IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S389 of 2011

BETWEEN:

British American Tobacco Australasia Limited
ACN 002 717 160
First Plaintiff

British American Tobacco (Investments) Limited
BCN 00074974
Second Plaintiff

British American Tobacco Australia Limited
ACN 000 151 100
Third Plaintiff

and

The Commonwealth of Australia
Defendant

SUBMISSIONS OF THE PLAINTIFFS IN REPLY

Date of document: 11 April 2012
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Part I: Publication of Submissions

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

A. Facts:

2. The Court should not receive the 13 volumes of "Schedule C Documents" which the Commonwealth seeks to press upon it. The materials on which the Commonwealth seeks to rely find their terminal point in the four so-called "constitutional facts" set out at [17] of its submissions. The findings of fact which the Commonwealth seeks only find expression in support of the novel argument developed at [79] – [95] of the Commonwealth's submissions. If the Court rejects that argument, they have no further role to play in this proceeding. For the reasons which are advanced at paragraphs [17] to [30] below, the "constitutional principle" for which the Commonwealth contends at [84] of its submissions should be rejected, in which case the Court need not treat further with the Commonwealth's materials.

3. The material advanced in support of the first "constitutional fact" for which the Commonwealth contends ("smoking ... causes grave harm to members of the public and public health") at [19] – [27] of the Commonwealth's submission only adds vehemence to the facts agreed in [19] and [20] of the Questions Reserved and admitted by BAT at paragraph 8 of its reply, and adds nothing to any analysis of the soundness of the novel constitutional principle for which the Commonwealth contends. The material referred to at [28] – [32] of the Commonwealth's submissions in support of the second "constitutional fact" which it advances ("retail packaging promotes tobacco products") likewise rises no higher than the fact agreed at [9] of the Questions Reserved. The third "constitutional fact" developed at [33] – [35] of the Commonwealth's submissions concerns only the purpose of mandatory health warnings, which is obvious on their face, and that some people might find them persuasive enough to quit smoking.

4. The fourth "constitutional fact" for which Commonwealth contends at [36] – [42] concerns the possible efficacy of plain packaging. But what the Commonwealth seeks to establish by way of the material referred to at [36] – [42] of its submission is not a "constitutional fact" within orthodox understanding of this Court's practice; that is, a primary fact of history, contemporary events,[1] economic conditions,[2] science, or nature drawn[3] from judicial notice, accepted works of reference or history,[4] collections of official, disinterested statistics or other authoritative works[5] and the existence of which primary fact supplies a criterion of constitutional validity.[6] What the Commonwealth seeks to do by the fourth so-called "constitutional fact" is to entreat the Court to make a predictive finding as to the likely effect of the *TPP Act*, based on speculative opinions as to the response of persons to the presence

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[1] *Sloan v Pollard* (1947) 75 CLR 445 at 469 per Dixon J; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 195 – 197 per Dixon J; at 207 – 208 per McTiernan J; at 222 - 225 per Williams J; at 267 per Fullagar J; at 276 – 277 per Kitto J; *Griffin v Constantine* (1954) 91 CLR 136 at 142 per Kitto J.

[2] *Clark King & Co Pty Limited v Australian Wheat Board* (1978) 140 CLR 120 at 174 – 177 per Stephen J, and at 189 - 190 per Mason and Jacobs JJ.

[3] *Jenkins v Commonwealth* (1947) 74 CLR 400 at 402 per Williams J; *Richardson v Forestry Commissioner* (1988) 164 CLR 261 at 294 – 295 per Mason CJ and Brennan J; *Levy v Victoria* (1997) 189 CLR 579 at 599 per Brennan CJ.

[4] *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 298 per Dixon J; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 196 – 197 per Dixon J; *Griffin v Constantine* (1954) 91 CLR 136 at 142 per Kitto J.

[5] Such as the statistics and Industries Assistance Commission report relied on in *Clark King & Co Pty Limited v Australian Wheat Board* (1978) 140 CLR 120 at 174 – 176 per Stephen J, and at 189 – 190 per Mason and Jacobs JJ.

