

7. Property Rights

Contents

The common law and private property	177
Definitions of property	180
What is ‘property’?	180
The reach of property rights	183
‘Vested’ property	184
Protections from statutory encroachment	185
Australian Constitution	185
Principle of legality	189
International law	189
Bills of rights	191
Relevant statutory provisions	191
Banking laws	191
Taxation	195
Personal property securities	197
Intellectual property	198
Proceeds of crime	200
Search and seizure provisions	207
Justifications for interferences	209
Conclusions	210

The common law and private property

7.1 The common law has long regarded a person’s property rights as fundamental. William Blackstone said in 1773: ‘There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property’.¹ In the national consultation on ‘Rights and Responsibilities’, conducted by the Australian Human Rights Commission (AHRC) in 2014, ‘property rights’ was one of the four areas identified as being of key concern.²

7.2 This chapter and Chapter 8 are about the common law protection of vested property rights. This chapter considers what is comprised in the concept of ‘property’ rights and how vested property rights are protected from statutory encroachment. The chapter focuses upon interferences with personal property rights; Chapter 8 considers interferences with real property and the rights of landowners.

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

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

7.3 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, in which 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. John Locke (1632–1704) celebrated property as a ‘natural’ right, advocating the protection of a citizen in ‘his Life, Health, Liberty, or Possessions’.³ Jeremy Bentham (1748–1832) continued the philosophical argument about property, anchoring it in laws:

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.⁴

7.4 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 rights, the *Universal Declaration of Human Rights* (UNDHR) in 1948,⁵ in providing that ‘[n]o one shall be arbitrarily deprived of his property’.⁶

7.5 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, discussed below. An interference with real property in the possession of another may give rise to the tort of trespass to land or of nuisance.⁷ 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 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.⁸

7.6 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*⁹ set out enduring common law principles against unauthorised search and seizure, later reflected in the fourth amendment to the *United States Constitution*.

3 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*.

4 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.

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

6 *Ibid* art 17(2).

7 See Ch 8.

8 *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.

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

7.7 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:

[A]t 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'.¹⁰

7.8 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, for example, as an 'arbitrary deprivation', in the language of the UDHR. In his *Commentaries on the Laws of England*, while calling the right to property an absolute right¹¹ anchored in the *Magna Carta*, Blackstone described the limited power of the legislature to encroach upon it 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.¹²

7.9 Property rights could be encroached upon 'by the law of the land', but only 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.¹³

10 *National Crime Authority v Flack* (1998) 86 FCR 16, 27. Heerey J continued: 'Section 3ZV of the *Crimes Act* ... introduced by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth) ... 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.

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

12 Blackstone, above n 1, vol I, bk I, ch 1, 134.

13 *Ibid* 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).

7.10 As French CJ affirmed in *R & R Fazzolari Ltd v Parramatta City Council*, it ‘was and has remained the case in England and Australia that compulsory acquisition and compensation for such acquisition is entirely the creation of statute’.¹⁴

Definitions of property

What is ‘property’?

7.11 The idea of property is multi-faceted. The term ‘property’ is used in common and some legal parlance to describe types of property that is 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. It also includes certain intangible or ‘incorporeal’ legal rights, also known in law as ‘choses in action’, such as copyright and other intellectual property rights, shares in a corporation, beneficial rights in trust property, rights in superannuation¹⁵ and some contractual rights, including, for example, many debts.¹⁶ Intangible rights are *created* by law. Tangible things exist independently of law but law governs rights of ownership and possession in them—including whether they can be ‘owned’ at all.¹⁷

7.12 In law, the term ‘property’ is perhaps more accurately or commonly 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’.¹⁸

7.13 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

14 *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41]. French CJ cited the following authorities: *Rugby Joint Water Board v Shaw-Fox* 1973 AC 202, 214 (Lord Pearson); *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, [29].

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

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

17 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); 80–81 (Gummow J). See also Blackstone, above n 1, vol II, bk II, ch 1, 14.

18 *Yanner v Eaton* (1999) 201 CLR 351, 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). ‘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.

owner as lessor and a tenant as lessee. Equitable interests may further be subdivided to include ‘mere equities’.¹⁹

7.14 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. The risk of confusion is increased when, without further definition, statutory or constitutional rights and liabilities are so expressed as to turn upon the existence of ‘property’. The content of the term then becomes a question of statutory or constitutional interpretation.²⁰

7.15 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.²¹

7.16 A ‘property right’ may take different forms depending on the type of property. Implicit in a property right, generally, are all or some of the following rights: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.²² Property rights also depend on the statutory framework of laws and property rights affecting the particular type of property, for example, the system of land tenure in a particular state or territory, or a scheme such as the *Personal Property Securities Act 2009* (Cth), and the interaction between that statutory scheme and the common law.

7.17 For land and goods, both of which may be possessed by someone other than the lawful owner, property rights in the sense of ownership must be distinguished from mere possession of the land or goods, even though the latter may give rise to qualified legal rights,²³ and from mere contractual rights affecting the property. The particular

19 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.

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

21 See, eg, Edgeworth et al, above n 19, 94–110.

22 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). See discussion in Edgeworth et al, above n 19. 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 19, 6.

23 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). See also the quote of Gummow J in *Yanner v Eaton*, above. Possession may, in effect, give the possessor rights akin to proprietary rights. Note, ‘Not only is a right to possession a

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.

7.18 The ‘bundle of rights’ approach has presented some contemporary challenges, particularly in relation to land holding. 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’ of that land? This is considered later and in Chapter 8.

7.19 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 17th century, as a new form of intangible personal property created by statute and the development of a specialist body of law governing its creation and transfer. Trade marks and registered designs have a similar genesis, as statutory creations.²⁴

7.20 The recognition of new forms of intangible property may be argued in the context of s 51(xxxi) of the *Constitution*, which is considered below. Arguments concerning rights over one’s person, for example claims over bodies and body parts, including reproductive material, are lively.²⁵ The need to recognise ‘traditional knowledge and traditional cultural expressions of Aboriginal and Torres Strait Islander people’ has also been advanced. 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.²⁶ Similar intellectual property issues were raised in the Rights and Responsibilities consultation.²⁷

7.21 The significance of recognising 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

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).

24 Patent rights were held to be property rights that attracted the presumption against divesting by legislation or delegated regulations: *UWA v Gray* [2008] FCA 498 [89].

25 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.

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

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

incompletely addresses the protection of Aboriginal and Torres Strait Islander peoples' cultural knowledge.²⁸

7.22 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.²⁹

7.23 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'.³⁰

7.24 Another challenge in terms of property rights in the Australian context is the recognition of native title; and understanding how such interests in land or waters fit within, or relate to, the understanding of property rights of the common law.³¹

The reach of property rights

7.25 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;³²
- the indefeasibility of registered interests under Torrens title land systems;³³

28 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>>.

29 Environmental Justice Australia, *Submission 65*.

30 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).

31 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Chs 4 and 6.

32 See, eg, Edgeworth et al, above n 19, ch 4.

33 See, eg, *Ibid* ch 5.

- the effect of registration on priority of registered security interests in personal property;³⁴ 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.³⁵

7.26 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 modern expression of title by possession in the Limitation of Actions legislation.³⁶ Under such legislation, the claim of a person may be barred after a designated period, generally between 12 and 15 years.³⁷ There is authority that even under Torrens title systems, title may be gained by adverse possession.³⁸

7.27 A further question about the extent of property rights includes how far the title of a landowner extends in the air above and the earth below. Cases involving scaffolding, overflying and cranes, have tested airspace rights.³⁹ Cases involving subterranean caves, treasures and minerals have tested the limits below the surface.⁴⁰ An aspect of such issues concerns prerogative claims to minerals, including substances like coal.⁴¹

7.28 The extent of property rights can be at issue when it is argued that rights of property have been taken away and therefore that the property owner is entitled to compensation for that ‘taking’. This was raised by stakeholders in this Inquiry in the context of environmental regulation issues, water rights and intellectual property.

