

6. Property Rights

Contents

A common law right	47
What is vested property?	50
Protections from statutory encroachments	51
Australian Constitution	51
Principle of legality	52
International law	53
Bills of rights	54
Justifications for encroachments	54

A common law right

6.1 The common law has long regarded a person's property rights as fundamental. William Blackstone said in 1773: 'There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.'¹

6.2 However, many laws have been made that interfere with property rights. This chapter discusses the source and rationale of the protection of vested property rights; how these rights are protected from statutory encroachment; and when laws that interfere with these rights may be justified.

6.3 The ALRC calls for submissions on two questions about these rights.

Question 6–1 What general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified?

Question 6–2 Which Commonwealth laws unjustifiably interfere with vested property rights, and why are these laws unjustified?

6.4 In his *Commentaries*, Blackstone called the right to property an absolute right,² anchored in the *Magna Carta* (1215), and described the limited power of the legislature to encroach upon it in terms that are still reflected in laws today:

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any

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

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

control or diminution, save only by the laws of the land ... The laws of England are ... extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land ... Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained ... All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.³

6.5 Arguably, for many centuries the common law principles reflected a view that the rights of property owners were more deserving of protection than the personal rights of liberty and safety of non-property owners.⁴

6.6 Property and possessory rights are explicitly protected by the law of torts and by criminal laws and are given further protection by rebuttable presumptions in the common law as to statutory interpretation, discussed below. An interference with real property in the possession of another may give rise to the tort of trespass to land or of nuisance. In *Entick v Carrington* (1765), Lord Camden LCJ said:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.⁵

6.7 These rights have long been exercisable against the Crown or government officers acting outside their lawful authority. After citing the passage above, Mason CJ, Brennan and Toohey JJ in *Plenty v Dillon* (1991) said that the principle in *Entick v Carrington* 'applies to entry by persons purporting to act with the authority of the

3 Blackstone, above n 1, Book 2.

4 For example, the common law's slow-to-develop protection of uninvited entrants from intentional or negligent physical injury by occupiers. It was only in 1828 in *Bird v Holbrook* (1828) that the courts declared the deliberate maiming of a trespasser, albeit only if it was without prior warning, to be unlawful: *Bird v Holbrook* (1828) 4 Bing 628. For negligent injury, trespassers were at first owed no duty of care; then, after *Southern Portland Cement v Cooper* [1974] only a duty of common humanity; until 1984 when the High Court of Australia in *Hackshaw v Shaw* (1984) recognised a limited duty of reasonable care when there was a real risk that a trespasser might be present and injured: *Southern Portland Cement v Cooper* [1974] AC 623 (PC); *Hackshaw v Shaw* (1984) 155 CLR 614.

5 *Entick v Carrington* [1765] EWHC KB J98 1066.

Crown as well as to entry by other persons'.⁶ Their honours then quoted Lord Denning adopting a quotation from the Earl of Chatham:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.' So be it—unless he has justification by law.⁷

6.8 Similarly, in *Halliday v Nevill* (1984), Brennan J said:

The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.⁸

6.9 Implicit in this statement of the law is the recognition that the law—common law or statute—may authorise entry onto private property. Examples of such statutes are discussed in Chapter 7, which deals with laws authorising what would otherwise be a tort.

6.10 Similarly, the common law provides protection against unauthorised interference or detention of chattels. *Entick v Carrington*⁹ concerned not just an unauthorised search but also a seizure of private papers. *Wilkes v Wood* (1763)¹⁰ set out enduring common law principles against unauthorised search and seizure, later reflected in the 4th amendment to the *United States Constitution*.

