52, 469–72.

72 See, eg, the description of the licensing regimes in Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

73 Godden, above n 69, 187. The effect of the crown vesting is considered in Penny Carruthers and Sharon Mascher, 'The Story of Water Management in Australia: Balancing Public and Private Property Rights To Achieve a Sustainable Future' (2011) 1 *Property Law Review* 97, 105.

74 Carruthers and Mascher, above n 73, 99.

75 Hepburn, above n 66, 4.

76 Pursuant to the power to enact laws for the peace, welfare (or order) and good government of the respective state: see discussion in Gardner et al, above n 71, [5.11]–[5.20].

77 Gardner et al refer to a range of possible heads of power: eg, as an aspect of interstate trade and commerce (s 51(i)), including the power in relation to navigation and shipping (s 98); the corporations power (s 51(xx)); the external affairs power (s 51 (xxix)); and defence (s 51 (vi)). See Ibid [5.21]–[5.46].

18.47 Since 1915, a cooperative approach to water resource management in the Murray-Darling Basin has prevailed between the Commonwealth government and the governments of New South Wales, Victoria and South Australia.[78]

18.48 A combination of provisions has been relied upon to support Commonwealth intervention in water management, particularly the *Water Act 2007* (Cth), including a referral of power by New South Wales, Queensland, South Australia and Victoria.[79] The *Water Act* was designed 'to enable the Commonwealth, in conjunction with the Basin States, to manage the [Murray-Darling] Basin water resources in the national interest'.[80] This had been 'the primary focus of both Commonwealth and interstate attention to management of the water resources for decades'.[81]

18.49 The *Water Act* puts into place a framework that 'ensures continuity in Basin States' existing roles and responsibilities in Basin water management'. Water entitlements continue to be defined and managed under Basin State laws; and state agencies continue to manage storages, river flows and water deliveries.[82]

18.50 The *Water Act* was preceded by the agreement, in 1994, of the Council of Australian Governments to a framework to achieve the efficient and sustainable use of water. This was based on the 'separation of water property rights from land title and clear specification of entitlements in terms of ownership, volume, reliability, transferability and, if appropriate, quality'.[83] It also made explicit provision for environmental water.[84]

18.51 In 2004 this approach informed the National Water Initiative (NWI). Pursuant to this initiative, all governments in Australia made a number of commitments, including to:

- return over-allocated water systems to sustainable levels of use
- improve water planning, including through providing water to meet environmental outcomes
- expand permanent trade in water
- introduce better and more compatible registers of water rights and standards for water accounting

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78 Department of Agriculture and Water Resources (Cth), *Submission 144*. See also Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

79 The *Water (Commonwealth Powers) Act 2008* was enacted by NSW, Qld, SA and Vic: Carruthers and Mascher, above n 73, 111. See also: Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

80 *Water Act 2007* (Cth) s 3(a), objects clause.

81 Gardner et al, above n 71, [3.2].

82 Department of Agriculture and Water Resources (Cth), *Submission 144*.

83 Council of Australian Governments, *Communiqué, Attachment A: Water Resource Policy* (Hobart, 25 February 1994) 21. Garry states that the framework 'marked a major national shift away from decades of administrative water allocation. It focused on the economic development of increasing water supplies towards market-based allocation based on limited supplies and principles of sustainability and resource management': Garry, above n 69, 26. See Carruthers and Mascher, above n 73, 107–8.

84 Carruthers and Mascher, above n 73, 108.

- improve the management of urban water.[85]

18.52 A key aspect of the NWI was to provide statutory access entitlements, which have a number of features that are characteristic of 'property' rights: exclusivity, alienability, and enforceability.[86] However, commentators express uncertainty as to the precise nature of statutory water rights. As Michael McKenzie remarked:

> Looking at all the characteristics together, there is probably enough to suggest that the water rights under access licences do amount to rights of property. However, depending on the context and the type of access licence, it would not be such a surprise if a court found otherwise.[87]

18.53 In *ICM Agriculture Pty Ltd v Commonwealth* (*ICM Case*) the High Court had to construe whether certain licences were caught by the constitutional provision concerning acquisition of property on just terms, in s 51(xxxi). This is considered below.

The example of minerals

18.54 In 1568 the *Case of Mines* established that all mines of gold and silver—the 'royal minerals'—belonged to the Crownwith the power to enter, dig and remove them.[88] The common law position with respect to gold and silver also became the law in the Australian colonies.[89] How far below the surface the *cujus est solum* doctrine went with respect to the surface land owner's land at common law was unclear, although, as Bradbrook noted,

> it is beyond doubt that at common law minerals are under the effective control of the landowner in that access to the resource can only be obtained by the surface landowner or by developers allowed entry onto the land with the landowner's consent. Thus, minerals may be said to be effectively, it not legally, in the ownership of the surface owner.[90]

18.55 In Australia, land granted from the Crown has always been subject to reservations in the Crown grant; and, from the late 19th century, such grants reserved all minerals to the Crown.[91] This amounted 'to a complete rejection of the operation of the *cujus est solum* doctrine'.[92] The limitations in the grants necessarily constrain the extent of the relevant property rights of the landowner in question. Where substances lie beneath the surface of the land the key issues in the Australian context are: the extent of reservations in the Crown grant, apart from gold and silver; and the effect of statutory intervention. With respect to the grant, if the relevant minerals were reserved,

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85 Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

86 Carruthers and Mascher, above n 73, 110. One commentator suggests that, through the NWI, Australia 'radically reformed its water entitlement system'; Garry, above n 72, 53.

87 McKenzie, above n 70, 463. As noted above, certain rights may have a 'proprietary' character, but not be regarded as property: *Yanner v Eaton* (1999) 201 CLR 351, 388–9 (Gummow J).

88 *The Case of Mines* (1568) 1 Plowd 310, 336; 75 ER 472, 510.

89 *Woolley v A-G (Vic)* (1877) 2 App Cas 163. See also *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.

90 Bradbrook, above n 52, 464.

91 Ibid. See later discussion of minerals.

92 Ibid.

the landowner does not 'own' them. Where the relevant minerals were not reserved, a later intervention to claim them for the Crown may give rise to a question of whether such taking is compensable and what control over access to the land the surface owner may have with respect to those granted licences for minerals.

18.56 In the Australian colonies the general pattern in each jurisdiction was 'to progressively reserve various minerals from Crown grants by legislation'.[93] What amounts to 'minerals' is a matter of construction and the legislation in each state and territory differs significantly.[94] Where some early legislation simply reserved 'minerals', later legislation was more specific in defining what was meant by the term. However, as Butt noted:

> These statutory definitions are very wide—so wide that one writer has commented that modern landowners may not even own the soil on their land.[95]

18.57 This has meant that to determine the extent of a surface owner's interest in minerals below the surface, the dates of the original Crown grants and the particular legislation in each jurisdiction 'assume great significance in determining in each instance whether a landowner owns a particular mineral beneath her or his land'.[96]

18.58 In addition, governments in several states have resumed mineral rights that may have remained in private ownership under the relevant Crown grant applicable to that land. Crown ownership of minerals has been made universal in Victoria and South Australia by legislative expropriation of all minerals;[97] in Tasmania of specified minerals;[98] and, in New South Wales, of coal.[99] State ownership of minerals 'has the important result that governments, rather than private landholders, determine the legal regimes governing mineral exploration and production'.[100] With respect to petroleum, a similar outcome has been achieved.[101]

18.59 The position in Australia is in contrast to that in the US, where landowners own the minerals and mining companies deal directly with them over access, extraction and royalties. This difference has major implications in relation to extraction of minerals from private property.[102]

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93 Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 2002) [15.18]. See also JRS Forbes and Andrew Lang, *Australian Mining and Petroleum Laws* (Butterworths, 1987).