[6] *Commonwealth Freighters Pty Limited v Sneddon* (1959) 102 CLR 280 at 292 per Dixon CJ; *Breen v Sneddon* (1961) 106 CLR 406 at 411 – 411 per Dixon CJ;

or absence of certain "stimuli" on cigarette packets, to impress upon the Court the wisdom and desirability of the *TPP Act*. But this is never a relevant inquiry under Australian law: legislation which engages a constitutional guarantee does not escape it by reason of opinions as to the desirability of the law.[7]

5. If (against BAT's submission) the factual efficacy of plain packaging is relevant to the question whether the *TPP Act* effects an acquisition of property on other than just terms, that fact cannot be established by force of the so-called "statutory judgment" in section 3(2) of the *TPP Act*.[8] Neither can the expressions of opinions by international bodies,[9] or bodies appointed by the Commonwealth[10] do so. The Court must itself be satisfied as to the soundness of the opinion and its foundation in fact.[11] This is no less true in the case of constitutional fact than in the case of any other fact in any other litigation.[12] The empirical basis of the Commonwealth's so-called "statutory judgment"[13] is market survey research, much conducted overseas[14] and sometimes in the nature of "polemics".[15] The caution needed when courts are confronted with survey evidence is well established: the reliability of survey evidence can be significantly affected by the form of the questions, sample size, the expertise of the interviewers and the procedure by which the results were recorded.[16] If this Court is to be asked to endorse the soundness of the opinion which constitutes the predictive "statutory judgment" expressed in section 3(2) of the *TPP Act*, it is entitled to demand that it should only be asked to do so after the empirical basis of, and the reasoning underpinning, that opinion is tested by the ordinary rules of evidence and trial procedures applicable[17]. The Court ought not be asked to do so only by "a flickering lamp [through] constitutional facts discernible only from shadowy materials".[18] At trial, the reliability of the surveys relied on by the Commonwealth, their translatability to Australian conditions and the soundness of the predictive opinions drawn from them may be the subject of proper examination that is not possible in a hearing before the Full Court of this Court.[19]

6. Accordingly, if the constitutional facts asserted by the Commonwealth at [17] are relevant to the issues arising in this proceeding, the Schedule C materials should not be received, and the

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[7] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 275 per Kitto J; *Clark King & Co Pty Limited v Australian Wheat Board* (1978) 140 CLR 120 at 153 – 154 per Barwick CJ; *Leask v Commonwealth* (1996) 187 CLR 579 at 602 per Dawson J; Heydon, *Cross on Evidence* (8th Aust Edition, 2010) at [3156], p 194 – 195.

[8] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 205 – 206 per McTiernan J; at 224 per Williams J; at 264 – 265 per Fullagar J; at 275 per Kitto J.

[9] Such as the Framework Convention on Tobacco Control referred to at [37] of the Commonwealth's submissions.

[10] Such as the National Preventative Health Taskforce, see SCB2 p 769 – 770; SCB3, p 875 – 876, p 954 – 956. As with the Commonwealth's submissions, "SCB" refers to the Schedule C Book produced by the Commonwealth.

[11] *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 at 622, [91] – 623, [92] per Heydon J.

[12] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 222, at 225 per Williams J.

[13] SCB2 p 720, esp., at p 769 – 770.

[14] The documents at SCB6 p 2400, SCB7 p 2569, SCB8 p 3472 concern studies conducted in Canada. The documents at SCB5 p 1821, SCB5 p 2130, SCB5 p 2134 concern New Zealand studies. The study at SCB5 p 1878 is a British study.

[15] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 196 per Dixon J. The studies at SCB13 p 5483, SCB5 p 1948, and SCB5 p 1907 appear in a journal entitled "Tobacco Control". The studies at SCB5 p 1930, and SCB5 p 1937 appear in a journal entitled "Addiction".

[16] *Arnotts Limited v Trade Practices Commission* (1989) 24 FCR 313 at 358 – 364, per Lockhart, Wilcox and Gummow JJ; *State Government Insurance Corporation v Government Insurance Office of New South Wales* (1991) 28 FCR 511 at 542 – 544 per French J.

[17] The exercise of Chapter III judicial power requires that facts be determined in accordance with rules and procedures which truly permit the facts to be ascertained: *Nicholas v R* (1998) 193 CLR 173 at 208-9 [74] per Gaudron J.

[18] *Betfair Pty Limited v Racing New South Wales* [2012] HCA 12 at [70] per Heydon J; see also, Kiefel J at [128].

[19] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 191 per Dixon J.

proceeding should be remitted for a trial of those issues as contemplated by Question (2) appearing at [37] of the Questions Reserved.