‘Vested’ property

7.29 The ALRC’s Terms of Reference refer to ‘vested property rights’. ‘Vested’ is primarily a technical legal term in property law used to differentiate a presently existing interest from a contingent interest.⁴² However, particularly in the United

34 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/>.

35 See, eg, Edgeworth et al, above n 19, [1.79].

36 See, eg, Ibid 139–72. In *Yanner v Eaton*, 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.

37 See, eg, Edgeworth et al, above n 19, 144–5.

38 See, eg, Ibid 517–20.

39 See, eg, Ibid 66–7.

40 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 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.

41 See Ch 8.

42 That is, contingent on any other person’s exercising his or her 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: see *Georgiadis v AOTC* (1994) 179 CLR 297.

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 state⁴³ 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 he or she desires.⁴⁴ The tension is particularly strong with respect to retrospective legislation.⁴⁵

7.30 In this Inquiry the ALRC considers ‘vested property rights’ more in its broad, rhetorical sense, than in its technical sense, in which there are distinct shades of meaning of ‘vested’.⁴⁶

Protections from statutory encroachment

7.31 Property rights find protection in the *Australian Constitution*, through the principle of legality at common law, and, to some extent, in international law.

Australian Constitution

7.32 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.

7.33 There is no broader constitutional prohibition on the making of laws that interfere with vested property rights. 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’⁴⁷—to acquire property. Nevertheless, this constitutional protection is significant and is regarded as a constitutional guarantee of property rights.⁴⁸ Barwick CJ described s 51(xxxi) as ‘a very great constitutional safeguard’.⁴⁹ Because of the potential of invalidity of legislation that may offend s 51(xxxi), express

43 *American States Water Service Co v Johnson* 31 Cal App 2d 606, 614; 88 P2d 770, 774 (1939).

44 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 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.

45 ‘There is no remedial act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side’: *George Hudson Limited v Australian Timber Workers’ Union* (1923) 32 CLR 413, 434 (Isaacs J).

46 For example: ‘vested in interest’, ‘vested in possession’. See, eg, Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [612].

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

48 *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 8.

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

provisions for compensation have been included. In addition to a general statute—the *Lands Acquisition Act 1989* (Cth)—a number of specific compensatory provisions have been included in many statutes.⁵⁰ There are also ‘fail safe’ provisions,⁵¹ collectively described as ‘historic shipwrecks clauses’, that provide that if the legislation does acquire property other than on just terms, within the meaning of s 51(xxxi), the person from whom the property is acquired is entitled to compensation.⁵²

7.34 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; and 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.⁵³

7.35 The High Court has taken a wide view of the concept of ‘property’ in interpreting s 51(xxxi) of the *Constitution*, reading it as ‘a general term’: ‘[i]t means any tangible or intangible thing which the law protects under the name of property’.⁵⁴ For example, 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 AOTC*.⁵⁵ However, claimants seeking to argue the invalidity of laws under s 51(xxxi) may fail because there was no property right.⁵⁶

7.36 The second question concerns whether there has been an ‘acquisition’ of property in circumstances where a Commonwealth law has an adverse effect on valuable legal rights.

7.37 In *JT International SA v Commonwealth*, French CJ expanded on the meaning of ‘acquisition’:

50 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.

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

52 *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.

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

54 *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.

55 *Georgiadis v AOTC* (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 47, 1280.

56 For example, ‘[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 ... That is not a right of a proprietary nature’: *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 243–4 (Brennan J).

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.⁵⁷

7.38 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.⁵⁸

7.39 Particular difficulty with the phrase ‘acquisition of property’ has arisen where federal law affects rights and interests which exist not at common law but under other federal law. 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.⁵⁹ 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.⁶⁰

7.40 The effect of the High Court authorities was explained by Crennan J:

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 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).

Putting to one side statutory rights which replace existing general law rights, the extent to which a right created by statute may be modified by subsequent legislation without amounting to an acquisition of property under 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.⁶¹

57 *JT International SA v Commonwealth* (2012) 250 CLR 1, [42]. In relation to the impact on land see Ch 8.

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

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

60 *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 *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.

61 *Ibid* [363]–[364]. References omitted.

7.41 The third question is about ‘just terms’. In contrasting the provision in the *United States Constitution*, *Blackshield and Williams* explains that:

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.⁶²

7.42 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.

7.43 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’.⁶³ 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 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).⁶⁴

7.44 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*, the High Court held that such a forfeiture was not an acquisition. 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.⁶⁵

7.45 Stakeholders in this Inquiry put forward arguments concerning s 51(xxxi) in the context of copyright and water rights. Copyright is considered below; water rights in

62 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) [27.130].

63 *Ibid* [27.90].

64 *Ibid* [27.92].

65 *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. See discussion in Williams, Brennan and Lynch, above n 62, 1232–58.

Chapter 8. Contemporary arguments often focus on whether a particular action is a ‘taking’ (‘acquisition’) or a ‘regulation’: the former being amenable to compensation, the latter within the ‘allowance of laws’ acknowledged as the province of government.

Principle of legality

7.46 The principle of legality provides some protection for vested property rights.⁶⁶ 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’.⁶⁷

7.47 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’.⁶⁸

7.48 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.⁶⁹ The presumption is also described as even stronger as it applies to delegated legislation.⁷⁰ The wording of a statute may of course be clear enough to rebut the presumption.⁷¹

International law

7.49 Article 17 of the UNDHR provides:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

7.50 Article 17 is reflected in art 5(d)(v) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),⁷² which guarantees ‘the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the

66 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

67 *Clissold v Perry* (1904) 1 CLR 363, 373.

68 *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].

69 ‘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 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).

70 *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 *UWA v Gray* [2008] FCA 498 [87] (French J).

71 *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, [43].

72 *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).

law’ in the exercise of a range of rights, including the ‘right to own property alone as well as in association with others’.

7.51 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.⁷³ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁷⁴

7.52 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 1975* (Cth).⁷⁵ 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 protect the residents of Palm Island from the effects of alcoholism.

7.53 The protection of property stated in the UNDHR is a limited one. As Professor Simon Evans has noted ‘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’.⁷⁶

7.54 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, as opposed to the principle right to ownership of property and against the arbitrary deprivation of that property, enjoy no such status.⁷⁷

7.55 There is no guarantee of property rights in either the *International Covenant on Civil or Political Rights* (ICCPR) or the *International Covenant on Economic, Social and Cultural Rights*. Evans has concluded, therefore, that:

At the very least it can be said that a property rights guarantee (of compensation for government action that acquires property rights or deprives a person of property rights) does not reflect a human right recognised under general international law.⁷⁸

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

74 *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 1.

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

76 Simon Evans, ‘Should Australian Bills of Rights Protect Property Rights’ (2006) 31 *Alternative Law Journal* 19, 20. Quoting Jonathan Shirley, ‘The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe’s Land Crisis’ (2004) 27 *Boston College International & Comparative Law Review* 161, 166.

77 Environmental Justice Australia, *Submission* 65.

78 Evans, above n 76, 20.

Bills of rights

7.56 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,⁷⁹ New Zealand⁸⁰ and the state of Victoria.⁸¹

7.57 The *European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)* expressly added a recognition of property interests in Protocol 1, art 1.⁸² Headed, 'Protection of property', art 1 states:

Every natural or legal person is entitled to the *peaceful enjoyment of his possessions*. 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.

