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

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

The example of water

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

74 Carruthers and Mascher, above n 73, 99.

75 Hepburn, above n 66, 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

84 Carruthers and Mascher, above n 73, 108.

- improve the management of urban water.[85]

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

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

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

The example of minerals

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

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

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

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85 Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).
86 Carruthers and Mascher, above n 73, 110. One commentator suggests that, through the NWI, Australia 'radically reformed its water entitlement system'; Garry, above n 72, 53.
87 McKenzie, above n 70, 463. As noted above, certain rights may have a 'proprietary' character, but not be regarded as property: *Yanner v Eaton* (1999) 201 CLR 351, 388–9 (Gummow J).
88 *The Case of Mines* (1568) 1 Plowd 310, 336; 75 ER 472, 510.
89 *Woolley v A-G (Vic)* (1877) 2 App Cas 163. See also *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.
90 Bradbrook, above n 52, 464.
91 Ibid. See later discussion of minerals.
92 Ibid.

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

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

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

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

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

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

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

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

95 Butt, above n 43, [218].

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

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

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

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

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

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

102 Ibid 843.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

123 Law Council of Australia, *Submission 140*.

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

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

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

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

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

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

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

Protections from statutory encroachment

Australian Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'Property'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'Acquisition'

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

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

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153 Ibid [147].

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

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

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

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

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

18.85 Emeritus Professor Suri Ratnapala observed that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18.92 French CJ, Gummow and Crennan JJ concluded that

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

18.93 Hayne, Kiefel and Bell JJ concluded that

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

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

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

'Just terms'

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

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

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

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

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

Characterisation

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

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

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

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

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

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

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

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

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

Racial Discrimination Act

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

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

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

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

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

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

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

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

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

Principle of legality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

International law

18.109 Article 17 of the UDHR provides:

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

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

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

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

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

187 Ibid 165–6. Citations omitted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

197 Environmental Justice Australia, *Submission 65*.

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

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

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

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

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

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

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

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

202 Ibid annex 11–B para 4(a)(ii).

203 Ibid annex 11–B para 4(b).

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

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

Bills of rights

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

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

Justifications for interferences

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

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204 *United States Constitution* amend V, the 'due process' provision.
205 *New Zealand Bill of Rights Act 1990* (NZ) s 21.
206 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.
207 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). This may be regarded as an international treaty in addition to being a bill of rights: see Koen Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 *European Law Review* 575.

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

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

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

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

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

Legitimate objectives

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

18.127 For example the ECHR states that the right to possession

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

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

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

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

210 *United States Constitution* amend V.

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

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

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

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

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

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

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

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

Balancing rights and interests

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

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

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

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

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

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

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

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

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

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216 *JT International SA v Commonwealth* (2012) 250 CLR 1, [43]. See Arts Law Centre of Australia, *Submission 50*.
217 Law Council of Australia, *Submission 75*.
218 *Pye v United Kingdom* [2007] III Eur Court HR 365, [53].
219 Ibid [54].
220 Ibid [62]. Emphasis added.

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

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

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

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

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

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

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

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

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

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

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

19. Personal Property Rights

Contents

Summary

19.1 Many Commonwealth laws interfere with personal property rights. The key areas of concern examined in this chapter include banking and taxation laws, personal property securities, intellectual property and criminal laws. Many have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court.

19.2 The breadth of the proceeds of crime legislation is one area that may require further consideration. The *Proceeds of Crime Act 2002* (Cth) provided for a review, which took place in 2006. The Parliamentary Joint Committee on Law Enforcement provides ongoing scrutiny of the Commonwealth legislation. Given the potential impact of unexplained wealth measures on personal property, and the proposal for a national coordinated scheme by the Law Enforcement Committee, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. The ALRC also suggests that a further review be scheduled in due course.

Laws that interfere with property rights

19.3 A wide range of Commonwealth laws may be seen as interfering with personal property rights. Grouped into areas, provisions affecting personal property are considered below under the following headings:

- banking laws;
- taxation;
- personal property securities;

- intellectual property;
- protection of cultural objects; and
- search and seizure provisions.