B. BAT's property:

7. *BAT's statutory intellectual property rights*: Paragraphs [46] – [55] of the Commonwealth's submissions use the undoubted fact that the registration of a trade mark, patent or design or the recognition of copyright does not confer on the owner an immunity from the operation of the law,[20] to assert a narrow and formalistic characterisation of the nature of BAT's statutory proprietary interests inconsistent with the focus of s 51(xxxi) of the Constitution on the substance and reality of proprietary interests, and its status as a constitutional guarantee.[21] Unlike the *Trade Marks Act 1955* (Cth), the *Trade Marks Act 1995* (Cth) provides expressly that a trade mark is personal property[22]. The *Trade Marks Act 1995* contemplates use of that property as an incident of ownership of a registered trade mark[23], and it divides the right "to use" from the right to obtain relief against an infringer.[24] In any event, rights of exclusion are of the essence of all proprietary rights.[25] For example, a right to use property without exclusive possession is a licence and not a lease.[26] But rights to exclude have substance only if accompanied by a concomitant liberty to use. Rights to exclude others from using property (including rights to relax that exclusion by licence)[27] have no substance if all use of the property is prohibited. For example, trade marks have as their purpose use on or appurtenant to goods:[28] if neither the registered owner nor anyone else can use the trade mark on the goods, the rights of exclusion have been deprived of their substance and reality. It is no answer to the application of s 51(xxxi) to a law that imposes restrictions on the use of property tantamount to an acquisition to say that the owner is left with their formal rights leached of all use and value.[29] It is also to be recalled that the interest acquired by a law under s 51(xxxi) need not correspond to the property interest sterilized.[30] In the light of the almost total sterilization of BAT's intellectual property rights, effectively prohibiting their use by BAT or anyone else, the Commonwealth's formalistic answer that BAT still possesses the "empty husk"[31] of its intellectual property rights and BAT could still prevent others using its

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[20] *Componar Sociedad Limitada v Nike International Limited* (2000) 202 CLR 45 at 73, [62] – 75, [67].

[21] *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J; *Newcrest Mining (WA) Limited Commonwealth* (1997) 190 CLR 513 at 595 per Gummow J.

[22] Section 21(1). See also, *Trade Marks Act 1994* (Cth), s 20, which Act was repealed by the *Trade Marks Act* 1995, s 5.

[23] See: s 7 ("use of a trade mark"); s 8 ("authorized use" of a trade mark); s 17 (a "trade mark" is used or intended to be used to distinguish goods or services); s 20(1) (registered owner has (inter alia) exclusive right to use); s 26 (use by authorized user); s 27 (use, proposed use, proposed authorization of use or proposed assignment with intent to use being a condition for application for registration); s 59 (no intention to use &c is a ground of opposition to registration); s 92 (no intention to use &c, and non-use, are grounds for removal); s122(1)(e) (exercise of a "right to use" a registered trade mark does not infringe another registered trade mark). But ss 28 and 29 of the *TPP Act* modify the operation of *Trade Marks Act* and the *Designs Act* respectively in relation to some of the consequences of non-use.

[24] See s 20(1) (use) and (2) (right to take action against an infringer of the *Trade Marks Act*).

[25] K Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 294 – 295, quoted with approval in *Yanner v Eaton* (1999) 201 CLR 351 at 365, [17] – 366, [18] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

[26] *Radaich v Smith* (1959) 101 CLR 209 at 214 per McTiernan J; at 219 per Taylor J; at 221 – 223 per Windeyer J.

[27] *Trade Marks Act 1995*, s 20(1)(b); *Patents Act 1990*, s 13(1); *Designs Act 2003* s 10(3)(f); *Copyright Act 1968* s 13(2) and s 14.

[28] *The Attorney General for New South Wales v The Brewery Employes Union of NSW* (1908) 6 CLR 469 at 513 per Griffith CJ; *Henry Clay & Bock Co Ltd v Eddy* (1915) 19 CLR 641 at 655 per Isaacs J. That is why the Commonwealth's reference at [51] of its submissions to use of the trade marks on letterheads or buildings, etc is irrelevant.

[29] *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 284 per Stephen J; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 284 per Deane J; *Smith v ANL Limited* (2000) 204 CLR 493 at 504, [21] – 505, [22].

[30] *Newcrest v Commonwealth* 190 CLR 513 at 634 per Gummow J.

[31] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286 per Rich J.

intellectual property (which use would be an offence under the *TPP Act*), is one which avoids the substance of the matter and denies the reality of BAT's proprietorship.