94 Bradbrook, above n 52, 465–8. For New South Wales see Butt, above n 43, [217].

95 Butt, above n 43, [218].

96 Bradbrook, MacCallum and Moore, above n 93, [15.18]. See also Bradbrook, above n 52.

97 *Mining Act 1971* (SA) s 16; *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 9.

98 *Mineral Resources Development Act 1995* (Tas) s 6.

99 *Coal Acquisition Act 1981* (NSW) s 5.

100 LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '60 Statutory Abolition of Private Mineral Ownership'.

101 Michael Hunt, 'Government Policy and Legislation Regarding Mineral and Petroleum Resources' (1988) 62 *Australian Law Journal* 841, 844.

102 Ibid 843.

18.60 The surface landowner's ability to control access, for the purpose of mineral exploration, is limited.[103] For example, a mining lease or mineral claim may not be granted over the surface of land in New South Wales which is on or within 200 metres of a dwelling house,[104] on or within 50 metres of a garden,[105] or over the surface of land on which there is a 'significant improvement',[106] without the written consent of the owner of the house, garden or improvement (and that of the occupant of the dwelling house, if applicable).[107] A mining lease or claim may be granted without consent below the surface 'at such depths, and subject to such conditions, as the [Minister] considers sufficient to minimise damage to that surface'.[108] A party who wishes to dispute whether such consent is required may apply to the Land and Environment Court for determination.[109] This was the course of action taken, for example, by a group of landholders in Sutton Forest in New South Wales, in opposition to Hume Coal drilling test bore holes on their property.[110] The Court granted Hume Coal access to the land, holding that an equestrian course, car park and improved pastures did not amount to 'significant improvements' under the legislation.[111]

18.61 The holder of a mining licence or lease must reach an access arrangement with the landowner, or have one determined by an arbitrator, to enter and conduct activities on a property.[112] However, the landowner has no power of veto over access to their land, and must comply with the statutory procedure for determining access arrangements.[113] The landholder is entitled to compensation for loss suffered or likely to be suffered as a result of the exercise of the rights conferred by the access arrangements.[114]

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103 See LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '220 All Land Open for Exploration and Mining'; LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '235 Land Subject to an Authority or Mineral Claim'.

104 *Mining Act 1992* (NSW) ss 62(1)(a), 62(2)(a) (mining lease), 188(1)(a), 188(2)(a) (mineral claim).

105 Ibid ss 62(1)(b) (mining lease), 62(2)(b), 188(1)(b), 188(2)(b) (mineral claim).

106 Ibid ss 62(1)(c) (mining lease), 188(1)(c) (mineral claim), sch 1 cl 23A.

107 Ibid ss 62(1), 188(1).

108 Ibid ss 62(7), 188(6).

109 Ibid ss 62(6A), 188(5). See generally LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '250 Residences and Significant Improvements'.

110 Anne Davies, 'Decision in Favour of Bore Drilling "Appalling"' *The Sydney Morning Herald* (Sydney), 2 December 2015, 11.

111 *Martin v Hume Coal Pty Ltd* [2015] NSWLEC 1461 (13 November 2015).

112 *Mining Act 1992* (NSW) s 140.

113 Ibid s 142. See further LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '275 Requirement of Access Arrangements for Prospecting Titles'.

114 *Mining Act 1992* (NSW) ss 263(1) (exploration licence), 264(1) (assessment lease), 265(1) (mining lease), 266(1) (small-scale title). See further LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '2845 Compensation for Prospecting and Mining'. Grassroots organisations such as the Lock the Gate Alliance continue to oppose and protest against what they consider to be 'unsafe coal and gas mining activities' which are

18.62 The impact of the *Coal Acquisition Act 1981* (NSW) was considered in *Durham Holdings Pty Ltd v New South Wales* (*Durham Holdings*).[115] At the time the legislation was passed there were substantial coal reserves in the Hunter Valley that were still in private ownership and there were major coal mining developments planned.[116] By virtue of the legislation, the private owners would no longer obtain the anticipated extent of royalties. There was provision in the legislation for compensation to private owners, but the rate of compensation was capped.[117]

18.63 The plaintiffs argued that the capping of compensation amounted to the denial of 'just' or 'adequate' compensation and as such was invalid. As is pointed out in *Blackshield and Williams*, '[i]f the acquisition had arisen under a Commonwealth statute, it would have breached the requirement in s 51(xxxi) of the Constitution that such acquisitions be made on "just terms"'.[118] The argument drew upon the judgment of the Court in *Union Steamship Co of Australia Pty Ltd v King*, in leaving open the possibility that there was a constitutional limit in state power founded on 'rights deeply rooted in our democratic system of government and the common law'[119]—in this case that the taking of the coal required just compensation.

18.64 The Court of Appeal rejected this argument and the High Court refused special leave to appeal. Gaudron, McHugh, Gummow and Hayne JJ said that

> whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description 'just' or 'properly adequate' falls outside that field of discourse.[120]

18.65 The legal result was that the states could acquire property without having to pay just compensation. Emeritus Professor David Farrier submitted that the High Court specifically rejected the idea of an implicit constitutional limit on state power founded on 'rights deeply rooted in our democratic system of government *and the common law*':[121]

> While the Court was concerned with the interpretation of the NSW Constitution, the argument that a just terms provision should be implied was based on the common law. The High Court rejected the suggestion that there was a doctrine of vested property

currently permitted under such state legislation: see, eg, Lock the Gate Alliance, *About Us* <www.lockthegate.org.au/about_us>.

115 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

116 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimination' (2001) 20 *Australian Mining and Property Law Journal* 10, 10.

117 Wassaf commented that 'The Government decided that it would be better for the State if the Crown received those royalties rather than the private owners': Ibid. He remarked that the specific cap on the compensation payable to BHP, CRA and RGC (Durham Holdings was the RGC subsidiary) was made on the basis that budgetary restraint was required and these companies could afford it: Ibid 11.

118 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) [16.24].

119 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court).

120 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10. Kirby J, while agreeing with the outcome, suggested that there may be a constitutional limit with respect to 'extreme' laws: 431. He referred to this, speaking extra-curially: Michael Kirby, 'Deep Lying Rights—A Constitutional Conversation Continues' (The Robin Cooke Lecture, 2004) 19–23.