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

Banking laws

Unclaimed money laws

19.5 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 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.[1]

19.6 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.[2] 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 10 years, would become the property of the Bank.[3]

19.7 The modern successor to the provision in the 1911 Act 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.

19.8 In 2012, the *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012* (Cth) reduced the relevant period to three years. Similar changes

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1 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].

2 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.

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

were made to first home owner accounts, life insurance and superannuation under the same amending Act.[4]

19.9 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 (Parliamentary Scrutiny) Act 2011*'.[5] However, it did not elaborate on this proposition.

19.10 The Hon Bernie Ripoll, the then Parliamentary Secretary to the Treasurer, stated that 'the reforms will ensure this lost money is properly protected so people can get what is rightfully theirs'.[6]

19.11 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.[7] However, 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 *International Covenant on Civil and Political Rights*, set out in Chapter 18.

19.12 The Human Rights Committee applied a structured proportionality test.[8] 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 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 a justification for the dramatic reduction in the period that must elapse before the obligation to transfer the funds to the ATO is activated.[9]

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4 *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).

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

6 See Bernie Ripoll, 'Media Release' (Media Release No 051, 26 November 2012).

7 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].

8 See Ch 2 in relation to proportionality; and Ch 3 in relation to the functions of the Committee.

9 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) [1.107].

19.13 The Human Rights Committee sought 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'.[10]

19.14 The Senate Standing Committee on Economics also 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.[11]

19.15 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 provided an 'appropriate measure of flexibility to address the concerns of financial institutions and protect the interests of consumers as required'.[12]

19.16 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 …[13]

19.17 In 2015, following a change of government, amending legislation was passed.[14]

19.18 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

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10 Ibid.

11 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.

12 Ibid [3.54]–[3.55].

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

14 *Banking Amendment (Unclaimed Money) Regulation 2015* (Cth); *Banking Laws Amendment (Unclaimed Money) Act 2015* (Cth).

> transfer all accounts with unclaimed moneys to the Commonwealth even though many of the accounts are still effectively active. Once these accounts are transferred, account holders have to complete the necessary paperwork and verify their details in order to reclaim their accounts.[15]

19.19 The unclaimed moneys legislation is an example of an interference with personal property rights in the form of deposit accounts, which are 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 with respect to such legislation.

Taxation

19.20 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.

19.21 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'.[16]

Withholding refunds

19.22 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'.[17]

19.23 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.[18]

19.24 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.[19]

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15 *Banking Laws Amendment (Unclaimed Money) Bill 2015—Explanatory Guide* [1.4]–[1.5].
16 Australian Taxation Office, 'Law Administration Practice Statements' (PS LA 1998/1) [1].
17 The Tax Institute, *Submission 68*.
18 Ibid.
19 Ibid. The particular provisions identified were: *Taxation Administration Act 1953* (Cth) ss 14ZW(1)(aad)(i), 14ZYA.

19.25 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;
>
> (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

19.26 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.[20]

19.27 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.[21]

19.28 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:

> The 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.[22]

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20 Australian Taxation Office, 'General Debt Collection Powers and Principles' (PS LA 2011/14) [6]–[7].
21 Australian Taxation Office, 'Enforcement Measures Used for the Collection and Recovery of Tax-Related Liabilities and Other Amounts' (PS LA 2011/18) [98]–[99].
22 The Tax Institute, *Submission 68*.

19.29 While the Practice Statements are for the guidance of ATO staff, they are regularly updated and available online.[23] 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

19.30 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.[24] As noted above, schemes such as these set out rules of priority of interests.

19.31 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.[25]

19.32 A review of the operation of the *Personal Property Securities Act* was conducted in 2014–15 by Bruce Whittaker.[26] 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,[27] 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.[28]

19.33 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'.[29] He urged that a collaborative drafting process be conducted, with

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23 PS LA 2011/18, for example, was issued first on 14 April 2011, and updated on 17 May 2013 and 3 July 2014. However a taxpayer cannot enforce adherence to a practice statement: *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 (24 October 2013) [11].

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

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

26 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.

27 Ibid rec 17.

28 Ibid 73.

29 Ibid [10.1.1].

private-sector input and public consultation, through an exposure draft bill.[30] Whittaker also recommended that whether a further review was needed be considered five years after his review.[31] Regular reviews of such a kind are one mechanism for assessing whether the justifications for legislation still apply.