The preceding provisions 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.⁸³

Relevant statutory provisions

7.58 A wide range of Commonwealth laws may be seen as interfering with property rights. Some apply to personal property, some to real property, and some to both. Grouped into areas, provisions affecting personal property will be considered under the following headings:

- banking laws;
- taxation;
- personal property securities;
- intellectual property laws;
- criminal laws.

7.59 These laws are summarised below. Some of the justifications that have been advanced for laws that encroach on property rights, and public criticisms of laws on that basis, are also discussed.

Banking laws

Unclaimed money laws

7.60 Laws dealing with unclaimed money have a long history. On a person's death, in default of 'next of kin', the person's personal property would default to the Crown

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

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

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

82 *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).

83 Emphasis added.

as ‘bona vacantia’ (vacant or ownerless goods). This became, over time, part of the consolidated revenue of the states and territories, with an ability for certain persons to seek ex gratia payments in deserving cases.⁸⁴

7.61 Banking is a head of Commonwealth legislative competence under s 51(xiii) of the *Australian Constitution*. In 1911, the Commonwealth enacted unclaimed money laws analogous to the laws concerning bona vacantia in intestate estates, including the concept of property vesting in the Crown.⁸⁵ The *Commonwealth Bank Act 1911* (Cth) provided that all moneys in an account which had not been operated on for ‘seven years and upwards’ would be transferred to a designated fund and if not claimed for a further ten years, would become the property of the Bank.⁸⁶

7.62 The modern successor to the 1911 Act provision was s 69 of the *Banking Act 1959* (Cth), which provided that, after a designated period, if there have been no deposits or withdrawals from an account, it is deemed ‘inactive’ and the bank is required to close the account and transfer the balance to the Commonwealth of Australia Consolidated Revenue Fund. The money remains in the possession of the Commonwealth until claimed, which requires an administrative process on behalf of the inactive account holder.

7.63 In 2012, the *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012* (Cth) reduced the relevant period to three years. Similar changes were made to first home owner accounts, life insurance and superannuation under the same amending Act.⁸⁷

7.64 The Explanatory Memorandum to the Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012 asserted that the amendments to the *Banking Act 1959* (Cth) were ‘compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights*

84 See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [5.31]. The Uniform Succession Laws Project produced a Model Intestacy Bill in 2007. See *Ibid* [5.12]. See also the discussion of the National Committee recommendations in New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy Report No 116* (2007). The history of the bona vacantia jurisdiction is described in *Brown v NSW Trustee and Guardian* [2012] NSWCA 431 [94]–[112].

85 The Bills Digest concerning the Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012 notes the origin of the unclaimed money laws in bona vacantia, and also the laws of escheat: Kai Swoboda, Parliament of Australia, *Bills Digest, No 50 of 2012–2013* (November 2012) 5. Escheat was a doctrine concerning land, where bona vacantia concerned personal property. Only the latter would concern bank accounts, as choses in action.

86 Provision was made for the Governor of the Bank, with the consent of the Treasurer, to allow any claim after that period has expired, ‘if he is satisfied that special reasons exist for the allowance of the claim’: *Commonwealth Bank Act 1911* (Cth) s 51.

87 *First Home Saver Accounts Act 2008* (Cth); *Life Insurance Act 1995* (Cth); *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth). A number of exceptions and different types of rules apply for particular accounts under the *Banking Regulations 1966* (Cth). For example, term deposits and farm management accounts are exempt from s 69 provided the account satisfies the criteria in s 69(1A). Further, children’s accounts must remain inactive for at least seven years before they are characterised as unclaimed moneys: reg 20(10).

(*Parliamentary Scrutiny*) Act 2011'.⁸⁸ However, it did not elaborate on this proposition.

7.65 The Hon Bernie Ripoll, the then Parliamentary Secretary to the Treasurer, noted that 'the reforms will ensure this lost money is properly protected so people can get what is rightfully theirs'.⁸⁹

7.66 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the 2012 Bill. It stated that a person's right to property is 'not guaranteed as a freestanding right in the human rights treaties' that fell under its consideration.⁹⁰ However, it noted that any 'discrimination in the enjoyment of the right to property' would be contained in a number of human rights guarantees, such as art 26 of the ICCPR.

7.67 Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7.68 The Human Rights Committee applied the three-pronged test set out in Chapter 2. First, the Committee noted that the objective to 'preserve a person's funds from being eroded by fees and charges ... *could be* seen as a legitimate objective'. Secondly, the Human Rights Committee considered that the removal of funds and the procedure in place to reclaim them did have a rational connection to preserving bank account balances. Thirdly, with respect to whether the limitation was proportionate to the restriction, the Committee considered this point less clear:

The objective advanced is thus to preserve the person's funds from being eroded by fees and charges, which could be seen as a legitimate objective. The removal of funds to the ATO and the establishment of procedures for the reclaiming of those funds as well as the requirement to pay interest on balances, would have the effect of preserving balances. The issue of proportionality is less clear, and the explanatory memorandum does not offer an justification for the dramatic reduction in the period that must elapse before the obligation to transfer the funds to the ATO is activated.

The committee seeks clarification of the basis for determining that the significant reduction in the time which must elapse before funds are required to be transferred is a proportionate means of achieving the objectives pursued by the bill.⁹¹

88 Explanatory Memorandum, Banking Amendment (Unclaimed Money) Bill 2012 (Cth). The Act came into force on 1 July 2013.

89 See The Hon Bernie Ripoll, 'Media Release' (Media Release No 051, 26 November 2012).

90 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Seventh Report of 2012* (November 2012) [1.104].

91 Ibid [1.107].

7.69 The Senate Standing Committee on Economics conducted an inquiry into the 2012 Bill. The Committee endorsed the Bill, arguing that the amendments

will be of significant benefit to consumers ... The amendments will help reunite people with their unclaimed money sooner, and will protect the real value of that money while it remains unclaimed.⁹²

7.70 The Committee went on to address concerns that the reduction in the period of inactivity before accounts were treated as unclaimed could potentially lead to moneys that are not genuinely unclaimed being treated as such. However, the Committee considered that the Bill provides an ‘appropriate measure of flexibility to address the concerns of financial institutions and protect the interests of consumers as required’.⁹³

7.71 In contrast, criticism of the 2012 legislation was reflected, for example, in a press release by the Institute of Public Affairs, that stated:

People should be able to leave money in bank accounts for as long as they wish without the fear that the government might come along and steal it from them. To do so is an arbitrary acquisition of property by the government. ...

Parents saving for their children’s education, young people saving for a home and others putting money aside for retirement are all at risk of losing their savings as a result of these changes ...⁹⁴

7.72 In 2015, following a change of government, amending legislation was introduced.⁹⁵

7.73 The Explanatory Guide to the Exposure Draft Bill set out the reasons for the shift in policy, on the basis of the regulatory burden for authorised deposit-taking institutions (ADIs) and account holders:

Evidence suggests that many of the accounts that are declared unclaimed and transferred to the Commonwealth are effectively active as the account holder remains aware of them. For example, around 15 per cent of unclaimed funds transferred from ADIs are reclaimed in the same year they are transferred to the Commonwealth. Approximately 50 per cent of all funds transferred to the Commonwealth as unclaimed are reclaimed within two years.

The high proportion of effectively active accounts transferred to the Commonwealth each year under the current provisions increases the regulatory burden of the unclaimed moneys provisions for ADIs and account holders. ADIs have to assess and transfer all accounts with unclaimed moneys to the Commonwealth even though many of the accounts are still effectively active. Once these accounts are transferred,

92 Senate Standing Committee on Economics, Parliament of Australia, *Treasury Amendment (Unclaimed Money and Other Measures) Bill 2012* (2012) [3.54]. There was a dissenting report released by the Coalition members of the Committee.

93 Ibid [3.54]–[3.55].

94 Institute of Public Affairs, ‘Gillard Government Seizure of Inactive Bank Accounts Is an Attack on Property Rights’ (Media Release, 28 February 2013).