121 D Farrier, *Submission 126*. Emphasis in the submission.

> rights under the common law. While this decision was primarily concerned with the right to exclude others (the government) from enjoyment, it necessarily has implications for any right to use: the effect of the acquisition was that this was completely removed.[122]

18.66 The Law Council of Australia (Law Council) expressed some disquiet, about the result in *Durham Holdings*, which, it said, 'may accord inadequate protection for so fundamental a right'.[123]

18.67 A further question concerns the relationship between native title and mineral rights. Following the High Court decision in *Mabo v Queensland [No 2]*[124] and the *Native Title Act 1993* (Cth), native title lies in *recognition*: it does not lie in Crown grant.[125] Professor Richard Bartlett notes that minerals and petroleum have been excluded from all determinations of native title by consent.[126] Other questions focus on whether native title has been extinguished by inconsistent grant and by legislation in relation to minerals.[127] However, as Bartlett states:

> it must be concluded that [*Western Australia v Ward*] dictates the general conclusion that native title rights to minerals and petroleum, even if they could be established, have been extinguished throughout Australia.[128]

18.68 The position with respect to land held by Indigenous groups under state laws may be different. For example, s 45(2) of the *Aboriginal Land Rights Act 1983* (NSW) provides that any transfer of lands to an Aboriginal Land Council under the Act 'includes the transfer of mineral resources or other natural resources contained in those lands'. This is qualified by later subsections with respect to gold, silver, coal, petroleum and uranium.[129]

18.69 The position with respect to other land rights legislation is that minerals occurring on land owned or held by Aboriginal groups under land rights legislation are owned by the Crown, not the Aboriginal group. This position is consistent with other non-Indigenous landowners.[130]

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122 Ibid. Wassaf concludes that '[t]he fact that divested coal owners can be treated in this way is quite extraordinary but it is within the power of a state government to do so and the Courts have declined to limit that power. Ultimately … under the Australian constitutional framework the complaints of discrimination and injustice in this instance are complaints of a political and not of a legal character': Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimination' (2001) 20 *Australian Mining and Property Law Journal* 10, 12.

123 Law Council of Australia, *Submission 140*.

124 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

125 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Ch 2, 60–1.

126 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) [30.1]. Bartlett refers to determinations of native title under the *Native Title Act 1993* (Cth).

127 See, eg, Sean Brennan, 'Native Title and the Acquisition of Property under the Australian Constitution' (2004) 28 *Melbourne University Law Review* 28, 44–7.

128 Bartlett, above n 126, [30.4]. See *Western Australia v Ward* (2002) 213 CLR 1, which has been followed in subsequent native title determinations.

129 *Aboriginal Land Rights Act 1983* (NSW) s 45(11), (12).

130 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 12; *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 14; *Minerals (Acquisition) Act* (NT) s 3; *Mineral Resources Act 1989* (Qld) s 8; *Land Act 1994* (Qld) s 21; *Aboriginal and Torres Strait Islander Communities (Justice, Land and*

Protections from statutory encroachment

Australian Constitution

18.70 The *Constitution* protects property from one type of interference: acquisitions by the Commonwealth other than 'on just terms'. Section 51(xxxi) of the *Constitution* provides that the Commonwealth Parliament may make laws with respect to

> the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

18.71 There is no broader constitutional prohibition on the making of laws that interfere with property rights.

18.72 The language of s 51(xxxi) was adapted from the Fifth Amendment to the *United States Constitution*. However, the American provision is 'formulated as a limitation on power', while the Australian provision is 'expressed as a grant of power'[131]—to acquire property.[132] Nevertheless, this constitutional protection is significant and is regarded as a constitutional guarantee of property rights,[133] to the extent it assures just terms for property acquired by the Commonwealth. Barwick CJ described s 51(xxxi) as 'a very great constitutional safeguard'.[134]

18.73 Because of the potential for invalidity of legislation that may offend s 51(xxxi), express provisions for compensation have been included in Commonwealth laws. In addition to a general statute—the *Lands Acquisition Act 1989* (Cth)—specific compensatory provisions have been included in many statutes.[135] There are also 'fail safe' provisions,[136] collectively described as 'historic shipwrecks clauses', that provide that, if the legislation does acquire property other than on just terms, within the

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Other Matters) Act 1984 (Qld) ss 62–3; *Aboriginal Lands Trust Act 2013* (SA) ss 52–5; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) ss 20–3; *Maralinga Tjarutja Land Rights Act 1984* (SA) ss 21–6; *Mining Act 1971* (SA) s 16; *Aboriginal Lands Act 1995* (Tas) s 27; *Mineral Resources Development Act 1995* (Tas) s 6; *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 9; *Mining Act 1978* (WA) s 9. In the ACT, since 1 January 1911, only leasehold interests in land, which confer no rights to minerals, have been granted: *Seat of Government Acceptance Act 1909* (Cth) ss 6–7; *Leases Act 1918* (ACT) (repealed). See LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '60 Statutory Abolition of Private Mineral Ownership'.

131 Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) 1274.

132 In a 1980 report, the ALRC commented that the express power granted by s 51(xxxi) is, '[f]or practical purposes … the only power to authorise compulsory acquisition', with respect to the issue of whether the Crown in right of Australia retained a prerogative power to requisition property: Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980) [74].

133 *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349 (Dixon J). The provision reflects the ideal enunciated by Blackstone in the 1700s that, where the legislature deprives a person of their property, fair payment should be made: it is to be treated like a purchase of the property at the market value. This provision does not apply to acquisitions by a state: *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. See Ch 20.

134 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403.

135 See, eg, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 12AD, 44A; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a); *Copyright Act 1968* (Cth) s 116AAA; *Corporations Act 2001* (Cth) s 1350; *Designs Act 2003* (Cth) s 106; *Lands Acquisition Act 1989* (Cth) s 97; *Life Insurance Act 1995* (Cth) s 251; *Native Title Act 1993* (Cth) ss 20, 23J; *Northern Territory (Self-Government) Act 1978* (Cth) s 50; *Patents Act 1990* (Cth) s 171.

136 A description by Kirby J in *Wurridjal v Commonwealth* (2009) 237 CLR 309, 424.

meaning of s 51(xxxi), the person from whom the property is acquired is entitled to compensation.[137]

18.74 In ascertaining whether the 'just terms' provision of s 51(xxxi) is engaged, four questions arise: Is there 'property'? Has it been 'acquired' by the Commonwealth? Have 'just terms' been provided? Is the particular law outside s 51(xxxi) because the notion of fair compensation is 'irrelevant or incongruous' and incompatible with the very nature of the exaction—an issue of characterisation of the relevant law.[138]

'Property'

18.75 The High Court has taken a wide view of the concept of 'property' in interpreting s 51(xxxi), reading it as 'a general term': '[i]t means any tangible or intangible thing which the law protects under the name of property'.[139]

18.76 Claimants seeking to argue the invalidity of laws under s 51(xxxi) may fail because it is held that there was no property right. In *Health Insurance Commission v Peverill* (*Peverill*),[140] the High Court considered a statutory change in a Medicare benefit that reduced the amount per item payable. A challenge was brought by a doctor to whom the benefits had been assigned through the practice of 'bulk billing'. The Court held that the benefit entitlement of the doctor did not amount to 'property'. Brennan J, for example, stated:

> The right so conferred on assignee practitioners is not property: not only because the right is not assignable … but, more fundamentally, because a right to receive a benefit to be paid by a statutory authority in discharge of a statutory duty is not susceptible of any form of repetitive or continuing enjoyment and cannot be exchanged or converted into any kind of property. On analysis, such a right is susceptible of enjoyment only at the moment the duty to pay is discharged. It does not have any degree of permanence or stability. That is not a right of a proprietary nature …[141]

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137 *Historic Shipwrecks Act 1976* (Cth) s 21. This was the first of such clauses, hence the generic description of them by reference to this Act. The validity of such clauses was upheld in *Wurridjal v Commonwealth* (2009) 237 CLR 309.