Intellectual property

Acquisition and the Constitution

19.34 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.[32] 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.[33]

19.35 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—s 51(xxix)—giving effect in this instance to the *World Health Organization Framework Convention on Tobacco Control*.[34]

19.36 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.[35] 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.[36]

19.37 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.

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30 Ibid [10.1.2].
31 Ibid [10.3].
32 *JT International SA v Commonwealth* (2012) 250 CLR 1.
33 *Tobacco Plain Packaging Act 2011* (Cth) ss 18–19; *Tobacco Plain Packaging Regulations 2011* (Cth).
34 *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.
35 *JT International SA v Commonwealth* (2012) 250 CLR 1.
36 Ibid [44].

Copyright

19.38 Protection of intellectual property rights was an issue identified in the Rights and Responsibilities consultation conducted by the Australian Human Rights Commission (AHRC) in 2014.[37] Protection from 'music theft' and online copyright infringement were concerns expressed during the consultation.[38] The *Copyright Amendment (Online Infringement) Act 2015* (Cth), passed on 22 June 2015, is intended to address some of these concerns.[39]

19.39 Copyright, as noted in Chapter 18, is a type of property that has a long history. It is also expressly referred to in a range of international treaties to which Australia is a party.

19.40 One stakeholder in this ALRC Inquiry drew attention to the ALRC's 2014 copyright report, in recommending a 'fair use' exception to copyright.[40] Dr Lucy Cradduck 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.[41]

19.41 This is essentially an argument for recognising another novel kind of property interest. Such a proposed 'right' has not been identified in law.[42] 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'.[43]

19.42 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.[44]

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37 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015).
38 Ibid 44.
39 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: *Copyright Act 1968* (Cth) s 115A.
40 Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014).
41 L Cradduck, *Submission 67*. Cradduck recommended that contracting out of copyright exceptions should be prohibited.
42 See Ch 18 concerning the fluidity and evolving nature of property rights.
43 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 44.
44 Arts Law Centre of Australia, *Submission 50*.

19.43 The Australian Publishers Association submitted to similar effect that

> Copyright is not an example of Commonwealth law encroaching on rights or freedoms, it is the essential foundation for freedom of writers to ask a price for the use of their creations. Technologies have made it easier, in the words of the US Supreme Court 'to make other people's speeches'. That has made the principles of copyright more rather than less important to traditional rights and freedoms. There is a significant threat to traditional rights and freedoms, not from the inclusion of copyright in Commonwealth laws, but from the possibility of new exceptions that allow untrammelled free use of works and cut into the sustainability of an industry that has traditionally supported and expanded the freedom of expression that is a core tenet of our common law heritage.[45]

19.44 Such arguments were traversed by the ALRC in the copyright inquiry.[46]

Protection of cultural objects

19.45 The *Protection of Cultural Objects on Loan Act 2013* (Cth) provides a scheme to provide protection for cultural objects on loan. While the objects are in Australia the legislation limits the circumstances in which lenders, exhibition facilitators, exhibiting institutions and people working for them can lose ownership, physical possession, custody or control of the objects because of:

- legal proceedings in Australian or foreign courts;
- the exercise of certain powers (such as powers of seizure) under Commonwealth, State and Territory laws; or
- the operation of such laws.[47]

19.46 The legislation operates to protect the property rights of the lenders, while potentially interfering with the property interests of others who have valid claims. The legislation contains an 'historic shipwrecks' clause to ensure its constitutionality.[48]

19.47 The Explanatory Memorandum to the Bill identified the legitimate objective of the Bill as being to encourage the loan of objects from overseas for temporary public exhibition in Australia:

> The legislation addresses a significant obstacle that Australia's major cultural institutions (such as museums, galleries and libraries) face in securing the loan of foreign objects and aligns Australia with an emerging international standard to provide protection for cultural objects on loan. Under existing Commonwealth legislation, protection for objects on loan only applies in specific and limited circumstances under the *Protection of Movable Cultural Heritage Act 1986*. The absence of more comprehensive legislation has made it increasingly difficult for those institutions to secure foreign loans.[49]

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45 Australian Publishers Association, *Submission 145*.
46 The recommendations are still under consideration by the Australian Government.
47 See, Protection of Cultural Objects on Loan Bill 2012, Explanatory Memorandum.
48 *Protection of Cultural Objects on Loan Act 2013* (Cth) s 20. See Ch 18.
49 Protection of Cultural Objects on Loan Bill 2012, Explanatory Memorandum.