6.11 Unauthorised interferences with chattels may be a trespass or conversion of the chattels, while unauthorised detention, even if initially authorised by statute, may give rise to tort actions in conversion or detinue once that authority has lapsed. For example, in *National Crime Authority v Flack* (1998), the plaintiff, Mrs Flack successfully sued the National Crime Authority and the Commonwealth for the return of money found in her house and seized by the National Crime Authority. Heerey J noted a common law restriction on the seizure of property under warrant:

[A]t common law an article seized under warrant cannot be kept for any longer than is reasonably necessary for police to complete their investigations or preserve it for evidence. As Lord Denning MR said in *Ghani v Jones* [1970] 1 QB 693 at 709: 'As

6 *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ).

7 *Southam v Smout* (Unreported, [1964] 1 Q.B.) 308, 320.

8 *Halliday v Neville* (1984) 155 CLR 1, 10 (Brennan J). Brennan J was quoted in *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ). In *Plenty v Dillon*, Gaudron and McHugh JJ said 'If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official': *ibid* 655.

9 *Entick v Carrington* [1765] EWHC KB J98.

10 *Wilkes v Wood* [1763] 2 Wilson 203; 98 E R 489.

soon as the case is over, or it is decided not to go on with it, the article should be returned.¹¹

What is vested property?

6.12 The idea of property is multi-faceted. The term ‘property’ is used in common and some legal parlance to describe types of property, that is, both real and personal property. ‘Real’ property encompasses interests in land and fixtures or structures upon the land. ‘Personal’ property encompasses both tangible things—chattels or goods—and certain intangible legal rights,¹² such as copyright and other intellectual property rights,¹³ shares in a corporation, beneficial rights in trust property, rights in superannuation¹⁴ and some contractual rights, including, for example, many debts.¹⁵

6.13 In law, the term ‘property’ is perhaps more accurately or commonly used to describe types of rights. Dealing with a term ‘property’ in a particular Act, the High Court of Australia said:

In [the Act], as elsewhere in the law, ‘property’ does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of property may be elusive. Usually it is treated as a bundle of rights.¹⁶

6.14 For land and goods, both of which may be possessed by someone other than the owner,¹⁷ property rights in the sense of ownership must be distinguished from mere possession of the land or goods, even though the latter may give some rise to qualified legal rights¹⁸ and from mere contractual rights affecting the property. The particular right may be regarded as ‘proprietary’ even though it is subject to certain rights of

11 *National Crime Authority v Flack* (1998) 86 FCR 16, 27 (Heerey J). Heerey J continued: ‘Section 3zv of the *Crimes Act* ... introduced by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth) ... did not come into force until after the issue and execution of the warrant in the present case. However it would appear to be not relevantly different from the common law’. For the current law, see, *Crimes Act 1914* (Cth) ss 3ZQX–3ZQZB.

12 Also known in law as ‘choses in action’. Intangible rights are *created* by law. Not all legal rights are part of a person’s property: eg many of the common law rights discussed in this Issues Paper or the human rights recognised in international law and in the ACT and Victorian charters. Tangible things exist independently of law but law governs rights of ownership and possession in them.

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

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

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

16 *Yanner v Eaton* (1999) 201 CLR 351, 365–366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). ‘Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle’: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).

17 The owner of land is generally the person entitled beneficially to a fee simple estate in freehold tenure: Muray Raff, ‘Environmental Obligations and the Western Liberal Property Concept’ (1998) 22 *MULR* 657, 659.

18 Actual possession may give the possessor better rights than others whose interest does not derive from the true owner: see *Newington v Windeyer* (land) or *National Crime Authority v Flack* (goods) Possession may, in effect, give the possessor rights akin to proprietary rights. Note, ‘Not only is a right to possession a right of property but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights’: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).

others in respect of the same property: a tenancy of land, for example, gives the tenant rights that are proprietary in nature as well as possessory.

6.15 A ‘property right’ may take different forms depending on the type of property. Implicit in a property right, generally, are all or some of the following rights: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.¹⁹ Property rights also depend on the statutory framework of laws and property rights affecting the particular type of property, for example, the system of land tenure in a particular state or territory, or a scheme such as the *Personal Property Securities Act 2009* (Cth); and the interaction between that statutory scheme and the common law.