95 An exposure draft of the amending legislation was released on 28 May 2015 in the form of the Banking Amendment (Unclaimed Money) Regulation 2015 (Exposure Draft Regulation); Banking Laws Amendment (Unclaimed Money) Bill 2015 (Exposure Draft). Submissions were sought by 26 June 2015.

account holders have to complete the necessary paperwork and verify their details in order to reclaim their accounts.⁹⁶

7.74 The unclaimed moneys legislation is an example of an interference with vested personal property rights in the form of deposit accounts, forms of choses in action. Such interference has a long history. The period after which the interference occurs, and the process by which a person may seek to reclaim what has been deemed to be ‘unclaimed’ are both relevant to any consideration of whether the interference is justified. The parliamentary review processes may provide an effective vehicle for the assessment of the justification for any proposed legislation.

Taxation

7.75 The Tax Institute suggested a range of provisions that may be considered as interfering with property rights. The Institute referred in particular to the Commissioner of Taxation’s powers to withhold refunds and to attach property.

7.76 The practice of staff of the Australian Taxation Office (ATO) is guided by Law Administration Practice Statements, ‘which provide instructions to ATO staff on the way they should perform certain duties involving the application of the laws administered by the Commissioner’.⁹⁷

Withholding refunds

7.77 Under s 8AAZLGA of the *Taxation Administration Act 1953* (Cth), the Commissioner of Taxation has the power to withhold a refund, pending verification of certain information. The Tax Institute suggested that a ‘right to a refund’ had certain property characteristics and that ‘a lay person would see a right to a refund of tax as a practical and important property right’.⁹⁸

7.78 The Tax Institute pointed to a number of ‘defects’ in the Commissioner’s power to withhold a refund that should be addressed:

The power does not contain a requirement for written notice, giving rise to uncertainty as to the time at which the power has been exercised. There is also uncertainty as to time at which the Commissioner must begin considering entitlement to refund, and when the Commissioner must conclude that consideration.⁹⁹

7.79 The Institute also noted that a taxpayer has limited review rights in relation to the exercise of the Commissioner’s power to withhold a refund.¹⁰⁰

7.80 Section 8AAZLGA of the *Taxation Administration Act* includes a number of matters to which the Commissioner must have regard when considering whether to withhold a refund, including, for example

- (c) the impact of retaining the amount on the entity’s financial position;

96 *Banking Laws Amendment (Unclaimed Money) Bill 2015—Explanatory Guide* [1.4]–[1.5].

97 Australian Taxation Office, ‘Law Administration Practice Statements’ (PS LA 1998/1) [1].

98 The Tax Institute, *Submission 68*.

99 *Ibid.*

100 *Ibid.* The particular provisions identified were: s 14ZW(1)(aad)(i) and s 14ZYA.

- (d) whether retaining the amount is necessary for the protection of the revenue, including the likelihood that the Commissioner could recover any of the amount if the notified information were found to be incorrect after the amount had been refunded.

Attaching property

7.81 The ATO's administrative practices with respect to the collection of tax liabilities is framed within the following expectations:

We expect tax debtors to pay their debts as and when they fall due for payment because:

- we are not a lending institution or a credit provider
- we expect tax debtors to organise their affairs to ensure payment of tax debts on time
- we expect tax debtors to give their tax debts equal priority with other debts.¹⁰¹

7.82 The *Taxation Administration Act* includes provisions to facilitate the collection of taxation debts by attaching to property in the hands of third parties through 'garnishee' powers:

Any third party who pays money to the Commissioner as required by a notice is taken to have been authorised by the tax debtor or any other person who is entitled to all of part of that amount. The third party is indemnified for any money paid to the Commissioner.¹⁰²

7.83 The Tax Institute acknowledged the existence of Practice Statements guiding the ATO's actions in this area, but submitted that 'there is no prior external oversight'. For example, a Practice Statement on enforcement measures provides for the Commissioner to give directions to ATO officers as to the appropriateness, timing of and amounts subject to garnishee notices. The Tax Institute expressed concern with respect to this power in that this direction 'represents the only oversight of this power prior to its exercise, and it occurs within the Commissioner's own office'. It submitted that

[t]he Commissioner's powers to act without prior external oversight are extraordinary. There are policy reasons for those extraordinary powers, such as the necessity for the Commissioner to move quickly to prevent the withdrawal of funds from Australian shores. However, the existence of these powers makes it essential that there are quick, cost-effective and clearly defined mechanisms for reviewing those decisions once made.¹⁰³

101 Australian Taxation Office, 'General Debt Collection Powers and Principles' (PS LA 2011/14) [6]–[7].

102 Australian Taxation Office, 'Enforcement Measures Used for the Collection and Recovery of Tax-Related Liabilities and Other Amounts' (PS LA 2011/18) [98]–[99].

103 The Tax Institute, *Submission 68*.

7.84 While the Practice Statements are for the guidance of ATO staff, they are regularly updated and available online.¹⁰⁴ There are public interest arguments in support of the powers, including the preservation of revenue and encouraging taxpayer compliance, notwithstanding that there may be some interference with property rights. Decisions of the Commissioner are reviewable as administrative decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 39B of the *Judiciary Act 1903* (Cth) and s 75(v) of the *Constitution*.

Personal property securities

7.85 The Personal Properties Securities Register has replaced a number of Commonwealth, state and territory government registers for security interests in personal property, including those for bills of sale, liens, chattel mortgages and security interests in motor vehicles such as the Register of Encumbered Vehicles and the Vehicle Securities Register.¹⁰⁵ As noted above, schemes such as these have rules of priority of interests.

7.86 The Arts Law Centre submitted that the *Personal Property Securities Act 2009* (Cth) encroaches on property rights by determining the circumstances in which an owner of personal property may be deprived of their vested property rights in commercial transactions that are deemed to be arrangements for personal property securities. The Centre drew attention to the impact on individual artists and Indigenous Art Centres of the complexity of the registration system and commercial consignment arrangements.¹⁰⁶

7.87 A review of the operation of the *Personal Property Securities Act* was conducted in 2014–15 by Bruce Whittaker.¹⁰⁷ One aspect of the review considered commercial consignment arrangements for artworks. Whittaker recommended an amendment to the definition of ‘commercial consignment’ in s 10(e) of the Act,¹⁰⁸ on the basis that

a sale of an artwork on consignment through an art gallery is unlikely to give rise to a commercial consignment for the purposes of the Act, and the artist should not need to register a financing statement or take other steps to protect their interest.¹⁰⁹

7.88 Regular review mechanisms for new statutory schemes provide a way of ensuring that the operation of legislation is meeting its objectives. Whittaker made 394 recommendations for reform of the legislation and advocated that they be implemented ‘as a package’.¹¹⁰ He urged that a collaborative drafting process be conducted, with

104 PS LA 2011/18, for example, was issued first on 14 April 2011, and updated on 17 May 2013 and 3 July 2014.

105 See further Australian Financial Security Authority, *Personal Property Securities Register* <www.ppsr.gov.au>.

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

107 Bruce Whittaker, *Review of the Personal Property Securities Act 2009—Final Report* (2015). The report was tabled on 18 March 2015. A review of the Act was required under s 343.

108 *Ibid* rec 17.

109 *Ibid* 73.

110 *Ibid* [10.1.1].

private-sector input and public consultation, through an exposure draft bill.¹¹¹ Whittaker also recommended that whether a further review was needed be considered five years after his review.¹¹² Regular reviews of such a kind are one mechanism for assessing whether the justifications for legislation still apply.