19.48 Another objective was of 'enhancing cultural life in Australia and promoting the right to enjoy and benefit from culture'.[50]

19.49 Given that the objective would have an impact on the assertion of rights by others, it said that '[t]o the extent that that Bill limits the right to an effective legal remedy, those limitations are reasonable, necessary and proportionate and the limitations are not arbitrary'.[51]

Proceeds of crime

19.50 Each Australian jurisdiction has legislation concerning the confiscation of the proceeds of crime.[52] 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.[53]

19.51 The Commonwealth laws include the *Proceeds of Crime Act 1987* (Cth) and the *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*). 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'.[54] 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.[55]

19.52 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:

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50 This was said to engage art 15(1)(a) of the ICESCR: the right of everyone to take part in cultural life.

51 Protection of Cultural Objects on Loan Bill 2012, Explanatory Memorandum. This legislation also provides some protection for a claim of *jus tertii*—see Ch 18. Proceeds under the *Proceeds of Crime Act 2002* (Cth) are exempt, in recognition of Australia's international obligations in relation to proceeds of crime, specifically the United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, the United Nations Convention Against Transnational Organised Crime and Its Protocol, and the United Nations Convention Against Corruption. See Craig Forrest, 'Immunity from Seizure and Suit in Australia: The Protection of Cultural Objects on Loan Act 2013' (2014) 21 *International Journal of Cultural Property* 143.

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

53 Ibid.

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

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

> 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.[56]

19.53 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 traced back to antiquity'.[57] The ALRC cited two early examples: the feudal law of 'deodand' (Deo—to god; dandam, to be given), and the felony forfeiture rule.[58] The effect of deodand was 'to render forfeit any instrument or animal that was the cause of accidental death of a person'.[59] 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'.[60]

19.54 With the disappearance of the old common law rules,[61] new ones were developed, such as the rule that prevented a killer from benefiting from the estate of the person killed.[62] In addition, new statutory forms of forfeiture have been introduced: '*in rem* forfeiture laws which permit confiscation of goods employed for, or derived from,

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

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

58 The origin of the word 'felony' is referred to by Gageler J in *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [103]. As Gageler J points out, there is a difference of view as to its origin: William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) 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, 1899) vol II, vol ii, 464–5.

59 '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*, 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.

60 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, 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 59.

61 *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 59, 44–7.

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

illegal activity'.[63] 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.[64]

19.55 The *Proceeds of Crime Act* was said to implement Australia's obligations under the *International Convention for the Suppression of the Financing of Terrorism*, and resolutions of the United Nations Security Council relevant to the seizure of terrorism-related property.[65]

19.56 Two particular aspects of the legislation which prompted stakeholder comment concern literary proceeds and unexplained wealth.

Literary proceeds

19.57 'Literary proceeds' are defined in s 153 as 'any benefit that a person derives from the commercial exploitation of':

> (a) the person's notoriety resulting, directly or indirectly from the person committing an indictable offence or a foreign indictable offence; or
>
> (b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.

19.58 If certain offences have been committed, literary proceeds orders can be made, ordering payments to the Commonwealth of amounts based on the literary proceeds that a person has derived in relation to such an offence. While there is no requirement that a person has been convicted of the offence, the court hearing the application for the order must be satisfied on the balance of probabilities that the person has committed the offence.[66]

19.59 The way the legislation operates is explained as follows:

> The Australian Federal Police are responsible for investigating whether or not a person has obtained literary benefits. If there is sufficient evidence to indicate that the literary proceeds provisions in the Act could capture a person's profits, the matter will be referred to the Commonwealth Director of Public Prosecutions. An application by the Commonwealth Director of Public Prosecutions is then made for restraining orders over the profits and then a literary proceeds order. The literary proceeds order will require that payments, based on the literary proceeds that a person has derived, are made to the Commonwealth.[67]

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

64 Richard Fox and Arie Freiberg, above n 59, 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).

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

66 *Proceeds of Crime Act 2002* (Cth) s 152. See summary of provisions in: Monica Biddington, 'Selling Your Story: Literary Proceeds Orders under the Commonwealth *Proceeds of Crime Act 2002*' (Research Paper No 27, Law and Bills Digest Section, Parliament of Australia, August 2007).