8. *BAT's rights not inherently susceptible to variation*: When rights are found not to be within the protection of s 51(xxxi) on the basis that they are inherently susceptible to variation, that is because their content at birth is so contingent or fragile that they cannot be included in the family of rights falling within the notion of property in s 51(xxxi).[32] The proposition that BAT's statutory intellectual property rights are of this nature is denied by the consistent authority of this Court,[33] the constitutional basis of the rights,[34] the terms of the statutes[35] and the Commonwealth's admission to the contrary.[36]

9. The Commonwealth's submissions to the contrary at [56] – [63] offer, in substance, two justifications: first, it asserts (at [58]) that intellectual property rights find their justification in the public interest, and, therefore, may be modified or extinguished to the point of acquisition without compensation if an (asserted) public interest so demands. On one view, all property rights find their philosophical justification in their utility to society[37]. But that does not make all property susceptible to uncompensated confiscation if the public interest is said to demand. Secondly, the Commonwealth points (at [59] – [60]) to previous regulation of the manner of the use of statutory intellectual property including, but not limited to, regulation of tobacco packaging. That elides susceptibility to regulation with the content of the property interest. The use of land is subject to many regulations to ensure that nuisance is not caused to neighbours. However, that does not make the rights of ownership of land of a non-proprietary character.

10. *BAT's goodwill*: The submissions of the Commonwealth at [64] – [68] concerning the proprietary nature of BAT's goodwill confuse the sources of goodwill, its proprietary nature and the value of goodwill.[38] The source of BAT's goodwill is its *past* trading activity so as to generate reputation and recognition.[39] It is wrong to say, as the Commonwealth does at [66], that goodwill is derived from the *continuation* of the trading activity. Goodwill's proprietary nature derives from the *present* ability to restrain invasion of that reputation.[40] Therefore, to say that a business's trading activities may be affected by regulation in the future does not answer a claim that there has been an acquisition of a proprietary interest in goodwill arising from past trading activities. The value of goodwill lies in the propensity of customers to return as they have in the past, and, upon that propensity, for it to be bought and sold.[41] That value may be affected by future regulation. But that is precisely BAT's complaint: the *TPP Act* strips BAT of its goodwill by preventing the use of the images and marks which created

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[32] *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 38, [86] per Gaudron J; at 73, [193] – 75, [203]. *Attorney General (NT) v Chaffey* (2007) 231 CLR 651 at 664, [25] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

[33] *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 527 per Dawson and Toohey JJ; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 602 per Gummow J; *Commonwealth v WMC Resources Limited* (1998) 194 CLR 1 at 29, [53] per Toohey J and at 70 – 71, [182] – [185] per Gummow J; *Attorney General (NT) v Chaffey* (2007) 231 CLR 651 at 664, [24] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 362, [93] per French CJ.

[34] *Attorney General (NSW) v The Brewery Employes Union of NSW* (1908) 6 CLR 469 at 513 per Griffith CJ *Grain Pool of Western Australia v Commonwealth* (2001) 202 CLR 479 at 496, [24] – [25] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[35] *Trade Marks Act*, s 21; *Patents Act*, s 13(2); *Designs Act*, s 10(2); *Copyright Act*, s 196(1).

[36] Commonwealth's defence paragraph 6(a)(iii), 7(a)(ii) and (b)(iii).

[37] J Locke, *Second Treatise of Government*, Chapter V, "Of Property", see esp., §32 (1690).

[38] *Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 614 – 615, [22] per Gaudron, McHugh, Gummow and Hayne JJ.

[39] Questions Reserved at [10] – [11]; *Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 613, [16] – 614, 19].

[40] *Conagra Inc v McCain Foods (Aust) Pty Limited* (1992) 33 FCR 302 at 366 per Gummow J.

[41] *Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 612, [15] - 614, [19] and 624, [48].

it, and, by reason of the attendant benefits it confers on the Commonwealth and others, effects an acquisition of that property. Nothing in the reasoning of Dixon J in *British Medical Association v Commonwealth*[42] denies the correctness of that complaint.

11. ***BAT's retail packaging***: The Commonwealth's answer to BAT's claim, based on its retail packaging, is to assert, based on a statement in the *Industrial Relations Act Case*,[43] that s 51(xxxi) does not apply to acquisitions of property in the future, and to assume that all BAT's retail packaging is yet to be acquired (see Commonwealth's submissions at [68] – [69]). There is no basis for the latter assumption in the Questions Reserved.[44] In any event, the *Industrial Relations Act Case* cannot carry the weight the Commonwealth seeks to impose on it. The property there at issue were rights of action yet to accrue which would be shaped by the law as it obtains when the cause of action accrues. In the case of corporeal property the situation is different. It could hardly be doubted that a law that vested in the Commonwealth all real property now or at any time acquired by a specified person would (whatever its other difficulties) effect an acquisition of property when acquired by that person. That is the substance of the *TPP Act*: whenever BAT acquires physical chattels for its retail packaging they will *eo instanti* become subject to the *TPP Act*, and BAT's rights in those chattels will be diminished and an acquisition of property effected.