138 *Airservices Australia v Canadian Airlines International* (1999) 202 CLR 133, [340]–[341] (McHugh J).

139 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 295 (McTiernan J). In the *Bank Nationalisation Case*, Dixon J said s 51(xxxi) 'extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property': *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349. It clearly extends to some rights created by statute: eg, *JT International SA v Commonwealth* (2012) 250 CLR 1, [29] (French CJ). The *Bank Nationalisation Case* considered acquisition of shares; *Dalziel* involved the commandeering of the possessory rights of a weekly tenancy; *Australasian United Steam Navigation Co Ltd v Shipping Control Board* (1945) 71 CLR 508 involved a ship, also requisitioned during wartime. A statute extinguishing a vested cause of action or right to sue the Commonwealth at common law for workplace injuries was treated as an acquisition of property in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297. This was upheld in *Commonwealth v Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493. A majority in *Georgiadis v AOTC*—Mason CJ, Deane and Gaudron JJ, with Brennan J concurring—held that the Commonwealth acquired a direct benefit or financial gain in the form of a release from liability for damages: see further, Blackshield and Williams, above n 131, 1280.

140 *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

141 Ibid [243]–[244]. Brennan J drew upon the description of property by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247–8.

18.77 The characterisation of rights in water was considered in the *ICM Case*.[142] Three landowners conducted farming enterprises near the Lachlan River in New South Wales on land that was within the area known as the Lower Lachlan Groundwater System.[143] The landowners held bore licences under New South Wales legislation to access groundwater.[144] These licences were replaced with aquifer access licences,[145] which reduced the amount of groundwater to which the plaintiffs were entitled—for two plaintiffs by about 70%.[146] The State of New South Wales offered the plaintiffs 'structural adjustment payments' that the landowners considered inadequate.[147] The Commonwealth, as represented by the National Water Commission, and the state of New South Wales had earlier entered into a funding agreement which provided that each was to provide equal funds to be used for such payments.[148]

18.78 The plaintiffs argued that the replacement of the bore licences with the aquifer licences involved an acquisition of property otherwise than on just terms in contravention of s 51(xxxi) of the *Constitution* and that the power of the Commonwealth under ss 96 and 51(xxxvi) of the *Constitution* to grant and to make laws with respect to granting financial assistance to a state, was subject to the just terms requirement of s 51(xxxi).

18.79 There were several aspects to the constitutional argument: that the licenses were 'property'; that they were 'acquired' for the purposes of s 51(xxxi) other than on 'just terms'; and the legislation involved was state law.[149] They failed: a majority of the Court found that the replacement of the bore licences did not constitute an acquisition of property within the meaning of s 51(xxxi).[150]

18.80 With respect to the argument about 'property', the members of the Court revealed different approaches in the analysis of the groundwater licences. An initial point was to conclude that the combined effect of the state legislation was to extinguish any common law rights (to 'percolating' water, as discussed above).[151]

18.81 French CJ, Gummow and Crennan JJ considered that the licences were not proprietary, in language that was similar to *Peverill*:

> where a licensing system is subject to Ministerial or similar control with powers of forfeiture, the licence, although transferable with Ministerial consent, nevertheless may have an insufficient degree of permanence or stability to merit classification as proprietary in nature.[152]

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142 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
143 Ibid [91].
144 Under the *Water Act 1912* (NSW).
145 Under the *Water Management Act 2000* (NSW).
146 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [6].
147 Ibid [7].
148 Ibid [10]–[11].
149 The engagement of the state legislation in the constitutional argument is considered in Ch 20.
150 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [89] (French CJ, Gummow and Crennan JJ); [155] (Hayne, Kiefel and Bell JJ).
151 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [72] (French CJ, Gummow and Crennan JJ); [144] (Hayne, Kiefel and Bell JJ).
152 Ibid [76].

18.82 Hayne, Kiefel and Bell JJ, in contrast, considered that it 'may readily be accepted that the bore licences that were cancelled were a species of property'.[153]

> That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so. It must also be accepted, as the fundamental premise for consideration of whether there has been an acquisition of property, that, until the cancellation of their bore licences, the plantiffs had 'entitlements' to a certain volume of water and that after cancellation their 'entitlements' were less.[154]

18.83 The constitutional question, however, was not simply whether the subject matter was 'property', but whether there had been an 'acquisition' of that property by the Commonwealth.[155] This is the principal question in most cases considering s 51(xxxi).[156]

'Acquisition'

18.84 Arguments concerning s 51(xxxi) often focus on whether a particular action is an 'acquisition' ('taking') or a 'regulation': the former being amenable to compensation, the latter within the 'allowance of laws' acknowledged as the province of government and not compensable. In the Australian context, the key question is 'acquisition' and this is a narrower one than, for example, the arguments concerning the scope of 'taking' in North American case law.[157] The American jurisprudence may nonetheless be helpful. In *Trade Practices Commission v Tooth & Co Ltd*, Toohey J commented:

> On the one hand, many measures which in one way or another impair an owner's exercise of his proprietary rights will involve no 'acquisition' such as pl (xxxi) speaks of. On the other hand, far reaching restrictions upon the use of property may in appropriate circumstances be seen to involve such an acquisition. That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered wherever constitutional regulation of compulsory acquisition is sought to be applied to restraints, short of actual acquisition, imposed upon the free enjoyment of proprietary rights. In each case the particular circumstances must be ascertained and weighted and, as in all questions of degree, it will be idle to seek to draw precise lines in advance.[158]

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153 Ibid [147].

154 Ibid. Heydon J also concluded that the bore licences were a form of property: Ibid [197].

155 Samantha Hepburn argued that the majority judgments in *ICM* 'do not effectively distinguish between verification analysis [of the subject matter as 'property'] and constitutional guarantee analysis' and suggests that 'the judgment of Heydon J which supports a strong and balanced verification analysis provides a clearer and in many ways preferable foundation for the future development of statutory verification methodology': Hepburn, above n 66, 21.

156 Sean Brennan comments that as the focus of the High Court is on the other s 51(xxxi) questions, 'it is difficult to discern principles governing what is and what is not property, beyond the basic proposition that the term must be liberally construed': Brennan, above n 127, 42–3.

157 See, eg, O'Connor, above n 23, 53–63; Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) [15.4.2.2]. See also *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (Holmes J) (1922): 'The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'.

158 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 415.

