

SECTION 20

PROPERTY RIGHTS

Section 20

A person must not be deprived of his or her property other than in accordance with law.

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POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 20?

You will need to consider s. 20 in assessing legislation, a policy or a program where it:

- provides for acquisition, seizure or forfeiture of a person's property under civil or criminal law;
- confers on a public authority a right of access to private property;
- limits or terminates property rights (for example, by legislation which establishes a limitation period);
- restricts the use of private property (for example, under planning laws);
- restricts or regulates established patterns of access (especially for commercial or business purposes) to public property;
- modifies commercial or business licensing arrangements;
- implements government control over its own property (for example, resumption of land);
- deprives a co-owner of property;
- impounds or suspends registration of a motor vehicle;
- creates a charge or mortgage on land;
- creates a charge or mortgage on personal property.

These policy triggers are not comprehensive.

DISCUSSION

Section 20 establishes a right not to be deprived of property other than in accordance with law. This right does not provide a right to compensation. Although the Charter does not, as a matter of law, require compensation when property is acquired, you should consider in those circumstances whether compensation is required as a matter of policy. The Scrutiny of Acts and Regulations Committee will be likely to continue to comment adversely on legislation that provides for the acquisition of property without compensation, although it has been recognised by the High Court that the requirement under the federal Constitution that the Commonwealth Parliament cannot pass a law that acquires property without compensation on just terms (s. 51 (xxxi)) does not apply to the States.¹⁶⁷

Section 20 ensures that the institution of property is recognised and acknowledges that Victoria is a market economy that depends on the institution of private property.

The scope of the right protected by s. 20 is a person's right not to be deprived of his or her property other than in accordance with law.

¹⁶⁷ *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399.

As mentioned above, this provision is distinct from the provision in the Australian Constitution which provides property guarantees in relation to property acquired under federal law. Section 20 applies to Victorian law, not Federal law.

It is well established in international human rights law that a person must not be arbitrarily deprived of his or her property. Deprivation otherwise than in accordance with law is an example of arbitrary deprivation. The *Universal Declaration on Human Rights* was the first international instrument to codify this right in article 17, which reads:

- (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.

What this right means

In one sense it is quite impossible for a government to deprive a person of his or her property otherwise than in accordance with law: if a Government acts unlawfully its actions will not be effective to deprive a person of his or her *title* to, or ownership of, his or her property.

However, 'property' in s. 20 has a wider meaning than title to or ownership of property, and 'deprived' has a wider meaning than being stripped of title or ownership (discussed below on page 130).

The primary impact of s. 20 will be in relation to these wider senses of property and deprivation. To comply with the right in these contexts, the deprivation must be authorised by law.

In the vetting context this means:

- Where the common law or legislative provision deprives a person of title to, or ownership of, his or her property, you should ensure that the powers conferred by the common law or legislative provision are not arbitrary. If they are not arbitrary, nothing further is required to satisfy the right contained in s. 20. (However, you should take into account any other policy development guidelines that require, for example, provisions for notice, consultation, review and compensation. The Charter does not displace any such existing guidelines or existing legal requirements.)
- Where the common law or legislative provision authorises the deprivation of property (in the wider sense), you should ensure that the powers conferred by the common law or legislative provision are not arbitrary. If those powers cannot be exercised arbitrarily, nothing further is required to satisfy the right contained in s. 20. (Again, however, you should take into account any other policy development guidelines.)
- Where a policy authorises or requires a deprivation of property (in the wider sense), you should ensure that the policy is authorised by the common law or legislation and that the powers conferred by the law are not arbitrary.

'Property'

The term 'property' is not defined in the Charter. It includes both real and personal property and any right or interest regarded as property under Victorian law. For example, the following will be included under s. 20:

- personal possessions;
- land;
- contractual rights;
- leases;
- shares;
- patents;
- debts.

The notion of 'property' also extends to statutory rights, particularly where they have the characteristics of traditional property rights such as permanence and transferability.

Importantly, property could also apply to non-traditional and less formal rights in relation to property, such as a licence to enter or occupy land and the right to enjoy uninterrupted possession of land.

The above list is not comprehensive. These Charter Guidelines cannot provide policy officers with a comprehensive statement of Victorian law on the definition of property. It is important that you familiarise yourself with the range of rights and interests considered to be 'property' under Victorian law which might be relevant to s. 20.

'Deprived'

The term 'deprived' is not defined in the Charter.

It will include situations where:

- title to property is transferred to someone other than the owner;
- title to property is extinguished;
- a regulation has the effect of substantially depriving a property owner of the ability to use his or her property or part of that property (including enjoying exclusive possession of it, disposing of it, destroying it, transferring it or deriving profits from it).

'Other than in accordance with law'

Section 20 only prohibits a deprivation of property that is carried out unlawfully.

To comply with this right, if a program or a policy may deprive a person of his or her property:

- the deprivation must occur under powers that are conferred by legislation or the common law; and
- if the deprivation of property occurs under discretionary powers, those powers should be confined and structured rather than arbitrary or unclear.

The second requirement is imposed because the requirement that permissible deprivations only be carried out 'in accordance with law' imports a requirement that the law not be arbitrary – that it be accessible to the public and formulated precisely enough to guide those who apply the law. Consult Measures to Improve Compliance below for ways to help ensure that these requirements are met.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the right protected by s. 20 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

KEY POINTS TO REMEMBER

- A person must not be deprived of his or her property unless the law provides that he or she may be.
- The right to property does not entail at state level any right to compensation upon deprivation.

MEASURES TO IMPROVE COMPLIANCE

If you are developing any policy or legislation that might result in the deprivation of property, ensure that:

- any deprivation of property is authorised by legislation or the common law;
- the criteria that is to be used for determining when it will occur are clearly articulated; and
- the criteria will not result in any discrimination, as defined in the Charter.

RELATED RIGHTS AND FREEDOMS

If your policy or legislation involves an issue under s. 20, you may also wish to examine whether the policy or legislation has an impact upon s. 13 which protects against the unlawful and arbitrary interference with privacy, family, home and correspondence.

HISTORY OF THE SECTION

The ICCPR does not contain a provision that protects against arbitrary deprivation of property, although articles 2(1), 24(1) and 24 of the ICCPR prohibit discrimination on various grounds, including property. Section 20 also reflects part of the content of article 17 of the Universal Declaration on Human Rights.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law

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