C. Acquisition of property:

12. At paragraph [73] of its submissions the Commonwealth characterises the benefits it obtains by the *TPP Act* as: improving public health, giving effect to international treaty obligations, reducing the appeal of tobacco products, and reducing the potential for retail packaging to mislead. The Commonwealth then denies those objects the character of a benefit in the nature of property. But to identify the objects of the legislation, rather than the means employed to achieve the objects, and then to deny those objects the character of a property interest is not a correct approach. A similar approach would characterise the benefit conferred by the legislation at issue in *Newcrest* as the preservation of the natural environment of the Kakadu National Park, and ignore the fact that the object was to be achieved by the sterilisation of Newcrest's property rights.[45] The correct question is whether the *TPP Act* seeks to achieve its objects by means that involve the conferral on the Commonwealth, or some other person, of "at least some benefit or advantage relating to the ownership or use of property"[46].

13. For the reasons given in BAT's primary submissions at [46] - [48], the Commonwealth's submission at [74] that the *TPP Act* does not appropriate the plaintiffs' property to the "use and service of the Crown"[47] cannot be sustained, even if that is the correct way of framing the enquiry[48]. The *TPP Act* confers upon the Commonwealth the right of a property owner because, as a concomitant to sterilising BAT's property, it prescribes, for all practical and

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[42] (1949) 79 CLR 201 at 270. In any event, in *Smith v ANL Ltd* (2000) 204 CLR at 505, [23] Gaudron and Gummow JJ commented that the legislation in that case "today perhaps would be though to be nearer the line of invalidity".

[43] (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[44] See paragraph [17] and [18] which are cast in the present and past tense.

[45] *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513 at 635 per Gummow J.

[46] *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 185 per Deane and Gaudron JJ; *ICM Agriculture* (2009) 240 CLR 140 at 179 [82] per French CJ, Gummow and Crennan JJ, at 201 [147] per Hayne, Kiefel and Bell JJ, and at 215 [190] per Heydon J (dissenting in result).

[47] *Attorney General (Cth) v Schmidt* (1961) 105 CLR 361 at 373 per Dixon CJ.

[48] The correctness of the use of the conception expressed by the phrase "use and service of the Crown" was doubted by Gibbs J in *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408. See also, *R v Smithers ex parte McMillan* (1982) 152 CLR 477 at 488 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ; *Mutual Pools & Staff Pty Ltd Commonwealth* (1994) 179 CLR 155 at 172 per Mason CJ; *Re Director of Public Prosecutions ex parte Lauler* (1994) 179 CLR 270 at 284 per Deane and Gaudron JJ.

valuable purposes, the extent to which, the circumstances in which, the purposes for which, and the way in which, property (both intellectual and physical) will be used in connection with retail packaging and the appearance of the cigarettes. The rights conferred on the Commonwealth by the *TPP Act* are *sui generis*[49]. The rights include the requirements that retail packaging and cigarettes shall comply with ss 18 to 26, thereby prescribing the Commonwealth's own get-up to the exclusion of any feature of BAT's get-up, including its registered and unregistered marks. The rights created by the *TPP Act* need not correspond precisely with what was taken[50], but in this case there is substantial correspondence.

14. The Commonwealth's argument that no property has been acquired depends critically upon the characterisation of the *TPP Act* merely as a restraint upon the plaintiffs' use of their own property, without the Commonwealth gaining any right to use that property itself. Such a characterisation should not be accepted. The fact that the *TPP Act* does not place BAT's property under the control of the Commonwealth with "complete powers of disposition"[51] is not, in the circumstances of the present case, determinative, or indeed relevant. By the *TPP Act*, the Commonwealth has placed control of BAT's intellectual and physical property in its own hands, as described in paragraphs [45] to [50] of BAT's primary submissions. And it has done so with the result that it has acquired the rights referred to in paragraph 13 above.

15. Insofar as the Commonwealth suggests in paragraph [75] of its submissions that the providers of the "Quitline" services obtain no material benefit from having their services promoted, once again the Commonwealth seeks to identify the benefit at the wrong level. The Commonwealth focuses on the ultimate impact of attracting more callers to Quitline, and submits that there is no financial benefit (because it is non-profit), but only an improvement in public health. The relevant inquiry is more direct. The operators of the "Quitline" service are saved the expense of having to acquire the advertising space they have been given for free, or the time and expense of having to promote their services in other ways. A portion of the plaintiffs' pack space is acquired for Quitline for free, and the effectiveness of that advertising is intended to be enhanced by the control conferred upon the Commonwealth over the use of the plaintiffs' property.