67 Biddington, above n 66.

19.60 The court has to consider a number of factors when considering whether to make a literary proceeds order, including 'whether supplying the product or carrying out the activity was in the public interest'; and 'the social, cultural or educational value of the product or activity'.[68]

19.61 The provisions were tested in relation to the publication of *My Story*, a book co-authored by convicted drug smuggler Schapelle Corby with Kathryn Bonella, based on a series of secret interviews Bonella conducted with Corby inside prison in Bali. The Commonwealth Director of Public Prosecutions (CDPP) applied to the Supreme Court of Queensland, pursuant to s 20 of the *Proceeds of Crime Act*, for an order 'that any payments made by Pan Macmillan Australia to Schapelle Corby or her sister or brother-in-law or any other agent', in respect of the biography written by Corby and another, 'must not be disposed of otherwise than into the custody and control of the Official Trustee in Bankruptcy'. A similar order was sought concerning payments made to Corby's sister concerning an article published in the magazine, *New Idea*. Freezing orders were sought concerning any such payments until the determination of the CDPP's claim that these moneys should be paid to the Commonwealth.[69]

19.62 In March 2007 the Court of Appeal ruled in the CDPP's favour and held that, as literary proceeds were generated in Australia in consequence of the publication in Australia of both the book and article, that was 'sufficient to satisfy the test that a benefit was derived in Australia for the purposes of the legislation'.[70] The matter was then heard in the trial division of the Supreme Court. In 2009 the Court again ruled in the CDPP's favour, that the CDPP could seize future payments made to Corby's family as proceeds of crime. The order enabled the seizure of around $128,000.[71]

19.63 Such orders are not frequent. As one commentator remarked:

> Despite that success, applications for literary proceeds of crime orders … are few and far between. 'It's very rare', … but, in the case of Corby, 'you can't have legislation that is intended to be a deterrent and not enforce it in a high-profile case, it would send the wrong message'.[72]

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68 *Proceeds of Crime Act 2002* (Cth) ss 154(a)(ii)–(iii).

69 *DPP (Cth) v Corby* [2007] 2 Qd R 318, 319 (Keane JA).

70 Ibid 321 (Williams JA).

71 Daisy Dumas, 'Corby Caught in the Murky World of Proceeds-of-Crime Laws' *The Sydney Morning Herald* (Sydney), 20 February 2014 12; 'Schapelle Corby Book Proceeds Seized by Director of Public Prosecutions' *Herald Sun* (online), 8 April 2009 <www.heraldsun.com.au>. A US example involved Jordan Belfort (The Wolf of Wall St) who was convicted of fraud. He reportedly profited $US1.7 m from the sale of his memoirs and the movie rights based on his book, but the funds were seized under US proceeds of crime laws: Eriq Gardner, 'US Government Wants Jordan Belfort's Pay from "Wolf of Wall Street"' *The Hollywood Reporter* (online), 10 January 2014 <www.hollywoodreporter.com>. See also Lucas Bastin, 'David Hicks and Australian Proceeds of Crime Legislation: Can He Sell His Story?' (2009) 37 *Federal Law Review* 315; Rebecca Sullivan, 'Could Schapelle Corby Make Money from Her Crime?' *News.com.au* (online), 10 February 2014 <www.news.com.au>.

72 Dumas, above n 71, quoting Melbourne barrister Christian Juebner. A proposed interview of Corby by Channel 7 led to an AFP raid of the Sydney offices of Channel 7. When the likelihood of the interview changed, the AFP dropped its investigation: 'Schapelle Corby: AFP Discontinues Proceeds of Crime Investigation' *ABC News* (online), 14 March 2014 <http://www.abc.net.au/news/>.