Intellectual property

Acquisition and the Constitution

7.89 It was claimed in *JT International SA v Commonwealth* that the *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act) interfered with vested intellectual property rights.¹¹³ The TPP Act imposed significant restrictions upon the colour, shape and finish of retail packaging for tobacco products. It prohibited the use of trade marks on such packaging, other than as permitted by the TPP Act, which allowed the use of a brand, business or company name for the relevant tobacco product. In addition, pre-existing regulatory requirements for health messages and graphic warnings remained in place.¹¹⁴

7.90 The plaintiff tobacco companies argued that the TPP Act effected an acquisition of their intellectual property rights and goodwill other than on just terms, contrary to s 51(xxxi) of the *Constitution*. The TPP Act was enacted pursuant to the power of the Commonwealth Parliament to make laws with respect to external affairs, giving effect in this instance to the *World Health Organization Framework Convention on Tobacco Control*.¹¹⁵

7.91 The High Court held that these statutory requirements for the plain packaging of tobacco did not constitute an acquisition of the intellectual property rights of the cigarette companies in their trademarks, designs and get up.¹¹⁶ French CJ concluded:

In summary, the TPP Act is part of a legislative scheme which places controls on the way in which tobacco products can be marketed. While the imposition of those controls may be said to constitute a taking in the sense that the plaintiffs' enjoyment of their intellectual property rights and related rights is restricted, the corresponding imposition of controls on the packaging and presentation of tobacco products does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition. That conclusion is fatal to the case of both [tobacco company plaintiffs].¹¹⁷

7.92 The case is an illustration of an 'interference' with the enjoyment of vested property rights, in the trade marks held by the plaintiff companies, that did not amount to an acquisition by the Commonwealth invoking the compensation provision under the *Constitution*.

111 Ibid [10.1.2].

112 Ibid [10.3].

113 *JT International SA v Commonwealth* (2012) 250 CLR 1.

114 *Tobacco Plain Packaging Act 2011* (Cth) ss 18–19; *Tobacco Plain Packaging Regulations 2011* (Cth).

115 *Tobacco Plain Packaging Act 2011* (Cth) s 3(1)(b). See also *World Health Organization Framework Convention on Tobacco Control*, opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005). The legislation also relied on other constitutional powers, as set out in s 14.

116 *JT International SA v Commonwealth* (2012) 250 CLR 1.

117 Ibid [44].

Copyright

7.93 Protection of intellectual property rights was an aspect of property rights identified in the Rights and Responsibilities consultation conducted by the AHRC in 2014.¹¹⁸ Protection from ‘music theft’ and online copyright infringement were concerns expressed during the consultation.¹¹⁹ The *Copyright Amendment (Online Infringement) Act 2015* (Cth), passed on 22 June 2015, is intended to address some of these concerns.¹²⁰

7.94 One stakeholder in this Inquiry drew attention to the ALRC’s Copyright report, in recommending a ‘fair use’ exception to copyright.¹²¹ Dr Lucy Craddock made a property rights argument from the perspective of the user, in arguing that

just as authors/owners of copyright have *vested rights* regarding copyright works, so do users of those works—these are the *vested rights* represented in the statutorily created *fair dealing exceptions* to fairly deal with copyright works. These rights are being ‘intruded upon’ by the ongoing ‘advancement’ of authors/owners rights ‘beyond proper limits’ by means of contracting out of the fair dealing exceptions.¹²²

7.95 This is essentially an argument for recognising another novel kind of property interest. Such a proposed ‘right’ has not been identified yet in law. In the AHRC’s Rights and Responsibilities consultation, one online survey response suggested that current copyright laws did not provide ‘adequate protections for fair use for comment and artistic expression’.¹²³

7.96 The Arts Law Centre of Australia also pointed to intellectual property issues, but from the perspective of the copyright owner.

Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. The recognition and protection of property rights are argued to be essential for promoting the intellectual and cultural development of society. The generally accepted rationale for those property rights is that the income that can be generated from copyright material is the incentive to innovation and creativity.¹²⁴

7.97 Such arguments were traversed by the ALRC in the copyright inquiry and the recommendations are still under consideration by the Australian Government.

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

119 Ibid 44.

120 The *Copyright Amendment (Online Infringement) Act 2015* (Cth) allows owners of copyright to apply to the Federal Court for an order requiring a carriage service provider to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

121 Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report 122 (2014).

122 L Craddock, *Submission 67*. Craddock recommended that contracting out of copyright exceptions should be prohibited.

123 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 44.

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

Proceeds of crime

7.98 Each Australian jurisdiction has legislation concerning the confiscation of the proceeds of crime.¹²⁵ An expansion of such laws sought to attach ‘unexplained wealth’. As explained by Dr Lorana Bartels:

Laws of this nature place the onus of proof on the individual whose wealth is in dispute. In other words, in jurisdictions with unexplained wealth laws, it is not necessary to demonstrate on the balance of probabilities that the wealth has been obtained by criminal activity, but instead, the state places the onus on an individual to prove that their wealth was acquired by legal means.¹²⁶

7.99 The Commonwealth laws include the *Proceeds of Crime Act 1987* (Cth) and the *Proceeds of Crime Act 2002* (Cth). The 1987 Act was developed in consultation with the states and territories ‘in what was intended to form a consistent, if not uniform, Commonwealth wide legislative package providing for conviction based forfeiture of property with orders made in one jurisdiction being capable of enforcement in any other’.¹²⁷ In its 1999 report, *Confiscation that Counts—A Review of the Proceeds of Crime Act 1987*, the ALRC proposed legislation that is reflected in the 2002 Act, recommending the expansion of the earlier legislation to include a civil forfeiture regime.¹²⁸

7.100 The 1987 Act is a conviction-based forfeiture regime; the 2002 Act, as explained in the Explanatory Memorandum, is ‘a civil forfeiture regime, that is, a regime directed to confiscating unlawfully acquired property, without first requiring a conviction’. One particular aspect was the targeting of ‘literary proceeds’. As set out in the Explanatory Memorandum to the 2002 Bill:

The Bill introduces provisions for the forfeiture of literary proceeds, which are benefits a person derives from the commercial exploitation of their notoriety from committing a criminal offence. The expression ‘literary proceeds’ is intended to include ‘cheque-book journalism’ related to criminal activity. In general those proceeds tend to fall outside the scope of recoverable proceeds of crime as they are often not generated until after the person has been convicted (and achieved notoriety). The Bill sets out provisions for the confiscation of proceeds derived from the exploitation of criminal notoriety by means of a type of pecuniary penalty order against the person.¹²⁹

7.101 Proceeds of crime legislation and other laws providing for forfeiture of property have a long history. As the ALRC commented in the 1999 report, ‘[f]orfeiture as a consequence of wrongful action is a concept whose origins in English law can be

125 See summary in Lorana Bartels, ‘Unexplained Wealth Laws in Australia’ (Trends & Issues in Criminal Justice No 395, Australian Institute of Criminology, 2010).

126 Ibid. See also Ch 11.

127 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [1.6], [2.10]–[2.19].

128 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999).

129 Explanatory Memorandum, *Proceeds of Crime Bill 2002* (Cth).

traced back to antiquity'.¹³⁰ The ALRC cited two early examples: the feudal law of 'deodand' (Deo—to god; dandam, to be given), and the felony forfeiture rule.¹³¹ The effect of deodand was 'to render forfeit any instrument or animal that was the cause of accidental death of a person'.¹³² With respect to forfeiture, the ALRC cited the common law rule under which the goods and chattels of a person convicted of a felony 'became forfeit to the Crown' and the related concept of 'attainder', 'under which all civil rights and capacities were automatically extinguished on sentence of death upon conviction for treason or felony'.¹³³

7.102 With the disappearance of the old common law rules,¹³⁴ new ones were developed, such as the rule that prevented a killer from benefiting from the estate of the person killed.¹³⁵ In addition, new statutory forms of forfeiture have been introduced: 'in rem forfeiture laws which permit confiscation of goods employed for, or derived from, illegal activity'.¹³⁶ In the Australian context, the *Customs Act 1901* (Cth) was an early Commonwealth example—a modern iteration of the old law of deodand as its focus was upon the goods themselves, rather than upon conviction.¹³⁷

7.103 The *Proceeds of Crime Act 2002* (Cth) was said to implement Australia's obligations under the International Convention for the Suppression of the Financing of

130 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.1].