16. At paragraph [10] of its submissions, the Northern Territory refers to *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, where Brennan J characterized the rights conferred upon political parties as "a right to the services of the broadcaster".[52] It followed that no property of the licensees was extinguished, and none was created in the hands of the political parties. The *TPP Act*, however, does not require BAT to provide services to the Commonwealth or the operators of the Quitline services free of charge. Rather, it confers a right to control the get-up on BAT's cigarettes and retail packaging. In those circumstances, for the reasons given in BAT's primary submissions, property of BAT is extinguished, and a corresponding proprietary benefit is created in or transferred to the Commonwealth and the Quitline operators. While, in *ACTV*, political parties "acquired none of the rights or privileges conferred by a broadcaster's license";[53] under the *TPP Act* the Commonwealth and the Quitline operators do acquire property rights of the plaintiffs.

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[49] See: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J; *Smith v ANL Ltd* (2000) 204 CLR 493 at 542 [157] per Callinan J; *ICM Agriculture Pty Ltd v Commonwealth* (2000) 240 CLR 140 at 215-6 [190] per Heydon J (dissenting in result).

[50] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305, per Mason CJ, Deane and Gaudron JJ.

[51] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 348 per Dixon J; Commonwealth's Submissions at [74].

[52] (1992) 177 CLR 106 at 166.

[53] (1992) 177 CLR 106 at 166.

D. Regulation and acquisition are not mutually exclusive:

17. In *Theophanous*, a majority of the Court stated that the boundary of the "just terms" requirement of s 51(xxxi) is the point where its application would be "inconsistent" or "incongruous".[54] Earlier decisions of the Court stating the test in terms whether the acquisition of property without just terms is a "necessary or characteristic feature" of the law in question are to the same substantive effect.[55] In paragraph [82] of its submissions, the Commonwealth seeks to characterize these tests as specific manifestations of a general theory of constitutional interpretation applicable to limitations on power. It then applies that general theory (and not the traditionally accepted tests) to the *TPP Act*, in support of its contention that no acquisition of property within the meaning of s 51(xxxi) is effected.

18. The general theory upon which the Commonwealth relies was stated by Brennan J in *Cunliffe v Commonwealth*[56] in the following terms: where an impugned law "invokes the support of a legislative power that is qualified by an express or implied limitation", the law "will not be supported by [the] power if it infringes the limitation on the power unless the infringement is merely incidental to the achievement of a legitimate (that is, non-infringing) purpose or object and the provisions of the law are reasonably appropriate and adapted (proportionate) to that end".

19. There is no general principle of Australian constitutional law that legislation, infringing a constitutional limitation on power, but reasonably appropriate and adapted to a legitimate end within power, will be valid. There are some constitutional limitations where it may be necessary to enquire whether a law is appropriate and adapted to meet a particular end. To take the most obvious example, the implied freedom of political communication does not guarantee absolute freedom of communication on political and governmental matters[57]. Laws that are reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government, are consistent with the constitutional provisions from which the freedom is inferred. A proportionality inquiry is inherent in the expression of such limitations.

20. The limitation on the exercise of power in s 51(xxxi) is of a different nature. Consideration of the particular features of s 51(xxxi) makes clear that there is no role for any proportionality inquiry in relation to its application. If nothing else, s 51(xxxi) only authorises the acquisition of property "for any purpose in respect of which the Parliament has power to make laws". The fact that property is acquired for a legitimate legislative purpose is thus the very *occasion* for the provision of just terms,[58] and cannot be a circumstance pointing to the non-application of the guarantee.

21. Furthermore, once it is recognized that the Parliament can only legislate for the acquisition of property (whether pursuant to s 51(xxxi) or some other power) for a purpose in respect of which Parliament has power to make laws, any attempt to distinguish between laws where the acquisition of property is a purpose of the law, and other laws where the acquisition is incidental to the achievement of some other legislative purpose[59], is destined to be a highly artificial, and unilluminating, exercise. In which category does a law acquiring land for the

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[54] *Theophanous v Commonwealth* (2006) 225 CLR 101 at 126 [60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

[55] See, e.g., *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 179-180 per Brennan J; *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180 [98] per Gleeson CJ and Kirby J.

[56] *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 323-324 per Brennan J.

[57] As the second *Lange* question shows: *Wotton v Queensland* [2012] HCA 2 at [25].

[58] *Smith v ANL Ltd* (2000) 204 CLR 493 at 501 [9] per Gleeson CJ; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 364 [103] per French CJ.

[59] cf paragraph [83] of the Commonwealth's submissions.

purpose of building a defence establishment fall?[60] What about a law providing for the forfeiture of property used or involved in the commission of a crime, for the purpose of obtaining compliance with the law?[61] Every acquisition of property by the Commonwealth must be for some valid legislative purpose other than the acquisition of property *per se*.

