



Human Rights Consultation Committee
Department of Justice
55 St Andrews Place
Melbourne 3000

25 August 2005

Supplementary Submission: Property rights in a Victorian Charter of Rights

1. Thank you for the opportunity to make a submission to this process. This submission is made in my capacity as an academic researcher and not on behalf of the Centre for Comparative Constitutional Studies or the University of Melbourne. (Andrew Brookes, CCCS Law Reform and Public Policy Intern, helped with research for this submission.)
2. This submission supplements my submission dated 1 August 2005 that focused on whether and how a Victorian Charter of Rights should protect property rights.

3. I understand that the Committee may be interested a submission addressing the desirability of adopting and adapting the language of s 51(xxxi) of the Commonwealth Constitution in providing protection for property rights in the Victorian Charter of Rights.
4. That section appears in the Commonwealth Constitution as a grant of power in the following terms:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxxi) 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.

Notwithstanding its form, this provision has been interpreted as a constitutional guarantee that restricts rather than augments Commonwealth legislative power.

5. It has been adapted and included in the Self Government Acts of the Australian Capital Territory, Northern Territory and Norfolk Island, as a restriction on legislative power, in the following terms:

Australian Capital Territory (Self-Government) Act 1988 (Cth), s 23:

- (1) Subject to this section, the Assembly has no power to make laws with respect to:
- (a) the acquisition of property otherwise than on just terms.

Northern Territory (Self-Government) Act 1978 (Cth), s 50:

- (1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

Norfolk Island Act 1979 (Cth), s 19:

- (2) The power of the Legislative Assembly in relation to the making of laws does not extend to the making of laws:
- (a) authorizing the acquisition of property otherwise than on just terms...

The Appendix to this submission includes a digest of Territory cases interpreting these provisions.

6. There would be advantages to adapting and adopting this language for Victoria:
- a. It would provide a model for a property rights guarantee that has applied in one form or another in this country for more than a century.
 - b. In particular, it would provide a source of existing case law on a relevantly similar property rights guarantee.
7. There are also disadvantages:
- a. The jurisprudence of the High Court in relation to s 51(xxxi) is very uncertain. The Court has not found a satisfactory mechanism for resolving the tension between the notion that s 51(xxxi) provides a guarantee of property rights and the idea that government must be able to regulate in the public interest without having to provide compensation to every property owner whose property is affected by the regulation.
 - b. That tension exists in every property rights guarantee and the experience of the High Court is hardly unique.
 - c. But in interpreting s 51(xxxi) the High Court is faced with a particularly difficult task. Section 51(xxxi) was arguably not designed as a property rights guarantee but to confirm the existence of power to

acquire property.¹ As a result, s 51(xxxi) does not include any language that helps address the tension between private rights and the public interest.²

- d. In that respect it is like the Fifth Amendment of the United States Constitution. The United States Supreme Court has described the dilemma as being identifying when regulation ‘goes too far’³ and amounts to a taking of property that requires compensation. It has been unable to settle on clear principles either, and has adopted what is in effect an ad hoc balancing test for resolving the vast majority of cases under the takings clause of the Fifth Amendment.⁴
- e. An overt balancing approach has not been adopted by the High Court. Instead, it has used the language of s 51(xxxi) to attempt to control the guarantee to provide clear and definite limits so that it does not threaten to sweep up all regulation. However, although the jurisprudence indicates that s 51(xxxi) does indeed have limits, those limits are not clear.
 - The term ‘property’ has not been an effective tool for controlling the guarantee. ‘Property’ is an almost infinitely malleable term. It is capable of embracing any economic advantage whatsoever. In the context of s 51(xxxi), the High Court has held that ‘property’ includes innominate and anomalous interests.⁵ The High Court (in another context) has endorsed the proposition that property consists of a bundle of rights⁶ – including rights to use, enjoy, dispose of property. Each element of that bundle is capable of being regarded as property. So a law that regulates a single incident of the property owner’s bundle of entitlements is capable of falling within the guarantee.⁷ The Court is yet to decide a case on that basis, but it the jurisprudential groundwork for it to do so does exist.
 - For some time, ‘acquisition’ proved a more effective means of controlling the guarantee. Section 51(xxxi) was not engaged when a law merely extinguished a person of a property right or deprived a person of a property right. The Commonwealth had to *acquire* a corresponding advantage; sometimes that was required to be a *proprietary* advantage (that is a property interest rather than relief from financial liability or satisfaction