131 The origin of the word 'felony' is referred to by Gageler J in *Attorney-General (NT) v Emmerson* [2014] HCA 13 [103]. As Gageler J points out, there is a difference of view as to its origin: Blackstone, above n 1, vol IV, bk IV, ch 7, 95; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed) vol II, vol ii, 464–465.

132 'This, in turn, had its genesis in the even earlier Anglo-Saxon concept of brana (the slayer) where the object causing death was forfeited and given to the family of the deceased': Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.2]. Deodand became a problem in the age of railways and industrial equipment. It was abolished at the same time as the introduction of a statutory right to seek compensation for wrongful death in Lord Campbell's Act: see Richard Fox and Arie Freiberg, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6 *Australian Journal of Legal History* 1, 36.

133 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.4]. The common law rule required the forfeiture of property in the case of offences punishable by death (the felony forfeiture rule). Dr KJ Kesselring cites two examples from the UK national archives in the public record office: KJ Kesselring, 'Felony Forfeiture in England, c. 1170–1870' (2009) 30 *The Journal of Legal History* 201, 201. For a consideration of the old rules see, also, eg, Jacob J Finkelstein, 'The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty' (1973) 46 *Temple Law Quarterly*; Richard Fox and Arie Freiberg, above n 132.

134 *Forfeitures for Treason and Felony Act 1870* 33 & 34 Vict, c 23. The legislation was followed in Australia: see Richard Fox and Arie Freiberg, above n 132, 44–7.

135 See, eg, *Forfeiture Act 1995* (NSW).

136 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, ALRC Report No 87 (1999) [2.5].

137 Richard Fox and Arie Freiberg, above n 132, 38. Freiberg and Fox trace the customs forfeiture provisions to the reign of Richard II and the attempts to regulate trade and encourage English shipping. To restrict coastal trade to English ships, goods carried on foreign vessels were forfeited. This approach was chosen as it was administratively convenient, and did not require customs staff to have to prove the elements of a crime: 39–41. The authors refer in particular to Lawrence Harper, *The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering* (Columbia University Press, 1939); Norman Gras, *The Early English Customs System* (Harvard University Press, 1918).

Terrorism, and resolutions of the United Nations Security Council relevant to the seizure of terrorism related property.¹³⁸

7.104 In 2010 the reach of the legislation was expanded to include ‘unexplained wealth’ provisions.¹³⁹ These provisions

allow the court to make orders with respect to the restraint and forfeiture of assets where the court is satisfied that there are reasonable grounds to suspect that a person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired.¹⁴⁰

7.105 The Revised Explanatory Memorandum said that the expansion of the legislation invoked art 20 of the *United Nations Convention Against Corruption*, entitled ‘Illicit Enrichment’:

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.¹⁴¹

7.106 The Commonwealth unexplained wealth regime draws on the Northern Territory and Western Australian experience, but the Commonwealth’s scheme is limited to confiscating unexplained wealth derived from offences within Commonwealth constitutional power.¹⁴² In the background to the Commonwealth provisions was an agreement by the Standing Committee of Attorneys-General,¹⁴³ in April 2009, to a set of resolutions ‘for a comprehensive national response to combat organised crime’, including to strengthen criminal asset confiscation by the introduction of unexplained wealth provisions.¹⁴⁴

7.107 However, proceeds of crime legislation may raise concerns about its breadth. In 2006, Tom Sherman AO, conducted the first independent review of the 2002 legislation, pursuant to the requirement for such a review in s 327 of the Act. He stated:

138 Explanatory Memorandum, Proceeds of Crime Bill 2002 (Cth).

139 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

140 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 18.

141 *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005). The Convention entered into force on 14 December 2005. See also, Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 4.

142 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 4.

143 This body is now referred to as the Law, Crime and Community Safety Council (LCCSC).

144 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 1. SCAG issued a communiqué on a national response to organised crime. In this communiqué, Ministers agreed to ‘arrangements to support the comprehensive national response ... to effectively prevent, investigate and prosecute organised crime activities and target the proceeds of organised criminal groups’: Standing Committee of Attorneys-General, *Communiqué 6–7 August 2009* <www.lccsc.gov.au>.

Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community?¹⁴⁵

7.108 The Law Council submitted to this ALRC Inquiry that civil confiscation proceedings and unexplained wealth proceedings under the *Proceeds of Crime Act 2002* (Cth) ‘have the potential to interfere with property rights’ and that consideration should be given as to ‘whether these schemes contain adequate safeguards to ensure proportionality and that intrusion upon property rights is justified’.¹⁴⁶ Similarly, in the Rights and Responsibilities consultation, concern was expressed particularly about state and territory legislation:

Property rights may be undermined by disproportionate criminal confiscation laws, which provide for the forfeiture of all assets owned by a person who is a declared ‘drug trafficker’. The submission from the Australian Lawyers Alliance noted:

... [C]riminal confiscation laws in the Northern Territory and Western Australia are currently grossly disproportional to an offence, and deeply impact upon an individual and their family’s rights to own property and for any acquisition to be on ‘just terms’.¹⁴⁷

7.109 In 2014, in *Attorney-General (NT) v Emmerson*, the High Court considered the forfeiture scheme of the Northern Territory. The Northern Territory Court of Appeal had held that a statutory scheme for the forfeiture of property of those convicted three or more times within a 10 year period of drug trafficking was invalid.¹⁴⁸ One ground of alleged invalidity of the scheme was that it provided for an acquisition of property otherwise than on just terms.¹⁴⁹

7.110 The objectives of the scheme were two-fold: to deter criminal activity and to prevent the unjust enrichment of persons involved in criminal activities. The objects were penal and in addition to punishment imposed in criminal proceedings.¹⁵⁰

7.111 A majority of the High Court (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) in *Emmerson* upheld the Northern Territory legislation. The Court stated:

The proper inquiry ... is the subject of the statutory scheme. The question is whether the statutory scheme can be properly characterised as a law with respect to forfeiture, that is, a law which exacts or imposes a penalty or sanction for breach of provisions which prescribe a rule of conduct. That inquiry must be answered positively, which

145 Tom Sherman, ‘Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)’ (Attorney-General’s Department, 2006) 37.

146 Law Council of Australia, *Submission 75*.

147 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 46.

148 *Emmerson v DPP* (2013) 33 NTLR 1. Under *Criminal Property Forfeiture Act* (NT) s 94(1). The history of such provisions is described in the judgment of the majority at *Attorney-General [NT] v Emmerson* [2014] HCA 13 [15]–[21].

149 *Emmerson v DPP* (2013) 33 NTLR 1, [100] (Barr J in agreement with Riley CJ).