18.85 Emeritus Professor Suri Ratnapala observed that

> the High Court has employed the term 'acquisition' to exclude the regulation of property in ways that diminish the exchange value of property without actual transfer of title to the state or some other person. Thus export restrictions, land zoning, price controls and the like do not attract compensation.[159]

18.86 In *JT International SA v Commonwealth*, French CJ expanded on the meaning of 'acquisition':

> Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights.[160]

18.87 As Deane and Gaudron JJ said in *Mutual Pools & Staff Pty Ltd v Commonwealth*:

> s 51(xxxi) is directed to 'acquisition' as distinct from 'deprivation'. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. [161]

18.88 Particular difficulty with the phrase 'acquisition of property' has arisen where Commonwealth law affects rights and interests that exist not at common law but under other Commonwealth laws. By s 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act), 'leases' to the Commonwealth of land held by Aboriginal peoples under the *Aboriginal Land Rights Act 1976* (Cth) were 'granted' for five years.[162] In *Wurridjal v Commonwealth* (*Wurridjal*), the High Court, by majority, held that the creation of a lease under this section was an 'acquisition' of property by the Commonwealth.[163]

18.89 In considering the significance of the source of the right in statute, Crennan J commented:

> It can be significant that rights which are diminished by subsequent legislation are statutory entitlements. Where a right which has no existence apart from statute is one that, of its nature, is susceptible to modification, legislation which effects a modification of that right is not necessarily legislation with respect to an acquisition

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159 Ratnapala and Crowe, above n 157, [15.4.2.2]. In the first edition of this work, Ratnapala commented: '[t]he fact that property regulation often transfers wealth from the owner to others has not been a significant issue for the Court. Indeed the Court regards such transfers not to be subject to the just terms clause where they are authorised by the very nature of the power conferred on the Parliament': Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 1st ed, 2002) 266.

160 *JT International SA v Commonwealth* (2012) 250 CLR 1, [42]. This case is considered further in Ch 19. The impact of the analysis in the context of rights in land is considered in Ch 20.

161 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, 184–5.

162 *Northern Territory National Emergency Response Act 2007* (Cth) s 31(1).

163 *Wurridjal v Commonwealth* (2009) 237 CLR 309, (French CJ, Gummow, Hayne, Kirby and Kiefel JJ, Crennan J dissenting and Heydon J not deciding). The High Court found that adequate compensation for acquisition of property under the NTNER Act was paid to those who had pre-existing rights, title or interests in this land. The High Court also found that the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), which provided that permits for entry onto Aboriginal land and townships were no longer required, provided reasonable compensation for the acquisition of property.

> of property within the meaning of s 51(xxxi). It does not follow, however, that all rights which owe their existence to statute are ones which, of their nature, are susceptible to modification, as the contingency of subsequent legislative modification or extinguishment does not automatically remove a statutory right from the scope of s 51(xxxi).[164]

18.90 Where there is a modification of a statutory right by subsequent legislation, the question of whether this amounts to an 'acquisition' within s 51(xxxi) 'must depend upon the nature of the right created by statute':

> It may be evident in the express terms of the statute that the right is subject to subsequent statutory variation. It may be clear from the scope of the rights conferred by the statute that what appears to be a new impingement on the rights was in fact always a limitation inherent in those rights. The statutory right may also be a part of a scheme of statutory entitlements which will inevitably require modification over time.[165]

18.91 The question of 'acquisition' was central to the High Court's analysis in the *ICM Case*, noted above, in which a majority of the High Court decided that the replacement of the bore licences with aquifer licences did not constitute an 'acquisition' of property within the meaning of s 51(xxxi).

18.92 French CJ, Gummow and Crennan JJ concluded that

> in the present case, and contrary to the plaintiff's submissions, the groundwater in the [Lower Lachlan Groundwater System] was not the subject of private rights enjoyed by them. Rather … it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. … The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an 'acquisition' by the State in the sense of s 51(xxxi).[166]

18.93 Hayne, Kiefel and Bell JJ concluded that

> [n]either the existence, nor the replacement or cancellation, of particular licences altered what was under the control of the State or could be made the subject of a licence to extract. If, as was hoped or expected, the amount of water in the aquifer would thereafter increase (or be reduced more slowly) the State would continue to control that resource. But any increase in the water in the ground would give the State no new, larger, or enhanced 'interest in property, however slight or insubstantial', whether as a result of the cancellation of the plaintiff's bore licences or otherwise.[167]

18.94 By contrast, in his dissent, Heydon J determined that the increase in water in the ground 'will be a benefit or advantage which New South Wales has acquired within the meaning of s 51(xxxi)'.[168]

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164 Ibid [363].
165 Ibid [364]. References omitted.
166 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [84].
167 Ibid [153].
168 Ibid [235]. See [232]–[235]. See also Hepburn, above n 66; Carruthers and Mascher, above n 73. Other arguments in the case are considered in Chapter 20.

'Just terms'

18.95 The third question is about 'just terms'. In *Blackshield and Williams*, s 51(xxxi) is contrasted with the US constitutional provision:

> The Fifth Amendment to the United States Constitution requires 'just compensation', whereas s 51(xxxi) requires 'just terms'. While 'just compensation' may import equivalence of market value, it is not clear that the phrase 'just terms' imports the same requirement. In cases decided in the immediate aftermath of World War II, the Court said that the arrangements offered must be 'fair' or such that a legislature could reasonably regard them as 'fair' (*Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495). Moreover, this judgment of fairness must take account of all the interests affected, not just those of the dispossessed owner.[169]

18.96 In *Wurridjal*, the NTNER Act excluded the payment of 'rent', but did include an 'historic shipwrecks clause'. Section 60(2) provided that, in the event of there being 'an acquisition of property to which paragraph 51(xxxi) of the *Constitution* applies from a person otherwise than on just terms', the Commonwealth was liable to pay 'a reasonable amount of compensation'. The provision prevented the potential invalidity of the legislation.[170]

18.97 With respect to what amounts to 'just terms', Ratnapala explains:

> A property that is under threat of acquisition loses market value. Therefore, in determining just terms the tribunal must so far as possible disregard the impact of the intended acquisition. The acquiring authority must be treated as a potential purchaser rather than a potentate. As Williams J explained in *Nelungaloo*, 'in the absence of a market, the value of the property taken must be ascertained by estimating the sum which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of the acquisition'. The Court has consistently held that just terms also entail the observance of the two cardinal demands of natural justice: an unbiased arbiter and a fair chance to present the owner's case.[171]

Characterisation

18.98 The fourth question concerns the characterisation of the law. Under this approach, 'although a law may appear to be one with respect to the acquisition of property, it is properly or relevantly characterised as something else'.[172] As explained in *Blackshield and Williams*:

> From time to time the Court has said that it would be 'inconsistent', 'incongruous' or 'irrelevant' to characterise a government exaction as one that attracts compensation. An obvious example is taxation, which involves the compulsory taking for Commonwealth purposes of a form of property. Because this taking is the very essence of taxation, the express power with respect to taxation in s 51(ii) must

169 Williams, Brennan and Lynch, above n 118, [27.130].

170 Kirby J, in dissent, accepted the plaintiffs' argument that in the context of traditional Aboriginal 'property', the 'just terms' requirement 'is not met by a statutory obligation to pay monetary compensation': *Wurridjal v Commonwealth* (2009) 237 CLR 309, [308].