¹ See generally Simon Evans, ‘Property and the Drafting of the Australian Constitution’ (2001) 29 *Federal Law Review* 121.

² Contrast s 25 of the South African Constitution.

³ *Pennsylvania Coal Co v Mahon* 260 US 393 (1922), 417.

⁴ *Penn Central Transportation Co v New York City* 438 US 104 (1978).

⁵ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (‘*Bank Nationalisation Case*’).

⁶ *Yanner v Eaton* (1999) 201 CLR 351.

⁷ See *Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392, 488-489 (Callinan J).

of a policy objective). However, that control may have been weakened over the last 20 years.⁸ Callinan J now openly doubts the correctness of the distinction.⁹

- The requirement of ‘just terms’ is not an effective control. Although there is some dispute about its requirements, the balance of authority is leaning to a requirement that compensation provide an indemnity to the affected property owner rather than a just accommodation of public and private interests.¹⁰
- f. It has also used a variety of verbal formulae to attempt to address the same problem. For example,
- whether the legislation effecting the acquisition was a necessary or characteristic means of achieving an objective within the scope of Commonwealth legislative power, not being solely or chiefly the acquisition of property;¹¹
 - whether the legislation was a genuine adjustment of competing rights and not directed at the acquisition of property;¹²
 - whether the legislation was enacted under a grant of power that ‘clearly encompassed the making of laws providing for the acquisition of property unaccompanied by any quid pro quo of just terms’;¹³
 - whether the legislation was ‘clearly directed only to the prevention of a noxious use of proprietary rights’;¹⁴
 - whether the right acquired (usually a statutory right) was one that was ‘inherently susceptible of statutory modification or extinguishment’;¹⁵
 - whether, in the context of the legislation, just terms were an ‘irrelevant or incongruous’ notion.¹⁶
- g. These formulae have not proved notably successful in producing clarity.

⁸ See eg *Mutual Pools* (1994) 179 CLR 155, 185 (‘some identifiable and measurable countervailing benefit or advantage’ suffices); *Smith v ANL* (2000) 204 CLR 493 [96].

⁹ *Smith v ANL* (2000) 204 CLR 493, 545–7.

¹⁰ For discussion see *ibid*, 500–1 (Gleeson CJ).

¹¹ *Airservices* (2000) 202 CLR 133, 180, 248–9, 252.

¹² *Ibid* 298–299.

¹³ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160–1.

¹⁴ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 414–6. Cf *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992).

¹⁵ *WMC Resources* (1998) 194 CLR 1, 35.

¹⁶ *Airservices* (2000) 202 CLR 133, 251.