150 *Attorney-General [NT] v Emmerson* [2014] HCA 13 [37]. It was argued that the penal aspect of the scheme was revenue-raising and played ‘no legislative role in the enforcement of the criminal law in relation to drug offences or in the deterrence of such activities’.

precludes any inquiry into the proportionality, justice or wisdom of the legislature's chosen measures.¹⁵¹

7.112 As the Court further explained,

The provisions comprising the statutory scheme in respect of declared drug traffickers do not cease to be laws with respect to the punishment of crime because some may hold a view that civil forfeiture of legally acquired assets is a harsh or draconian punishment. As Dixon CJ said, concerning the customs legislation providing for forfeiture considered in *Burton v Honan*:

'once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislative and not for the Judiciary'.¹⁵²

7.113 With respect to the argument that the provisions in their breadth amounted to an acquisition of property without provision of just terms, the Court said that characterising them in this way was 'erroneous':

It is within the province of a legislature to gauge the extent of the deleterious consequences of drug trafficking on the community and the soundness of measures, even measures some may consider to be harsh and draconian punishment, which are thought necessary to both 'deter' and 'deal with' such activities. The political assessments involved are matters for the elected Parliament of the Territory and complaints about justice, wisdom, fairness or proportionality of the measures adopted are complaints of a political, rather than a legal, nature.¹⁵³

7.114 As the law was considered outside s 51(xxxi), the Court's judgment is an example of an application of the principle of legality in the context of proceeds of crime legislation: the legislature having made its intention clear, the question of assessing things like 'proportionality' were not a matter for the Court, but for the 'elected Parliament'.¹⁵⁴

7.115 In 2012 the Parliamentary Joint Committee on Law Enforcement recommended strengthening the proceeds of crime legislation further (the 2012 report).¹⁵⁵ The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2014* (Cth) was passed on 9 February 2015 to amend the *Proceeds of Crime Act 2002* (Cth).

151 Ibid [80].

152 Ibid [81]; *Burton v Honan* (1994) 86 CLR 169, 180.

153 *Attorney-General [NT] v Emmerson* [2014] HCA 13 [85]. Compare Gageler J who concluded that the dominant character of the laws was one with respect to the acquisition of property, and as such were laws for acquisition otherwise than on just terms: Ibid [140].

154 A clear intention could not have overcome s 51(xxxi), if it applied.

155 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012). Legislation reflecting some of the Committee's recommendations was introduced in November 2012: Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (Cth) sch 1. This Bill lapsed.

7.116 The Parliamentary Joint Committee on Law Enforcement recommended ‘major reform of the way unexplained wealth is dealt with in Australia as part of a harmonisation of Commonwealth, state and territory laws’.¹⁵⁶

Unexplained wealth legislation represents a new form of law enforcement. Where traditional policing has focused on securing prosecutions, unexplained wealth provisions contribute to a growing body of measures aimed at prevention and disruption. In particular, unexplained wealth provisions fill an existing gap which has been exploited, where the heads of criminal networks remain insulated from the commission of offences, enjoying their ill-gotten gains.¹⁵⁷

7.117 The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 was reviewed by the Senate Legal and Constitutional Affairs Legislation Committee and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee). The Legal and Constitutional Affairs Committee supported the amendments to strengthen the *Proceeds of Crime Act 2002* (Cth), informed by its view that ‘serious and organised crime poses a significant threat to Australian communities’.¹⁵⁸

7.118 The Parliamentary Joint Committee on Law Enforcement made two recommendations of relevance to this chapter that were included in the Bill: one concerning the evidence relevant to unexplained wealth proceedings that could be seized under a search warrant;¹⁵⁹ the other concerning the removal of a court’s discretion to make unexplained wealth restraining orders where a person’s wealth is over \$100,000.¹⁶⁰

7.119 There are three types of orders that can be sought in relation to unexplained wealth: unexplained wealth restraining orders—s 20A; preliminary unexplained wealth orders—s 179B; and unexplained wealth orders—s 179E.

7.120 The removal of discretion was traversed fully in the 2012 report and by the Legal and Constitutional Affairs Committee. As explained in the 2012 report:

In the making of final orders for most proceedings under the [*Proceeds of Crime Act*], if the appropriate conditions and tests are satisfied, then the court must make that final order. In the case of unexplained wealth orders, however, the court retains a discretion

156 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) viii.

157 Ibid.

158 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014) [2.43]. There was a single recommendation in the report: to support the passage of the Bill in the Senate: Ibid Rec 1, [2.51].

159 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) rec 5; Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) sch 1 items 27–28.

160 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) recs 12–13; Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) sch 1 items 2, 4, 18.

and may, rather than must, make the order, even though the CDPP or the agency bringing the application meets all of the requirements.¹⁶¹

7.121 The 2012 report recommended that the court’s discretion to make a restraining or preliminary unexplained wealth order be removed in cases where the amount of unexplained wealth was more than \$100,000.¹⁶² The Legal and Constitutional Affairs Committee supported this approach, noting the additional safeguards in cases concerning unexplained wealth restraining orders and final unexplained wealth orders, which provided that the court may refuse an order if ‘it is not in the public interest to make the order’:¹⁶³

In relation to concerns raised in respect of removing the court’s discretion to make an unexplained wealth order, the committee considers that the safeguards provided by the bill to retain the discretion where unexplained wealth is less than \$100,000 or where it is not in the public interest to make the order are adequate and will reinforce the purpose of the unexplained wealth provisions to target the ‘Mr and Mrs Bigs’ of organised crime.¹⁶⁴

7.122 The kinds of concerns addressed by the Legal and Constitutional Affairs Committee are reflected in the submission of the Law Council, which was concerned about there being ‘adequate safeguards ... to protect individual rights, or clear limits on the scope of prescribed power’.¹⁶⁵

7.123 An assessment that takes into account safeguards and issues of proportionality is one that may occur within the parliamentary context, forming part of the scrutiny mechanisms applying to parliamentary bills. This is discussed in Chapter 2. As noted above, the various bills to expand or ‘strengthen’ the proceeds of crime legislation have been subject to such scrutiny. The 2002 legislation expressly included a review requirement. This is one mechanism for ensuring that the potential width of legislation is reviewed periodically. Since 2010 the confiscation scheme has been expressly subject to the oversight of the Parliamentary Joint Committee on Law Enforcement.¹⁶⁶

7.124 With the expansion of the legislation in 2015, to achieve a national coordinated approach, a review that considers the operation of the legislation across Australia may be appropriate. Such a review could also take into account issues of proportionality and

161 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) [3.183]. The Committee noted that when the original Bill was first introduced in 2009 it did not include a discretion, but it was included by amendments in the Senate.

162 Ibid rec 12. Additional statutory oversight mechanisms were recommended: Ibid rec 13.

163 *Proceeds of Crime Act 2002* (Cth) ss 20A(4), 179E(6).

164 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014) [2.45].

165 Law Council of Australia, Submission No 5 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014). See also Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) rec 13.

166 *Proceeds of Crime Act 2002* (Cth) s 179U. This provision was introduced by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

scope. Specific areas of review may concern safeguards and procedural fairness issues.¹⁶⁷

Search and seizure provisions

7.125 A number of Commonwealth criminal law provisions may interfere with property rights.¹⁶⁸ The Law Council identified, in particular, search and seizure provisions.¹⁶⁹

7.126 Under provisions introduced into the *Crimes Act 1914* (Cth) through the *Crimes Legislation Amendment Act 2011* (Cth) electronic equipment may be temporarily removed from warrant premises for the purposes of examination.¹⁷⁰ An executing officer need not inform the person where and when the equipment will be examined if he or she believes on reasonable grounds that having the person present might endanger the safety of a person or prejudice an investigation or prosecution. The Law Council submitted that the 14 day time limit allowed for examination of removed electronic equipment, 'may involve a significant disruption to business and unjustifiably interfere with property rights, if a more proportionate measure is available to achieve the same end'.¹⁷¹

7.127 While the Crimes Legislation Amendment Bill 2010 was discussed by the Scrutiny of Bills Committee, there was no comment on these provisions.

