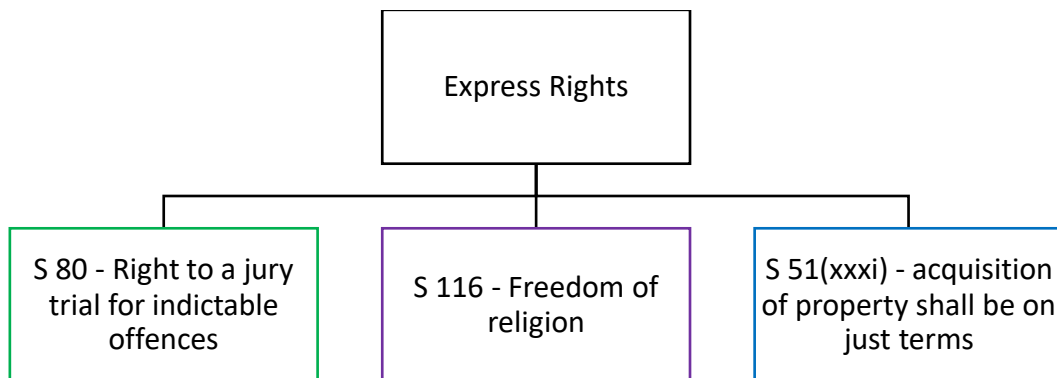
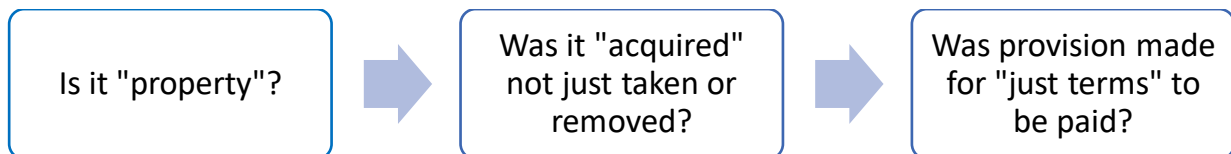


WEEK 10: EXPRESS RIGHTS AND FREEDOMS



[Acquisition of Property – s 51(xxxi)]



STEP 1: State Law

Section 51(xxxi):

- the power to make laws on the acquisition of property on just terms from any state or person
- for any purpose in respect of which the parliament has the power to make laws
- applies to Cth, not states: *Duncan v NSW* (2015)

STEP 2: Is it “property”?

- *Minister of State for the Army v Dalziel* (1944):
 - o Wide definition
 - o McTiernan J: the word property in this section is a general terms. It means **any tangible or intangible thing** which the **law protects** under the name of property
 - o Rich J: property is a bundle of rights
- **IF any of these apply – the thing is a *property***
 - o Land
 - o Possession of land *Minister of State for the Army v Dalziel* (1944)
 - o Shares & shareholders’ entitlements: *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948)
 - o “innominate and anomalous interests,” such as the power to appoint directors: *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948)
 - o Money: *Australian Tape Manufacturers v Cth* (1993)
 - o The right to take legal action (a ‘chose in action’): *Georgiadis v Telecom (1994)*; *IR Act case* (1996)
 - o Mining leases: *Newcrest Mining* (1997)

- Trademarks, designs, patents, copyright: *JT International (2012)*; *Nintendo v Centronics Systems* (1994)
- Legal and equitable interests, corporeal and incorporeal: *A-G (NT v Chaffey)* (2007)

STEP 3: Was it 'acquired'?

- Acquisition is distinct from deprivation, extinguishment or modification; *Mutual Pools*
- Property must be acquired by someone else
- Benefit obtained does not have to be the same as the property acquired: *Georgiadis; Newcrest Mining (WA) Ltd v Cth* (1997)
- Must be of a proprietary character: *JT International, Tasmanian Dams*

EXCEPTIONS

- 1 - Some heads of power deal with **subject matter** that "necessarily involves" an **acquisition** of property, and cannot be subject to s 51(xxxi), eg tax, bankruptcy, forfeiture
- 2 - Laws not directed to acquisition of property, but to the **adjustment of competing rights and liabilities** as part of general regulation in the public interest, or under a government scheme, eg social security
- 3 - Laws providing a **simple modification of a statutory right**

EXCEPTION 1: LAWS WHICH NECESSARILY INVOLVE TAKING

- Taxation power, s 51(ii); *A-G (Cth) v Schmidt* (1961)
- Bankruptcy; *A-G (Cth) v Schmidt* (1961)
- Forfeiture; *Burton v Honan; DPP; Ex parte Lawlor* (1994); *Theophanous* (2006)
- Copyright: *Nintendo v Centronics* (1994)
- Imposition of sanction/ penalty: *Mutual Pools* (1994)

EXCEPTION 2: GENERAL REGULATION IN THE COMMON INTEREST

- Creation, modification, extinguishment or transfer of rights and liabilities
- As an incident of general regulation
- In the common interest or under a government scheme
- Examples:
 - social security,
 - *Mutual Pools* (1994) (adjustment to tax refund)
 - *Health Insurance Commission v Peverill* (1994) (adjustment to Medicare rebate)
 - *Georgiadis* (1994) (statutory alteration to CL right to sue for workers' compensation)
 - *Airservices* (1999) (statutory lien over aeroplanes to recover charges)

EXCEPTION 3: SIMPLE MODIFICATION OF STAT RIGHTS

- Laws which simply modify statutory rights do not infringe on s 51 (xxxi)

STEP 4: Was it on just terms?

- 'Just terms' = 'fair', ie not necessarily 'market value': *Nelungaloo v Cth* (1947)

- Parliament has wide discretion to determine what is fair, or set procedure for how just terms to be calculated: **Grace Brothers** (1946)
- High Court examines procedure to ensure adequacy: *Tasmanian Dams* per Deane J
- Provision for “reasonable compensation to be determined by the Courts” is sufficient: **Wurridjal** (2009)

What is the legal and practical effect?

- If the 3 tests are proved (property, acquisition and just terms) than the Cth has jurisdiction to validly take the property
- If any of the exceptions apply, then the Cth does not have the jurisdiction to make the law.