6.16 The ALRC’s Terms of Reference refer to ‘vested property rights’. ‘Vested’ is primarily a technical legal term to differentiate a presently existing interest from a contingent interest.²⁰ However, particularly in the United States, the term has acquired rhetorical force in reinforcing the right of the owner not to be deprived of the property arbitrarily or unjustly by the state²¹ or, in disputes over land use, to reflect the confrontation between the public interest in regulating land use and the private interest of the owner—including a developer—in making such lawful use of the land as he or she desires.²² The tension is particularly strong with respect to retrospective legislation.²³

Protections from statutory encroachments

Australian Constitution

6.17 The *Australian 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.

19 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). This judgement was quoted in Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (Lexis Nexis Butterworths, 9th Edition, 2013) 5. Some property rights may however be unassignable: see, *Ibid* 6.

20 That is, contingent on any other person’s exercising his or her rights: ‘an immediate right of present or future enjoyment’: *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 496, 501. See also, *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30. The term ‘vested’ has been used to refer to personal property, including a presently existing and complete cause of action: See below at 6.20 *Georgiadis v AOTC* (1994) 179 CLR 297.

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

22 Walter Witt, ‘Vested Rights in Land Uses —A View from the Practitioner’s Perspective’ (1986) 21 *Real Property, Probate and Trust Journal* 317. A right is described as immutable and therefore ‘vested’ when the owner has made ‘substantial expenditures or commitments in good faith reliance on a validly issued permit’: Terry Morgan, ‘Vested Rights Legislation’ (2002) 34 *Urban Lawyer* 131.

23 ‘There is no remedial act which does not which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side’: *George Hudson Limited v Australian Timber Workers’ Union* (1923) 32 CLR 413, 434 (Isaacs J). For further discussion, see Ch 7.

6.18 There is no broader constitutional prohibition on the making of laws that interfere with vested property rights. Nevertheless, this constitutional protection is significant. 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.²⁴

6.19 A question often arises as to whether or not a person whose rights are affected by a Commonwealth statute had a ‘property’ right. The High Court is said to have taken a wide view of the concept of ‘property’ in interpreting this section. ‘It means any tangible or intangible thing which the law protects under the name of property.’²⁵

6.20 A statute extinguishing a vested cause of action or right to sue the Commonwealth at common law for workplace injuries was treated as an acquisition of property in *Georgiadis v AOTC* (1994).²⁶ Similarly, the High Court in *Greville v Williams* (1906) treated the plaintiff’s right to receive a pension from his superannuation contributions on the abolition of his office as a vested property right attracting the presumption.²⁷

6.21 However, many claimants have failed to show an acquisition of property,²⁸ either because there was no acquisition,²⁹ or because there was no property right.³⁰

Principle of legality

6.22 The principle of legality provides some protection to vested property rights.³¹ When interpreting a statute, courts will presume that Parliament did not intend to

24 ‘It was and has remained the case in England and Australia that compulsory acquisition and compensation for such acquisition is entirely the creation of statute’: *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [41] (French CJ). See also *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270.

25 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 295 (McTiernan J). In the *Bank Nationalisation Case* (1948), 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.

26 *Georgiadis v AOTC* (1994) 179 CLR 297. This was upheld in *Commonwealth v Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493. A majority in *Georgiadis v AOTC* held that the Commonwealth acquired a direct benefit or financial gain in the form of a release from liability for damages: see further, Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) 1280.

27 *Greville v Williams* (1906) 4 CLR 694, 703 (Griffiths CJ). This decision was reversed on other grounds by the Privy Council in *Williams v Curator of Intestate Estates* (1909) 8 CLR 760.

28 Eg, intellectual property laws based on s 51(xviii) of the Constitution may ‘impact upon existing proprietary rights’ or adjust or regulate competing rights, claims, obligations or liabilities without infringing s 51(xxxi): *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

29 What amounts to an acquisition is contentious. Generally, acquisition involves the acquirer receiving something; it involves more than the mere extinguishment of rights. See further, *JT International SA v Commonwealth* (2012) 250 CLR 1.