8. The result is that at the High Court level and below, s 51(xxxi) cases are frequently sharply divided and the results are unpredictable. In particular, policy questions about appropriate transitional arrangements in legislative schemes are transformed into questions about whether entitlements under the old scheme were or were not property (a question that is not capable of any definite answer given the malleable nature of the property concept) and about whether the advantage received by the Commonwealth or someone else was sufficient to constitute an acquisition.
9. It might be argued that these disadvantages would not be so significant in the context of a Victorian Charter of Rights.
 - a. *The Charter would not be entrenched so that the legislature could always overrule a judicial determination that compensation was payable.* There is some force to this argument. But the tangible immediacy of a judicial determination that compensation was payable is likely to make this politically unviable. This is a context in which the dialogic model of rights review is unlikely to be effective.
 - b. *The Charter would only apply to individuals and not to corporations; so the ‘problem’ of corporations attempting to undermine regulatory schemes by seeking compensation would not arise.*¹⁷ Regulatory legislation rarely distinguishes between corporate entities and individuals – it regulates all who operate in an area or engage in a certain kind of conduct. Legislation is more likely to provide that “Property owners must not ... ” or “Licence holders’ licences are modified ... ”. A court interpreting this language will have little basis for adopting an interpretation that affords compensation to individual property owners or licence holders but denies it to corporate licence holders. It will be driven to an interpretation that compensation should be provided to all, or to none (and in which case there may be a declaration of incompatibility). These may be desirable results – I don’t comment on that. My point is that confining a Charter’s operation to individuals’ human rights does not mean that legislation will be interpreted in a way that protects only individuals’ rights.
10. In fact it seems to me that the disadvantages of s 51(xxxi) would be *more pronounced* in a State context rather than less. In the State context, there is more direct regulation of property (in particular land and common law rights of action) than occurs at Commonwealth level. A State version of s 51(xxxi) would open up a judicial debate about whether a right to compensation ought to be interpreted into legislation by the courts in relation to every planning, heritage and environmental law.
11. Nonetheless I remain of the view that some protection of property rights is necessary in the Charter. But s 51(xxxi) does not provide a suitable model.

¹⁷ I assume for present purposes that there is something to the argument that corporations should not be protected by the Charter (and that is far from clear).

12. I set out my preferred option in my previous submission (1 August 2005). The final element of that option was a requirement that property not be deprived except in accordance with law.
13. An alternative might be to pick up a provision like s 30 of the Land Acquisition and Compensation Act 1986, which represents long-standing Victorian practice and addresses the major property holdings of most individual Victorians. The jurisprudence under the Act is by no means straightforward. But adopting that provision would avoid creating an additional complex jurisprudence under an analogue of s 51(xxxi).

I would be very happy to discuss any of these issues or other related issues with the Committee if that would be of assistance. Thank you again for the opportunity of making this submission.

Yours sincerely

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APPENDIX: Territory cases

1. Wylkian Pty Ltd v Australian Capital Territory [2003] ACTCA 11

The appellant was a fireworks importer, distributor and seller who held a licence to sell fireworks under the dangerous goods legislation. Amendments to dangerous goods regulations restricted the class of persons to whom fireworks could be sold. W contended that its licence was ‘a valuable trading right’ (and therefore ‘property’) that had been acquired as a result of the amendments.

The ACT Supreme Court Court of Appeal dismissed the appeal and approved the observations of the trial judge:

Approaching the legislation in question here with these principles [those enunciated by the High Court in a series of cases on s 51(xxxi) of the Constitution] in mind it does not seem to me that there is any accrued right or anything in the nature of property arising out of the content of the statutory regulation of dangerous goods, and fireworks in particular, at any one time. In my opinion the legislation envisaged that the Regulation would reflect what needed to be done in the public interest from time to time in relation to dangerous goods, consistently with the Act. Licences or permits issued pursuant to the legislation or the delegated legislation are exemptions from what the legislation otherwise makes unlawful and cannot govern the content of what is or is not unlawful. Furthermore, even if there were property, in a broad sense, of that kind, I cannot see that the amendments involve any acquisition of it by anybody. There is no suggestion that others will take the benefit of that which is now denied to the plaintiffs. (quoted in the Court of Appeal judgment at [11])

2. Australian Capital Territory v Pinter [2002] FCAFC 186:

The respondents had claimed compensation under ACT criminal injuries compensation legislation. The legislation was amended while the respondents’ claim to compensation was pending. The transitional provisions applied to the respondents’ claim which was *still* pending at the commencement date. They provided that when an award was eventually made, it could no longer include any compensation for pain and suffering.