19.64 The justification for the legislation is the avoidance of 'chequebook journalism' through the deterrence of possible seizure of assets. The Commonwealth is not alone in such legislation: Queensland, South Australia and the ACT have literary or 'artistic' proceeds confiscation provisions.[73]

19.65 Civil Liberties Australia submitted that, because the proceeds of literary works 'are not the direct proceeds of the commission of a crime', such targeting 'is an encroachment on freedom of speech'.[74]

Unexplained wealth

19.66 In 2010 the reach of the legislation was expanded to include 'unexplained wealth' provisions.[75] 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.[76]

19.67 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.[77]

19.68 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.[78] In the background to the Commonwealth provisions was an agreement by the Standing Committee of Attorneys-General,[79] in April 2009, to a set of resolutions 'for a comprehensive national response to combat organised crime',

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73 *Criminal Proceeds Confiscation Act 2002* (Qld) ss 200–11; *Criminal Assets Confiscation Act 2005* (SA) ss 110–17; *Confiscation of Criminal Assets Act 2003* (ACT) ss 80–1, 83. See analysis in Bastin, above n 71, 318–21.

74 Civil Liberties Australia, *Submission 94*.

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

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

77 *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.

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

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

including to strengthen criminal asset confiscation by the introduction of unexplained wealth provisions.[80]

19.69 However, proceeds of crime legislation may raise concerns about its breadth. In 2006, Tom Sherman 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:

> 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?[81]

19.70 The Law Council of Australia (Law Council) submitted to this ALRC Inquiry that civil confiscation and unexplained wealth proceedings under the *Proceeds of Crime Act* 'have the potential to interfere with property rights' and that consideration should be given to 'whether these schemes contain adequate safeguards to ensure proportionality and that intrusion upon property rights is justified'.[82] Similarly, in the AHRC 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'.[83]

19.71 In 2014, in *Attorney-General (NT) v Emmerson*,[84] 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.[85] One ground of alleged invalidity of the scheme was that it provided for an acquisition of property otherwise than on just terms.[86]

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80 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>.

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

82 Law Council of Australia, *Submission 75*.

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

84 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014).

85 *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 (2014) [15]–[21].

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

19.72 The objectives of the scheme were: to deter criminal activity and to prevent the unjust enrichment of persons involved in criminal activities. The objects were penal and in addition to any punishment imposed in criminal proceedings.[87]

19.73 A majority of the High Court 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 precludes any inquiry into the proportionality, justice or wisdom of the legislature's chosen measures.[88]

19.74 The Court further explained that 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'.[89]

19.75 With respect to the argument that the breadth of the provisions 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.[90]

19.76 The Court's judgment is an example of an application of the principle of legality: 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'.[91]

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87 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [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'.

88 Ibid [80] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

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

90 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [85]. Compare Gageler J who concluded that the dominant character of the laws was the acquisition of property, and the acquisition was otherwise than on just terms: Ibid [140].

91 A clear intention could not have overcome s 51(xxxi) of the *Constitution*, if it applied.

19.77 In 2012 the Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) recommended strengthening the proceeds of crime legislation further (the Law Enforcement Committee report).[92] 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*.

19.78 The Law Enforcement Committee recommended 'major reform of the way unexplained wealth is dealt with in Australia as part of a harmonisation of Commonwealth, state and territory laws'.[93]

> 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.[94]

19.79 The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 was reviewed by the Senate Legal and Constitutional Affairs Legislation Committee (Legal and Constitutional Affairs Committee) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee). The Committee supported the amendments to strengthen the *Proceeds of Crime Act*, informed by its view that 'serious and organised crime poses a significant threat to Australian communities'.[95]

19.80 The Law Enforcement Committee 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;[96] 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.[97]

19.81 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.

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

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

94 Ibid.

95 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].

96 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 27–8.

97 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.

19.82 The removal of discretion was traversed fully in the Law Enforcement Committee report and by the Legislation Committee.

> 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 and may, rather than must, make the order, even though the CDPP or the agency bringing the application meets all of the requirements.[98]

19.83 The Law Enforcement Committee 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.[99] 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':[100]

> 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.[101]

19.84 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'.[102]

19.85 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 3. 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 breadth of

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98 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 a discretion was not included in the original Bill, when first introduced in 2009, but it was included by amendment in the Senate.

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

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

101 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].