30 ‘A right to receive a benefit to be paid by a statutory authority in discharge of a statutory duty is not susceptible of any form of repetitive or continuing enjoyment and cannot be exchanged or converted into any kind of property ... That is not a right of a proprietary nature’: *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 243–244 (Brennan J).

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

interfere with vested property rights, unless this intention was made unambiguously clear. More narrowly, legislation is presumed not to take vested property rights away without compensation.³²

6.23 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.³³ The presumption is also described as even stronger as it applies to delegated legislation.³⁴ The wording of a statute may of course be clear enough to rebut the presumption.³⁵

6.24 As early as 1904, Griffith CJ in *Clissold v Perry* (1904) referred to the rule of construction that statutes ‘are not to be construed as interfering with vested interests unless that intention is manifest’.³⁶ More recently in 2009, French CJ stated in the High Court of Australia:

Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. ... The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights.³⁷

International law

6.25 Article 17 of the Universal Declaration of Human Rights provides:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.³⁸

32 The narrower presumption is useful despite the existence of the Constitutional protection because, first, ‘It is usually appropriate (and often necessary) to consider any arguments of construction of legislation before embarking on challenges to constitutional validity’: *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 414 [27] (Kirby J). Second, the Constitutional limitation in s 51(xxxi) does not apply to acquisitions of property by a state. See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [5.21]–[5.22].

33 ‘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 (Old) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 683 (Mason J). See also, *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 623 [37] (Gaudron J).

34 *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1986) 120 CLR 400, 406 (Kitto J). Kitto J was citing *Newcastle Breweries Ltd v The King* [1920] 1 KB 854. See also, *UWA v Gray* [2008] FCA 498 [87] (French J).

35 ‘It is of little assistance, in endeavouring to work out the meaning of parts of that scheme [allowing an offeror to compulsorily acquire shares after a takeover on certain conditions under the *Corporations Law NSW*], to invoke a general presumption against the very thing which the legislation sets out to achieve. Furthermore, for the reasons given in the preceding paragraph, it does not help to say that legislation enabling abrogation of property rights should be strictly confined according to its terms, when the legislation confers a power upon a regulatory authority (subject to procedures of review) to alter those terms’: *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, 340 [43].

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

37 *R & R Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 618–619, [43] (French CJ).

38 A right to property is not provided for in the ICCPR or the ICESCR.

6.26 This and other international instruments cannot be used to ‘override clear and valid provisions of Australian national law’.³⁹ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁴⁰

Bills of rights

6.27 In other countries, 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,⁴¹ New Zealand⁴² and the state of Victoria.⁴³

Justifications for encroachments

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

6.29 Protocol 1, Article 1 of the *European Convention on Human Rights* provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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

6.30 Bills of rights and international law commonly provide exceptions to the right not to be deprived of property, usually provided the exception is reasonable, in accordance with the law, and/or subject to just compensation.⁴⁴ For example, the Fifth Amendment to the *United States Constitution*, part of the Bill of Rights ratified in 1791, 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.⁴⁵

6.31 There are many laws and regulations that interfere with property rights. Laws limit land use to protect the environment,⁴⁶ to balance competing private interests or for the public interest. Other laws might regulate the content and advertising of products, such as food, drinks, drugs and other substances, to protect the health and safety of Australians. Many such laws will of course be justified. The ALRC invites submissions identifying those Commonwealth laws that interfere with property rights and that are *not* justified, explaining why these laws are not justified.

39 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

40 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

41 *United States Constitution* amend V.

42 *Bill of Rights Act 1990* (NZ) s 21.

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

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

45 *United States Constitution* amend V.

46 See Lee Godden and Jacqueline Peel, *Environmental Law* (2010) Ch 4.