22. Even putting to one side the impossibility of identifying the "principal" or "real" purpose of a law acquiring property, the Commonwealth's submission presents a fundamental difficulty. The Commonwealth appears to rely on what might be described as the "causal" significance of any acquisition of property to a legislative scheme. That is to say, it argues that some acquisitions should be regarded as mere "consequences or incidents" of a non-acquisitive purpose (Commonwealth Submissions at [83]-[84]). Such acquisitions are, in other words, but by-products of the legislative scheme. Other acquisitions, presumably, are said to drive the legislative purpose in a more central or direct way. Such a distinction cannot be maintained. No part of a legislative scheme can be dismissed or trivialized as a mere "consequence or incident". To say as much about a legislative acquisition of property cannot conceal the fact that the acquisition is one component of the means by which Parliament has chosen to achieve that ultimate purpose.

23. In any event, what the Commonwealth would seek to characterise here as a "consequence or incident" of the regulation of the sale of tobacco products is, in truth, the fundamental means by which that regulation is achieved. Even if it is accepted that the Commonwealth's "ultimate purpose" in acquiring the plaintiffs' property is the improvement in public health, and that that purpose "and none other" explains the totality of the *TPP Act* (Commonwealth Submissions at [90]) this does not deprive the law of its character as a law with respect to the acquisition of the plaintiffs' property.

24. The decision of this Court in *Newcrest* might be used to test the Commonwealth's submission. No doubt protecting an area of natural significance such as Kakadu from degradation was an entirely proper legislative object. Prohibiting mining activity within that area could not reasonably be argued not to be an appropriate and adapted means of achieving that object. And, equally, the acquisition of Newcrest's property in its mining leases could only sensibly be described as a necessary consequence or incident of the means adopted. Does the Commonwealth suggest that *Newcrest* was wrongly decided and should be overruled?

25. The Commonwealth's submission ignores the fact that, "if, in addition to whatever other characters it may have, the law has the character of a law with respect to the acquisition of property, the law in that aspect must satisfy the safeguard, restriction or qualification provided by s 51(xxxi), namely, the provision of just terms".[62]

26. The Commonwealth seeks to support its submission with an argument that Cancer Council Australia also seeks to make as *amicus curiae*; namely, that a prohibition upon the noxious use of a product does not constitute a taking within the meaning of the "takings clause" in the Fifth Amendment to the Constitution of the United States of America (see Commonwealth Submissions at [85]).

27. There is no principle that legislation which effects an acquisition of property does not fall within s 51(xxxi) of the Constitution if it is for the purpose of protecting public health, and no support for that proposition is found in the United States authorities under the "takings clause" of the Fifth Amendment (applied to the States by the Fourteenth Amendment).

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[60] cf *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

[61] *Re Director of Public Prosecutions; Ex parte Lauler* (1994) 179 CLR 270 at 294 per McHugh J; *Theophanous v Commonwealth* (2006) 225 CLR 101 at 127-8 [68]-[71] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

[62] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 387 [187] per Gummow and Hayne JJ.

Under the Fifth Amendment it is recognized that "if regulation [of the use of property] goes too far it will be recognized as a taking".[63] In applying that principle, the United States Supreme Court has sought to distinguish a "regulatory taking" which attracts the operation of the Fifth Amendment from a mere exercise of the "police power", being the power of the States to promote the safety, health, morals and general welfare of the public".[64] Therefore, regulation of property to prevent it from being used to manufacture alcohol,[65] or as a source of infestation for other property,[66] from being used for industrial or other undesirable purposes where it is in a residential area,[67] or to prevent excavation below the water table which would create safety hazards,[68] have been held to be valid exercises of the "police power" and not "takings" within the Fifth Amendment even though they may affect, to some extent, the value of property.

28. However, the Supreme Court has recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the charge".[69] Thus, regulation which effects a permanent physical occupation of property is a "taking" within the Fifth Amendment no matter how pressing the social need for the regulation.[70] Equally, a regulation that deprives property of all economically beneficial use effects a "taking" no matter what the "police power" justification.[71] Outside those circumstances, in assessing whether a regulation of property effects a "taking" because it "goes too far", the Supreme Court, at one stage, looked, not only to the economic impact of the regulation of the property, but also to whether the regulation was reasonably necessary to achieve a substantial public purpose.[72] However, more recently, in *Lingle v Chevron USA Inc*[73], the Supreme Court has rejected a focus on the purpose of the law and the efficacy of the means selected to achieve that purpose as a relevant inquiry to determine whether it affects a taking and stated that the appropriate test is whether the regulation is the functional equivalent to the appropriation of the property or the ouster of the owner from his property.