7.128 The Law Council also drew attention to pt 1AAA of the *Crimes Act*, which was introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). These provisions allow an Australian Federal Police member or special member to search a property under a delayed notification search warrant without immediate notification to the occupier. The Law Council submitted that, as there is 'only provision for compensation for damage to electronic equipment (section 3ZZCI) rather than other property owned by an individual, questions arise as to whether the scheme is reasonable or proportionate'.¹⁷²

7.129 In reviewing the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Scrutiny of Bills Committee commented that there was a 'potential for a delayed notification search warrant scheme to trespass on personal rights and liberties (by allowing AFP officers to covertly enter and search premises, without the knowledge of the occupier of the premises)'.¹⁷³ However, these comments addressed

167 These were matters raised during parliamentary committee scrutiny: see, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourth Report of the 44th Parliament* (March 2014).

168 The definition of 'property' in the *Crimes Act 1914* (Cth) is very broad, including 'money and every thing, animate or inanimate, capable of being the subject of ownership': *Ibid* s 3.

169 Law Council of Australia, *Submission 75*.

170 *Crimes Act 1914* (Cth) ss 3K(3), (3AA).

171 Law Council of Australia, *Submission 75*.

172 *Ibid*.

173 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 786.

the extension of powers to issue warrants to new categories of legal officers, rather than addressing issues of interference with personal property.

7.130 The Parliamentary Joint Committee on Intelligence and Security’s Advisory Report into the Bill also noted that submissions had raised the ‘adequacy of compensation’ as a concern with the delayed notifications search warrant scheme.¹⁷⁴ The Committee did not make specific recommendations about compensation for the seizure of property.

7.131 The Attorney-General’s Department’s submission to that Committee’s report included the following justificatory comments for pt 1AAA:

These amendments are a response to the challenge posed by current requirements to notify the occupier of the premises in relation to the execution of a search warrant. Such notification alerts suspects of police interest in their activities, and can disrupt the investigation allowing a person to avoid further detection, conceal or destroy evidence, or notify their associates, who may not yet be known to police. The item introduces a new scheme, limited to terrorism offences, to allow delaying notification of the execution of the warrant. This will give the AFP the significant tactical advantage of allowing an investigation to remain confidential. An application for a delayed notification search warrant will be subject to multiple levels of scrutiny and authorisation. Extensive safeguards will ensure that the Bill balances the legitimate interests of law enforcement in preventing serious terrorism offences with the need to protect important human rights.¹⁷⁵

7.132 While not specifying which provisions in the Bill act as ‘extensive safeguards’, it may be understood that they include the threshold for issuing a warrant under pt 1AA of the *Crimes Act*, which provides that a magistrate may issue a warrant to search premises where there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, any evidentiary material at the premises.¹⁷⁶ Sections 3F and 3J outline the things that are authorised by the search warrant and the powers of executing officers. Section 3M provides that the owner be afforded compensation for damage to equipment sustained in the execution of a warrant, in some circumstances. Powers of search and seizure relating to terrorist acts and offences are subject to a sunset clause.¹⁷⁷ The inclusion of such a clause is one way of counterbalancing concerns about potential encroachment on rights—by giving it a limited duration.

7.133 A further aspect of search and seizure powers raised by the Law Council concerns s 35K of the *Australian Security and Intelligence Organisation Act 1979* (Cth) which excuses the Commonwealth from liability to pay a person compensation for property damage in the course of, or as a direct result of, a special intelligence operation. The Law Council submitted that

174 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014) [2.49].

175 Attorney-General’s Department, Submission No 8 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill 2014* (2014).

176 *Crimes Act 1914* (Cth) s 3E(1).

177 *Ibid* s 3UK.

[t]his may not be justified in many cases as a matter of national security if, for example, the property is owned by a third party or becomes damaged incidentally to the special intelligence operation. Further, precluding payment of compensation tends to increase the likelihood that such an encroachment is disproportionate.¹⁷⁸

7.134 Section 35K was also introduced by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The Scrutiny of Bills Committee requested information from the Attorney-General as to whether the payment of compensation in respect of damage to property is consistent with that taken in relation to other controlled operations scheme. The Committee did not note a response. The Explanatory Memorandum to the Bill also did not provide a justification for s 35K, noting only that ‘there remains scope for the payment of compensation to aggrieved individuals in appropriate cases’.¹⁷⁹

7.135 A number of aspects of counter-terrorism legislation have been raised by stakeholders in this Inquiry, as well as through the parliamentary scrutiny processes. Some of these concerns may prompt further review.

Justifications for interferences

7.136 The most general justification for laws that interfere with vested property interests is that the interference is necessary and in the public interest.

7.137 Protocol 1, Article 1 of the *European Convention* provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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.

The preceding provisions 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.

7.138 Bills of rights and international law commonly provide exceptions to the right not to be deprived of property, usually provided the exception is reasonable, in accordance with the law, and/or subject to just compensation.¹⁸⁰ 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.¹⁸¹

7.139 The compensation on just terms provision in the *Australian Constitution* is considered above.

178 Law Council of Australia, *Submission 75*.

179 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

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

181 *United States Constitution* amend V.

7.140 There are many laws and regulations that interfere with property rights. Laws limit land use to protect the environment, to balance competing private interests or for the public interest.¹⁸² Other laws might regulate the content and advertising of products, such as food, drinks, drugs and other substances, to protect the health and safety of Australians. Many such laws will be ‘justified’.

7.141 In the Issues Paper, the ALRC invited submissions identifying those Commonwealth laws that interfere with property rights and that are *not* justified, explaining why these laws are not justified. The ALRC also asked what general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified.¹⁸³

7.142 The Law Council submitted that additional criteria for justifying encroachments on property rights might be whether:

- (a) the public interest in acquisition, abrogation or erosion of the property right outweighs the public interest in preserving the property right; and
- (b) is the acquisition, abrogation or erosion of the property right lawful.¹⁸⁴

7.143 The Arts Law Centre of Australia recommended the application of the balancing process described by French CJ in *JT International SA v Commonwealth*. His rejection of the claim by the plaintiff tobacco companies of ‘acquisition’, such as to attract compensation under s 51(xxxi) of the *Constitution*, reflected

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.¹⁸⁵

7.144 The Arts Law Centre submitted that the criteria should also include an assessment of whether the law that ‘interferes’ with vested property rights is implemented and operated in practice in the most optimal way available.

It is possible that what are otherwise justified public purposes and public benefits to be gained from an ‘interference’ with vested property rights are not implemented or operated in the optimum manner possible in the circumstances.¹⁸⁶

Conclusions

7.145 A number of Commonwealth laws may be seen as interfering with vested personal property rights.

7.146 In the constitutional context, the central issue is whether the particular interference by Commonwealth laws amounts to an ‘acquisition’ by the Commonwealth other than on just terms under s 51(xxxi) of the *Constitution*, which

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

183 See Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Questions 6–1, 6–2.

184 Law Council of Australia, *Submission 75*.

185 *JT International SA v Commonwealth* (2012) 250 CLR 1, [43].

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

may lead to the invalidity of laws. For owners of property rights, actions through Commonwealth laws may not amount to an acquisition, so as to trigger the compensatory provision in s 51(xxxi), but they may nonetheless be regarded as an 'interference'. Most of such concerns arise in the context of real property rights, which are considered in the next chapter.

7.147 With respect to personal property rights, the key areas of concern examined in this chapter have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. With respect to unclaimed money laws, these are the subject of an amending bill at the time of writing.

7.148 The width of the proceeds of crime legislation is one area that may require further consideration. The 2002 Act provided for a review, which took place in 2006. The further expansion in 2015 suggests that another review of the *Proceeds of Crime Act 2002* (Cth) should take place in addition to ongoing scrutiny of the Commonwealth legislation by the Parliamentary Joint Committee on Law Enforcement. As the expansion and coverage of this legislation was undertaken as a national initiative, with both the Commonwealth and states and territories involved, any such review would need to take into account the scheme as a whole and in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*.