102 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.

legislation is reviewed periodically. Since 2010 the confiscation scheme has been expressly subject to the oversight of the Law Enforcement Committee.[103]

19.86 The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act* was intended to improve the operation of the Commonwealth unexplained wealth provisions. The Act implemented a number of recommendations made in the Law Enforcement Committee report. These related to clarifying the investigation and litigation of Commonwealth unexplained wealth matters, such as streamlining affidavit requirements and removing a court's discretion to make unexplained wealth orders once relevant criteria are satisfied.[104] The amendments also included the stipulation of a report to the Law Enforcement Committee by the Commissioner of the Australian Federal Police about unexplained wealth investigations and proceedings.[105]

19.87 The Law Enforcement Committee also recommended that the Commonwealth Government take the lead in developing a nationally consistent unexplained wealth regime, and that a referral of powers be sought towards that end.[106] The 2015 amendments did not expressly refer to these recommendations but may be seen as a first step in this direction.

19.88 The *Proceeds of Crime Act* is subject to ongoing review by the Law Enforcement Committee. The breadth of the unexplained wealth provisions is a matter that falls within these ongoing functions.

19.89 The Law Council supported a review of the breadth of the Commonwealth proceeds of crime legislation by the Law Enforcement Committee 'to determine whether it unduly interferes with vested personal property rights' and whether the scheme was 'proportionate'. The Law Council considered that this was important because of the introduction of unexplained wealth measures into the Commonwealth legislation and the amendment in 2014 to prevent restrained assets being used to meet reasonable legal expenses for the purposes of defending unexplained wealth proceedings.

19.90 The Law Council suggested that such a review should take into account the following:

(a) personal property rights;

(b) the equality-of-arms principle;

(c) the presumption of innocence;

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

104 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

105 *Proceeds of Crime Act 2002* (Cth) ss 179U(3)–(5).

106 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) recs 14, 15. See also recs 16–18.

(d) legal aid commissions; and

(e) consistency with the *United Nations Convention Against Corruption*.[107]

19.91 The Law Council also pointed to an announcement in August 2015 for further changes to the unexplained wealth legislation as a matter that should be included in any review.[108]

19.92 The Law Council drew attention to the *Australian Border Force Act 2015* (Cth) and the amendment to s 213(3)(g) permitting the Comptroller-General of Customs to issue notices to financial institutions. 'Authorised officers', for the purposes of issuing notices, now include a Department of Immigration and Border Protection worker who is an Australian Public Service employee authorised by the Comptroller-General of Customs. The Law Council stated that the effect of this is that

> any authorised DIBP employee may apply for a freezing order where there is suspicion that funds in an account are proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concerns or is wholly or partly an instrument of a serious offence. A magistrate must then make the freezing order if satisfied that there is a risk that the balance of the account will be reduced.

19.93 The Law Council was concerned that the granting of a freeze order 'is a low threshold which leaves the court with limited discretion to refuse to make such an order', once the requirements of s 15B of the *Proceeds of Crime Act* have been met. The freeze order suspends a person's right to deal with their property, without:

(a) establishing beyond reasonable doubt that the person whose property is subject to the order has committed an offence; and

(b) the affected party being heard.[109]

19.94 The Law Council considered that the officers authorised to make a freeze order application 'should be limited to those with a demonstrated need to do so in the law enforcement context':

> It has not been demonstrated that such a need exists for APS employees within the broader DIBP and therefore may be unjustified. It is also noted that there is no time restriction on the power to freeze assets, which suggests its use may be disproportionate in its impact on those subjected to a freeze order. The Law Council recommends that the law be amended to impose a maximum time period, requiring authorised officers to justify the ongoing need for a freeze order.[110]

19.95 Concerns of this kind could be addressed through the ongoing review functions of the Law Enforcement Committee. Given the potential impact of unexplained wealth measures on personal property, and the Law Enforcement Committee's proposal for a national coordinated scheme, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the

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107 Law Council of Australia, *Submission 140*.

108 'PM Urges Australians To Dob In Ice Dealers' *The Sydney Morning Herald* (online), 16 August 2015 <www.smh.com.au>; Michael McKenna, 'PM To Give Anti-Bikie Ice Watchdog More Bite' *The Australian* (online), 17 August 2015 <www.theaustralian.com.au>.