171 Ratnapala and Crowe, above n 157, [15.4.3]. Citations omitted.

172 Williams, Brennan and Lynch, above n 118, [27.90].

> obviously extend to this kind of taking; and it follows that such a taking will not be characterised as an 'acquisition of property' within the meaning of s 51(xxxi).[173]

18.99 Apart from taxation, an example of a law that does not attract the just terms provision is that of forfeiture of prohibited goods under *Customs Act 1901* (Cth). In *Burton v Honan*, Dixon CJ said that

> [i]t is nothing but forfeiture imposed on all persons in derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the Parliament has power to make laws within s 51(xxxi) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender.[174]

Racial Discrimination Act

18.100 The *Racial Discrimination Act 1975* (Cth) provides some protection for property rights. This became central to issues of extinguishment of native title. Section 10(1) provides:

> **Rights to equality before the law**
>
> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

18.101 This provision was crucial in the determination of the High Court in *Mabo v Queensland [No 1]* in which the Court held that the purported extinguishment of native title, without compensation, by the *Queensland Coast Islands Declaratory Act 1985* (Qld) was inconsistent with s 10 and invalid under s 109 of the *Australian Constitution.* The object of the Queensland legislation was the extinguishment of any native title on annexation by the State of Queensland.[175]

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173 Ibid [27.92]. See also the discussion of taxation in Ratnapala and Crowe, above n 157, [13.1]. That taxation is not considered a taking of property is based on the principle of representation or consent. This rule goes back to ancient common law principles recognised in cls 12 and 14 of the *Magna Carta* 1215. This cardinal rule of constitutional government is strongly enforced by the Commonwealth Constitution under which, taxes can only be imposed by law enacted by federal or state parliament, duties of excise and custom being exclusive to the federal Parliament (ss 51(ii), 53, 55 and 90); revenue raised from tax becomes part of the Consolidated Revenue Fund (CRF) (s 81); no funds can be withdrawn from the CRF without parliamentary authorisation (s 83); and according to constitutional convention, a government that is denied supply by the House of Representatives cannot continue.

174 *Burton v Honan* (1994) 86 CLR 169, 181. Other illustrations are *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *Theophanous v The Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134. See discussion in Williams, Brennan and Lynch, above n 118, 1232–58.

175 *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 214 (Brennan, Toohey and Gaudron JJ). However the Court held that, subject to the *Constitution* and paramount Commonwealth laws, including the *Racial Discrimination Act*, it was not beyond the power of the Queensland Parliament to extinguish native title without compensation. See discussion in Bartlett, above n 126, [2.1]–[2.15].

18.102 Similarly, in *Western Australia v Commonwealth*, the High Court held that the *Land (Titles and Traditional Usage) Act 1993* (WA), which extinguished native title in that state and replaced it with lesser statutory rights, was inconsistent with s 10 of the *Racial Discrimination Act*.[176] As explained by the Court:

> If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorize expropriation of property characteristically held by the 'persons of a particular race' for purposes additional to those generally justifying expropriation or on less stringent conditions including lesser compensation) is inconsistent with s 10(1) of the *Racial Discrimination Act*.[177]

18.103 The *Native Title Act 1993* (Cth) expressly states that it is to be read and construed subject to the provisions of the *Racial Discrimination Act*.[178] The *Native Title Act* also provides a scheme for managing the past and future extinguishment of native title, which may involve the payment of compensation for extinguishing acts.[179]

Principle of legality

18.104 The principle of legality provides some protection for vested property rights.[180] When interpreting a statute, courts will presume that Parliament did not intend to interfere with vested property rights, unless this intention was made unambiguously clear. As early as 1904, Griffith CJ in *Clissold v Perry* referred to the rule of construction that statutes 'are not to be construed as interfering with vested interests unless that intention is manifest'.[181]

18.105 More narrowly, legislation is presumed not to take vested property rights away without compensation. The narrower presumption is useful despite the existence of the constitutional protection because it is 'usually appropriate (and often necessary) to consider any arguments of construction of legislation before embarking on challenges to constitutional validity'.[182]

18.106 The general presumption in this context is longstanding and case law suggests that the principle of legality is particularly strong in relation to property rights.[183] The presumption is also described as even stronger as it applies to delegated

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176 *Western Australia v Commonwealth* (1995) 183 CLR 373.

177 Ibid [41] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See discussion in, eg, Bartlett, above n 126, [3.26]–[3.28].

178 *Native Title Act 1993* (Cth) s 7.

179 See, eg, Bartlett, above n 126, ch 28. Issues of extinguishment are considered by Bartlett in pt 3.

180 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

181 *Clissold v Perry* (1904) 1 CLR 363, 373. See also *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563 (Griffith CJ and Rich J).

182 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, [27] (Kirby J). See also Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [5.21]–[5.22].

183 'This rule certainly applies to the principles of the common law governing the creation and disposition of rights of property. Indeed, there is some ground for thinking that the general rule has added force in its application to common law principles respecting property rights': *American Dairy Queen (Qld) Pty Ltd v*

legislation.[184] The wording of a statute may of course be clear enough to rebut the presumption.[185]

18.107 Professor Kevin Gray describes the 'interpretive canons' that reflect the principle of legality in the property context as summarised by two propositions, which he says 'comprise the core of an historic and freestanding common law doctrine relating to takings':[186]

> First, expropriatory legislation is presumed (in the absence of an unequivocally expressed common intent) to require the payment of compensation. This presumption gives expression to what McTiernan J once called an important 'rule of political ethics'. Any compulsory deprivation of title for the benefit of the wider community represents a sacrifice which should be shared by that community collectively. No individual citizen should be 'singled out to bear a burden which ought to be paid for by society as a whole'. The prejudice against arbitrary or uncompensated taking is, in the words of Kirby J, 'basic and virtually uniform in civilised legal systems'.
>
> Second, merely regulatory legislation is presumed (in the absence of a clear contrary intent) to require *no* payment of compensation. The prime demonstration of this rule of interpretation appears in the widespread refusal to accept that the restrictions imposed by zoning laws give rise to any compensation claim by the affected landowner. Such 'adjustment of competing claims between citizens' imposes (or reinforces) burdens which must simply be 'endured in the public interest'.[187]

18.108 In relation to the assertion of control over water, the legislation by which common law rights of land holders were replaced by access licences gave rise to consideration of the principle of legality in relation to the question of whether the vesting clauses in state legislation extinguished private rights.[188] In the *ICM Case*, the High Court concluded that the combined effect of the state legislation was to extinguish common law rights.[189]

International law

18.109 Article 17 of the UDHR provides:

> (1) Everyone has the right to own property alone as well as in association with others.

Blue Rio Pty Ltd (1981) 147 CLR 677, 683 (Mason J). See also *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, [37] (Gaudron J).

184 *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1986) 120 CLR 400, 406 (Kitto J). Kitto J was citing *Newcastle Breweries Ltd v The King* [1920] 1 KB 854. See also *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, [87] (French J).

185 *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, [43]. See also *Mabo v Queensland [No 1]* (1988) 166 CLR 186. In the latter case, while the High Court held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) was invalid under the *Racial Discrimination Act*, Brennan, Toohey and Gaudron JJ observed that the Qld Act would only have had the 'draconian' effect of extinguishing native title, without compensation, if the terms of the legislation 'do not reasonably admit of another': Ibid 213–14.

186 Kevin Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?' (2007) 24 *Environmental and Planning Law Journal* 161, 166.

187 Ibid 165–6. Citations omitted.

188 Gardner et al, above n 71, [9.31]–[9.33], ch 10.

189 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [72] (French CJ, Gummow and Crennan JJ); [144] (Hayne, Kiefel and Bell JJ).

(2) No one shall be arbitrarily deprived of his property.