The Supreme Court held by majority (Miles CJ and Gray J; Crispin J dissenting) that the transitional provisions effected an uncompensated acquisition of property.

In an equally sharply divided decision, the Full Court of the Federal Court dismissed an appeal (Black CJ, Spender J and Higgins J in the majority; Finn J and Dowsett J dissenting).

3. TC Distributors (NT) Pty Ltd v Northern Territory [2002] NTCA 2

The appellants owned a number of vehicles which were licensed under NT legislation as motor omnibuses. The legislation was amended to prevent motor omnibus ‘plying for hire’ in taxi or minibus areas (ie. urban/suburban areas).

The appellants contended that the amendments effected an acquisition of property requiring compensation under the self government Act or under an Historic Shipwrecks clause¹⁸ in other legislation.

The Supreme Court of the Northern Territory Court of Appeal held that there was not a relevant acquisition of property:

In my view Angel J [the trial judge] was correct in concluding that an omnibus licence under the earlier legislation was not an interest in property. Under the legislation the holder of the licence was "immunised" from the criminal offence of plying a vehicle for hire without a motor omnibus licence (s39). The licence itself was inherently susceptible of statutory modification or extinguishment. It was a licence that was issued for a period of three years "unless sooner cancelled or suspended" (s43). The licence could be renewed but there was no obligation upon the respondent to renew (s43). The motor omnibus licence was issued subject to such conditions as the Director thought fit and specified in the licence and those conditions were able to be amended or revoked at any time by written notice (s41). Further, the Director could add new conditions at any time by written notice directed to the licence holder (s41). The legislation did not include any provision enabling the transfer of the licence from one person to another and, in this regard, is to be contrasted with the situation regarding taxi licences (s26). Also, by way of contrast to taxi licences, omnibus licences were unlimited in number and available to all who qualified and made application. They were unlimited in scope. There was no market in such licences. (Riley J at [15].)

4. Elliott v Minister for Transport and Infrastructure Development [2000] NTSC 91

This case arose under the same legislation as that considered in *TC Distributors*. The plaintiffs held taxi licences (rather than omnibus licences). Under the amendments, the taxi industry was 'deregulated'. Previous licenses were cancelled and a compensation regime was put in place.

In the Northern Territory Supreme Court, Angel J found that this amounted to an acquisition of property requiring compensation under the Self Government Act or under an Historic Shipwrecks clause:

In the present case I think there has been an acquisition of property. The plaintiffs' taxi licences, a monopoly right shared by a restricted number, have been cancelled and coincidentally and correspondingly a right with respect of the same subject matter, the ability to operate a taxi cab for reward, is given to any number of the public upon application and payment of a prescribed fee. The scheme as a whole is more than the mere extinguishment of a right which is inherently susceptible to that course (at [19]).

The remaining question then was whether the compensation regime put in place under the amendments passed muster under the Self Government Act. That question was not resolved.

¹⁸ Where the application of a provision of this Act would, but for this section, result in an acquisition of property otherwise than on just terms, the person from whom the property is acquired shall be entitled to receive just compensation for the acquisition, and a court of competent jurisdiction may determine the amount of the compensation or make such order as, in its opinion, is necessary to ensure that the acquisition is on just terms.

5. Jenkins v Territory Insurance Office [2001] NTSC 0092

This case again concerned transitional provisions in compensation scheme reform legislation. The plaintiff was injured in a motor accident. The legislative compensation scheme was then amended to cap claims for future economic loss by non-Territory residents. That defendant argued that the cap should be applied when the plaintiff's compensation was assessed. The plaintiff argued that the amendment introducing the cap effected an uncompensated acquisition of property.

Riley J accepted the plaintiff's submission, finding that the amending provision was invalid in its operation on the plaintiff, saying 'the acquisition of property without just terms is neither necessary to, nor characteristic of, legislation dealing with the subject matter of the scheme established under the Motor Accidents (Compensation) Act'.