29. The discussion of United States authorities by Stephen J in *Trade Practices Commission v Tooth & Co Ltd*[74] or by the House of Lords[75] and Privy Council[76] do not provide any further support to the novel proposition that an acquisition of property for the purposes of promoting public health does not attract the requirement of "just terms" in s 51(xxxi) of the Constitution.

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[63] *Pennsylvania Coal Company v Mahon* 250 US 393, 415 (1922).

[64] *Lochner v New York* 198 US 45, 53 (1905).

[65] *Mugler v Kansas* 123 US 623 (1887).

[66] *Miller v Schoene* 276 US 272 (1928).

[67] *Hadacheck v Sebastian, Chief of Police of the City of Los Angeles* 239 US 394 (1915), *Reinman v City of Little Rock* 237 US 171 (1915).

[68] *Goldblatt v Town of Hempstead* 369 US 590.

[69] *Pennsylvania Coal Company v Mahon* 250 US 393, 416 (1922).

[70] *Loretto v Teleprompter Manhattan CA TV Corp* 458 US 419, 426 – 434 (1982).

[71] *Lucas v South Carolina Coastal Council* 505 US 1003, 1014 - 1019 (1992).

[72] *Penn Central Transportation Co v New York City* 438 US 104, 123 - 127 (1978); *Agins v City of Tiburon* 447 US 255, 260 – 261 (1980).

[73] 544 US 528, 539, 542 - 543 (2005).

[74] (1979) 142 CLR 397 at 413 – 414.

[75] *Belfast Corporation v OD Cars Ltd* [1960] AC 490 at 519.

[76] *Campbell-Rodriques v Attorney General of Jamaica* [2007] UKPC 65 at [17].

30. Examined through the lens of Fifth Amendment jurisprudence, the *TPP Act* both represents a permanent physical invasion of BAT's property (by forcing it to use the Commonwealth preferred get-up on its packaging) and effectively deprives BAT of all economically beneficial use of its own get-up, including its trade marks, patents, designs and the images in which it enjoys copyright, by ousting them from the one medium in which they could be used, namely the packaging. It would, therefore, be a "taking" within the meaning of the Fifth Amendment and, no matter how cogent the public purposes justifying that "taking", the constitutional right to "just compensation" would be engaged.

E. No just terms provided:

31. The Commonwealth's submissions at [96] – [99] seek to diminish the content of the "just terms" to be accorded to the owner of acquired property by deducting from them the asserted value of the perceived public benefit by the confiscation of the property. However, it is precisely to prevent a property owner's interests being sacrificed to a wider public interest that s 51(xxxi) demands just terms. The justice of which s 51(xxxi) speaks is individual justice to the owner of the property, and that involves restoration to the property owner of the value of what is taken.[77] The *TPP Act* makes no attempt to achieve individual justice, as the presence of s 15 of the Act would appear to recognise. The maintenance of the empty husks of BAT's trade marks effected by ss 28 and 29 of the *TPP Act* cannot be regarded as some form of "rehabilitation"[78].

F. Section 15 of the TPP Act is invalid:

32. Section 15 of the *TPP Act* is of a fundamentally different character to s 15A of the *Acts Interpretation Act* 1901 (Cth). Section 15A is a law providing for a rule of interpretation. On the other hand, s 15 of the *TPP Act* is a substantive provision concerning application that is functionally equivalent to s 7A of the *Industrial Relations Act* 1998 (as then in force) about which submissions were made, but no decision given, in *Re Dingjan; Ex parte Wagner*.[79] Provisions of this nature go further than s 15A of the *Acts Interpretation Act* by requiring the Court to give legislation every valid application, and no invalid application, without supplying any criterion (other than "validity") by which that task is to be performed.[80] In the result, the validity or operation of the *TPP Act* cannot be determined by reference to the text of the legislation, but only by reference to its application to particular factual situations. It is not a "reading down" provision, but a "reading up" provision. It follows, that the Court is required to perform a legislative task.

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[77] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310 – 31 per Brennan J; *Smith v ANL Ltd* (2000) 204 CLR 492 at 500, [8] – 501, [9] per Gleeson CJ, 512, [48] – 513, [50] per Gaudron and Gummow JJ; at 531, [109] – [112] per Kirby J; at 541 - 542 [196], at 555 – 556, [194]; *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 at 307, [146] – 211, [183].

[78] See paragraph [98] of the Commonwealth's submissions.

[79] (1995) 183 CLR 323. Section 7A is set out in the reasons for judgment of Gaudron J at 366, footnote (135).

[80] See *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 372 per McHugh J.