18.110 Article 17.1 is reflected in art 5(d)(v) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[190] which guarantees 'the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law' in the exercise of a range of rights, including the 'right to own property alone as well as in association with others'.[191]

18.111 The recognition and protection of intellectual property is specifically referred to in the UDHR, art 27:

> Everyone has the right to the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author.

18.112 Such international instruments do not become part of Australian law until incorporated into domestic law by statute,[192] as for example when the *Racial Discrimination Act* was enacted to give effect to CERD. International instruments cannot otherwise be used to 'override clear and valid provisions of Australian national law'.[193] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[194]

18.113 In *Maloney v The Queen* the High Court had occasion to consider the effect of art 5(d)(v) of the CERD. The High Court decided that laws that prohibit an Indigenous person from owning alcohol engage the human right to own property, citing the effect of art 5(d)(v) as implemented by the *Racial Discrimination Act*.[195] In that case, the High Court found that s 168B of the *Liquor Act 1992* (Qld) was inconsistent with s 10 of the *Racial Discrimination Act*, which protects equal treatment under the law. However, the High Court upheld the prohibition on alcohol possession as a 'special measure' under s 8 of the *Racial Discrimination Act* and art 1(4) of the CERD, designed to reduce alcohol-related problems on Palm Island.

18.114 The protection of property stated in the UDHR is a limited one.[196] Environmental Justice Australia submitted that

> unlike other protected human rights which have a fundamental foundation in the integrity and dignity inherent in every person, particular rights to certain property as they exist at a particular point in time … enjoy no such status.[197]

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190 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

191 See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

192 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

193 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

194 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

195 *Maloney v The Queen* (2013) 252 CLR 168.

196 Professor Simon Evans suggests that 'the prohibition on arbitrary deprivation is rather more limited than a guarantee of compensation for all deprivations of property' and the 'extent of protection afforded by the *Universal Declaration* in relation to private property ownership is vague at best': Simon Evans, 'Should Australian Bills of Rights Protect Property Rights' (2006) 31 *Alternative Law Journal* 19, 20. Lorraine Finlay submitted, however, that 'a compensation guarantee is implicit': L Finlay, *Submission 97*.

197 Environmental Justice Australia, *Submission 65*.

18.115 There is no express guarantee of property rights in either the ICCPR or the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[198] although the ICESCR, in art 15, does recognise the right of an author, in terms replicating art 27 of the UDHR.

18.116 A further obligation under international law arises out of free trade agreements (FTAs) that Australia has entered into.[199] The FTAs have introduced certain obligations with respect to expropriation of property that are binding on Australia at international law. For example, art 11.7 of the *Australia-United States Free Trade Agreement* provides:

> Article 11.7: Expropriation and Compensation
>
> 1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation ('expropriation'), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law.[200]

18.117 Actions that amount to nationalisation or expropriation may include both 'direct expropriation'—when property is transferred to the state; and 'indirect expropriation'—'where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure'.[201] Among the factors to be considered is 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations'.[202] In this respect, the meaning of 'indirect expropriation' may be wider than the meaning attributed to the term 'acquisition' in s 51(xxxi) of the *Constitution* by the High Court. A qualification is set out: namely, '[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations'.[203]

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198 Lorraine Finlay points to other analysis which suggests that 'a general "global right to property" does exist as a binding obligation under international law': L Finlay, *Submission 97*.

199 See Department of Foreign Affairs and Trade (Cth), *Free Trade Agreements: Status of FTA Negotiations* <dfat.gov.au>.

200 Department of Foreign Affairs and Trade (Cth), *Australia-United States Free Trade Agreement: Chapter Eleven—Investment* <dfat.gov.au>. What amounts to adequate and effective compensation is spelled out, including that it be 'equivalent to the fair market value of the expropriated investment immediately before the expropriation took place': Ibid art 11.7(2)(b). Licences in relation to intellectual property rights issued in accordance with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS agreement) are excepted: art 11.7(5)

201 Department of Foreign Affairs and Trade (Cth), above n 200, annex 11–B paras 2–3.

202 Ibid annex 11–B para 4(a)(ii).

203 Ibid annex 11–B para 4(b).

18.118 As noted above, Australia's obligations under international treaty law have no domestic force unless given effect by valid federal law. The Commonwealth Parliament has enacted the *US Free Trade Agreement Implementation Act 2004*, but it does not cover the subject of expropriation. Where statutory language permits, Australian courts are likely to favour constructions that are more consistent with Australia's treaty obligations. They will not, however, use treaty provisions to set aside the clearly expressed language of valid legislation. This may include expropriations under state laws. This does not mean that the federal government is relieved of its obligations at international law and may be obliged to compensate investors who lose property through state expropriation.

18.119 The Commonwealth government cannot compel a state government to comply with art 11.7 except by valid federal law. The Commonwealth Parliament has competence to implement treaties concluded in good faith under the external affairs power in s 51(xxix) of the Constitution. Such legislation may override inconsistent state laws. This is a matter that may be addressed by inter-governmental agreement.

Bills of rights

18.120 In some jurisdictions, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Constitutional and ordinary legislation prohibits interference with vested property rights in some jurisdictions, for example the United States,[204] New Zealand[205] and Victoria.[206]

18.121 The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) expressly added a recognition of property interests in Protocol 1, art 1.[207] Headed, 'Protection of property', art 1 states that 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions'. There are qualifications in the expression of the right, considered below.

Justifications for interferences

18.122 At common law the power of parliament to encroach upon property rights was subject to the qualification that any deprivation was not arbitrary and only occurred where reasonable compensation was given. The most general justification for laws that interfere with, or take away, vested property interests—that the interference was not 'arbitrary'—is that the action was necessary and in the public interest. For example, the ECHR, after setting out the right to peaceful enjoyment of a person's 'possessions', states:

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204 *United States Constitution* amend V, the 'due process' provision.

205 *New Zealand Bill of Rights Act 1990* (NZ) s 21.

206 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

207 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). This may be regarded as an international treaty in addition to being a bill of rights: see Koen Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 *European Law Review* 575.

> No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[208]

18.123 Bills of rights commonly provide exceptions to the right not to be deprived of property, in similar terms, usually provided the exception is reasonable, in accordance with the law, and subject to just compensation.[209] For example, the Fifth Amendment to the *United States Constitution* provides:

> No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[210]

18.124 The provision in the *Australian Constitution* concerning acquisitions of property on just terms, considered above, is another example.

18.125 There are many laws and regulations that interfere with, or affect, property rights. The authority to do so is not in issue. What may amount to an interference 'in the public interest' can be subjected to a structured proportionality analysis, to assess whether a given law that interferes with property rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right.

Legitimate objectives

18.126 The control or regulation of the use of property in the public interest has been considered a legitimate objective, so long as that does not amount to an 'acquisition' or 'taking' of property, such as to contravene constitutional requirements of 'just terms' compensation.

18.127 For example the ECHR states that the right to possession

> shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[211]

18.128 The regulation of the use of property rights may have an objective of protecting the environment, of balancing competing private interests, or be for the broader public interest.[212] Commonwealth laws that regulate the content and advertising of products, such as food, drinks, drugs and other substances, to protect the health and safety of Australians, are considered in Chapter 19. Laws that interfere with real property rights are considered in Chapter 20.