109 Law Council of Australia, *Submission 140*.

110 Ibid.

United Nations Convention Against Corruption. The ALRC considers that a further review in due course, like the one in 2006, should be scheduled in due course. Specific areas of review may include safeguards and procedural fairness issues.[111]

Search and seizure provisions

19.96 A number of Commonwealth criminal law provisions may interfere with property rights.[112] The Law Council identified, in particular, search and seizure provisions.[113]

19.97 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.[114] An executing officer need not inform the person where and when the equipment will be examined, if the officer 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'.[115]

19.98 While the Crimes Legislation Amendment Bill 2010 was discussed by the Scrutiny of Bills Committee, there was no comment on these provisions.[116]

19.99 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 provision for compensation for damage only to electronic equipment (s 3ZZCI) and not any other property owned by an individual, 'questions arise as to whether the scheme is reasonable or proportionate'.[117]

19.100 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 Australian Federal Police officers to covertly enter and

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111 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).

112 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.

113 Law Council of Australia, *Submission 75*.

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

115 Law Council of Australia, *Submission 75*.

116 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2010* (November 2010) 330–4.

117 Law Council of Australia, *Submission 75*.

search premises, without the knowledge of the occupier of the premises)'.[118] However, these comments addressed the extension of powers to issue warrants to new categories of legal officers, rather than addressing issues of interference with personal property.

19.101 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.[119] The Intelligence and Security Committee did not make specific recommendations about compensation for the seizure of property.

19.102 The Attorney-General's Department's submission to the Intelligence and Security Committee included the following comments about the justification 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.[120]

19.103 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.[121] 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.[122] The inclusion of such a clause is one way of counterbalancing concerns about potential encroachment on rights—by giving it a limited duration.

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118 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 786.

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

120 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).

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

122 Ibid s 3UK.

19.104 The Law Council also expressed concerns about s 35K of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*). This provision creates an immunity, subject to a number of conditions, for authorised conduct that is part of a special intelligence operation. Although the immunity does not extend to conduct that 'causes significant loss of, or serious damage to, property',[123] the Law Council submitted that the immunity

> 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.[124]

19.105 Despite the immunity, the Inspector-General of Intelligence and Security (IGIS) can recommend that ASIO pay compensation to aggrieved individuals in appropriate cases.[125] The Explanatory Memorandum for the Bill that inserted s 35K into the *ASIO Act* stated that

> the oversight role and function of the IGIS is an effective and important means of ensuring that consideration is given to the payment of compensation to individuals in appropriate cases concerning actions taken under Division 4, while preventing any prejudice to national security that could arise if participants in an SIO were subject to civil liability in respect of their conduct as part of the SIO.[126]

19.106 The Independent National Security Legislation Monitor's (INSLM) ongoing oversight roles include div 3, pt III of the *ASIO Act*, in which s 35K is located.[127] The Parliamentary Joint Committee on Intelligence and Security (Intelligence and Security Committee) is required to complete, by 7 March 2018, a review of the operation, effectiveness and implications of a number of provisions, including div 3, pt III of the *ASIO Act*.[128]

19.107 The Independent National Security Legislation Monitor's (INSLM) ongoing oversight roles include div 3, pt III of the *ASIO Act*, in which s 35K is located.[129] The Parliamentary Joint Committee on Intelligence and Security (Intelligence and Security Committee) is required to complete, by 7 March 2018, a review of the operation,

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123 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35K(1)(e)(iii).

124 Law Council of Australia, *Submission 75*.

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

126 Ibid.

127 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6. Under s 5, the INSLM's functions include reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. Counter-terrorism and national security legislation is defined to include div 3 pt III of the *ASIO Act*: s 4.

128 *Intelligence Services Act 2001* (Cth) s 29(1)(bb). The Intelligence and Security Committee also has the power to question ASIO officials about decisions to conduct a special intelligence operation, as part of its power to review the administration and expenditure of the intelligence agencies, including ASIO: Ibid s 29(1)(a).

129 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6. Under s 5, the INSLM's functions include reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. Counter-terrorism and national security legislation is defined to include div 3 pt III of the *ASIO Act*: s 4.