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208 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) Protocol 1, art 1.

209 See, *New Zealand Bill of Rights Act 1990* (NZ) s 21; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

210 *United States Constitution* amend V.

211 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) Protocol 1, art 1.

212 See Lee Godden and Jacqueline Peel, *Environmental Law* (Oxford University Press, 2010) ch 4.

18.129 The objective may be to regulate competing private claims to rights—such as the various laws concerning priorities to land and goods, referred to above. One particular aspect of such laws was tested in the UK, invoking the ECHR, which was incorporated into the domestic law of the UK in the *Human Rights Act 1988*. In the House of Lords opinion in *JA Pye (Oxford) Ltd v Graham* (*Pye Case*), Michael Graham established a claim to title of certain agricultural land by virtue of adverse possession pursuant to the then applicable limitation of actions legislation.[213] The dispossessed landowners, including JA Pye (Oxford) Ltd, claimed that their property rights were protected by the ECHR and had been violated because they had lost ownership of their land without compensation.

18.130 The litigation was then taken to the European Court of Human Rights, finally reaching the Grand Chamber, which focused on the meaning of 'necessary to control the use of property in accordance with the general interest' in art 1. The Grand Chamber, by majority, held that, although the relevant provision was engaged, there had been no violation of the rights of the prior landowners by virtue of their loss of the land due to adverse possession.

18.131 The limitation of action provisions were characterised as 'not intended to deprive paper owners of their ownership',

> but rather to *regulate questions of title* in a system in which, historically, twelve years' adverse possession was sufficient to extinguish the former owner's right to re-enter or to recover possession, and the new title depended on the principle that unchallenged lengthy possession gave a title.[214]

18.132 Regulating questions of title as part of the general land law was a 'control of use' that did not amount to a 'deprivation of possessions' within art 1.

18.133 Distinguishing 'regulation' or 'control' from 'acquisition', 'deprivation' or 'taking' is generally intertwined with the question of compensation and its reasonableness. 'The precise location of the threshold where regulation shades into confiscation (ie effects a "regulatory taking")', Gray commented, 'is one of the most difficult questions of modern law'.[215] The specific application of the acquisition/regulation distinction in the context of Commonwealth laws is considered in Chapter 19, in relation to personal property, and Chapter 20, in relation to real property.

Balancing rights and interests

18.134 Where a law interferes with property rights and is aimed at a legitimate objective, a further question may be asked as to the appropriate balance between interests, including between private interests and between private interests and the public interest.

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213 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.
214 *Pye v United Kingdom* [2007] III Eur Court HR 365, [66]. Emphasis added.
215 Gray, above n 186, 175. See also O'Connor, above n 23.

18.135 An example of the balancing of private rights and the public interest is evident in *JT International SA v Commonwealth*, in considering whether there had been an acquisition of property within s 51(xxxi) of the *Constitution* pursuant to the *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act). French CJ rejected the argument that there had been an 'acquisition' of the plaintiffs' intellectual property by the application of Commonwealth regulatory requirements as to the textual and graphical content of tobacco product packages. Rather, he said:

> it reflects a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs. The scheme does that without effecting an acquisition.[216]

18.136 The Law Council submitted, to similar effect, that the question should be whether the public interest in acquisition, abrogation or erosion of the property right outweighs the public interest in preserving the property right.[217]

18.137 A balancing of rights is evident in the *Pye Case* illustrating the application of the ECHR provision in the UK. The majority of the Grand Chamber of the European Court of Human Rights stated that, to be compatible with the first part of art 1, an interference with the right to 'peaceful enjoyment' of property 'must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[218] Normally a taking of property without reasonable compensation would amount to a 'disproportionate interference' in contravention of art 1.

> The provision does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement for the full market value.[219]

18.138 In this case, the applicants lost their land through the operation of limitation provisions for actions to recover land. The interest in land was '*necessarily* limited by the various rules of statue and common law applicable to real estate'—including 'town and country planning legislation, compulsory-purchase legislation, and the various rules on adverse possession'.[220]

18.139 In deciding whether there was a 'fair balance' in the application of the 'control of use', the majority said that there must be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. The Court acknowledged that 'the State enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of

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216 *JT International SA v Commonwealth* (2012) 250 CLR 1, [43]. See Arts Law Centre of Australia, *Submission 50*.

217 Law Council of Australia, *Submission 75*.

218 *Pye v United Kingdom* [2007] III Eur Court HR 365, [53].

219 Ibid [54].

220 Ibid [62]. Emphasis added.

achieving the object of the law in question'.[221] The determination of what was a 'fair balance' was not a straightforward one, given that the decision was reversed several times before it reached the Grand Chamber, which itself overturned the first decision of the European Court.[222]

18.140 One rationale of the adverse possession rules was said to be certainty.[223] However where the ownership of land is clear, as in the context of registered titles, this rationale is not compelling. In the House of Lords in *Pye*, Lord Bingham said that

> where land is registered it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it.[224]

18.141 Such arguments support review of the law concerning adverse possession—a matter covered in Australia under state laws.[225] The particular law in question in the UK was amended in 2002.[226]

18.142 What a case like *Pye* demonstrates is how a proportionality analysis can be used in relation to laws that may be said to interfere with property rights. It also shows how fine the distinction sometimes is in characterising a law as a 'control of use' or 'regulation' as distinct from one that is regarded as a 'taking' or 'acquisition'—particularly where the law concerns a restriction of, or has an impact on, use.

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221 Ibid [75]. The particular litigation had gone through several stages to reach the Grand Chamber, in each case involving a reversal of the decision before. The litigation prior to the Grand Chamber's consideration is considered in Brendan Edgeworth, 'Adverse Possession, Prescription and Their Reform in Australian Law' (2007) 15 *Australian Property Law Journal* 1. While the decision was ultimately in favour of the adverse possessor, considerable disquiet was expressed by a number of the judges involved as to the result, particularly in the context of registered land titles.

222 The decision at first instance was that the claim to possessory title succeeded: [2000] Ch 676 (Neuberger J). This was reversed in the Court of Appeal: *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804. The House of Lords then allowed the appeal, restoring the first instance decision: *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. The dispossessed landowners then applied to the European Court which upheld the claim: [2005] ECHR 921. The Grand Chamber then overturned the previous ruling: *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 44302/02, 30 August 2007).

223 The classical exposition of this is by Sir Thomas Plumer MR in *Marquis Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1; 37 ER 527. Other justifications have been found, eg, in the 'law and economics' school: Brendan Edgeworth, above n 221, 12–13. The preference for the active user of land over the one who 'sleeps' on the title, may also reflect John Locke's justifications of property on the basis of labour: John Locke, *Two Treatises of Government* (Cambridge University Press, First Published 1690, 2nd Ed, Peter Laslett Ed, 1967) [27], [32]. See Brendan Edgeworth, above n 221, 14–15.

224 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, [2].

225 Professor Brendan Edgeworth makes a compelling case for such review of adverse possession laws, and the related laws of prescriptive easements: Brendan Edgeworth, above n 221. See also Lynden Griggs, 'Possession, Indefeasibility and Human Rights' (2008) 8 *Queensland University of Technology Law Journal* 286.

226 See, eg, Elizabeth Cooke, *The New Law of Land Registration* (Hart Publishing, 2003).