IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S389 of 2011

BETWEEN

BRITISH AMERICAN TOBACCO AUSTRALASIA LTD & ORS

Plaintiffs

AND

COMMONWEALTH OF AUSTRALIA

Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY (INTERVENING)

Part I: Certification

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

Part II: Basis of intervention

2. The Attorney-General for the Northern Territory intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Commonwealth.

3. The purpose of the intervention is to make submissions only in relation to two issues arising under Questions (1) and (3), viz:

   (a) whether in its relevant operation the *Tobacco Plain Packaging Act 2011* (**TPP Act**) will confer an interest on the Commonwealth or some third party sufficient to constitute an "acquisition of property" of a kind to which pl 51(xxxi) of the *Constitution* applies;

   (b) whether in its relevant operation the TPP Act falls outside pl 51(xxxi) of the *Constitution* because: (i) the concept of compensation is incongruous; or (ii) any acquisition effected by the law is part of and incidental to the general regulation of the conduct, rights and obligations of citizens in an area regulated in the common interest.

Part III: Leave to intervene

4. Leave to intervene is not required.

Part IV: Applicable constitutional provisions, statutes and regulations

5. See Annexure A to the submissions of the plaintiffs filed on 26 March 2012.

Part V: Statement of argument

A. "Acquisition of property"

6. The "identifiable benefit or advantage" accruing to the Commonwealth or a third party must be proprietary in nature although it need only be slight or insubstantial.[1] It must accrue to the acquirer (or third party) *qua* owner.[2] The mere sterilisation of property by proscription or prohibition does not confer a proprietary interest on the Crown. Where the use of property is prevented by legislation enacted for a public purpose, neither the Commonwealth nor any other person necessarily acquires a proprietary interest of any kind in the property.[3] A statutory proscription will generally only have that effect where the law extinguishes some liability attaching to the Commonwealth or a third party (such as a right to mine minerals and occupy land for that purpose, or a right under a chose in action), and thereby enhances its property interest.[4] The TPP Act does not have that operation and effect; nor does it positively authorise the use of the property by any other person, or confer an executive authority to provide authorisation. The countervailing benefit alleged to have accrued to the acquirer or some third party is not pleaded by the plaintiffs. In submission, the countervailing benefit is said to take six forms.[5]

7. The first category of benefit or advantage which the plaintiffs assert is that the Commonwealth has secured to itself an owner's right to refrain from deploying its property for certain purposes.[6] The statutory

---

1 *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1 at 145 per Mason J, see also at 181 per Murphy J, at 247-248 per Brennan J; *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106 at 165-166 per Brennan J (McHugh J concurring on this point), at 197-198 per Dawson J; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ, at 528 per Dawson and Toohey JJ (McHugh J concurring).

2 In *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1, Deane J suggested (at 287) that the "property" acquired in that case consisted of the bare benefit of the prohibition of the exercise of the rights and use and development of the land which would be involved in doing any of the prohibited acts. That view was not expressed by the other members of the Court who considered the issue. The only similar statement from this Court is the reference by Kirby J in *Smith v ANL* (2000) 204 CLR 493 at 556, to the acquisition of property rights "for the precise purpose of extinguishing them". See also Kirby J in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 92 [237].

3 *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1 at p145 per Mason J. See also at 247-8 per Brennan J. Mason J's analysis in this respect was adopted by the Full Federal Court in *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 163 per Black CJ and Gummow J.

4 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 17 per Brennan CJ; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 634 per Gummow J (Gaudron and Toohey JJ agreeing); *Smith v ANL Ltd* (2000) 204 CLR 493 at 499-500 per Gleeson CJ, at 504 per Gaudron and Gummow JJ; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 311 per Brennan J.

5 Submissions of the Plaintiffs, par 46.

6 Submissions of the Plaintiffs, par 46(a).

intellectual property rights here consist of exclusive rights to do certain acts with respect to the subject matter. The interference with or diminution of statutory intellectual property rights does not necessarily result in the acquisition of a proprietary right by another.[7] The prohibition on the use of the intellectual property rights does not afford the Commonwealth any benefit or advantage relating to the ownership or use of that property in anything replicating the capacity of owner. Nor does the legislation contemplate that the Commonwealth will exploit the intellectual property rights in any commercial or proprietary manner.[8] There is no equivalence between the relevant purposes or rights of the Commonwealth, in either its legislative or executive capacity, and the rights of an owner who chooses to refrain from deploying an intellectual property right for commercial or personal reasons. On proper characterisation the Commonwealth is not appropriating to itself or exercising the right to refrain from deploying a property interest. Rather, it has legislated in what it perceives to be the public interest to prevent all persons engaged in a particular commercial activity, being manufacturers and suppliers of tobacco products, from displaying logos, however described and configured, on the retail packaging of tobacco products or the products themselves.

8. The second category of benefit or advantage which the plaintiffs assert is that the Commonwealth has reserved to itself the right to dictate every aspect of the appearance of the plaintiffs' cigarette packets.[9] A purported benefit of that nature stands in contrast to the vesting of a proprietary interest under which the acquirer (or third party) is given rights of control over property.[10] The latter type of right is an interest in real or personal property that presently exists. It gives the holder rights, in particular circumstances, to deal with that property in a manner inimical to the owner's interests. The provisions of the TPP Act which

---

7 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 527-528 per Toohey and Dawson JJ. Mason CJ, Brennan, Deane and Gaudron JJ noted their agreement with Toohey and Dawson JJ (at 495 and 499), and in particular that a reduction in the content of the exclusive rights does not effect an "acquisition". Although that case involved lifting a prohibition to confer a freedom to do something which previously constituted an infringement of an owner's right, the principle is the same. The benefit or advantage said to flow must have a proprietary element. See also Gummow J's analysis of the extinguishment of a right in the nature of an immunity from prosecution in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 69 [179] and 71 [189], to the effect that is not a property right susceptible of acquisition within the meaning of pl 51(xxxi).

8 The Commonwealth could not, for example, enter into an agreement, for reward or otherwise, permitting another person to use, or not use, the intellectual property rights. Such benefits or advantages as the Commonwealth may derive from the prohibition lack the characteristics of 'property' identified by Lord Wilberforce in the often cited passage in *National Provincial Bank Ltd. v. Ainsworth* (1965) AC 1175 at 1247-1248: "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability". See also *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 327 at 342 per Mason J.

9 Submissions of the Plaintiffs, par 46(b).

10 See, for example, *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 245 [328] per McHugh J in relation to a property interest in the nature of a lien to secure the payment of outstanding charges.

prescribe the appearance of the plaintiffs' cigarette packets are concerned with property that has yet to be brought into existence. The right is spent if and when the relevant property is created. The Commonwealth never acquires any rights in respect of the physical property comprising the packaging or the tobacco product. Nor does it acquire any rights in respect of the various ingredients that are transformed into the packaging and tobacco product.[11] To say that a manufacturer of products generally enjoys control over the appearance and content of product packaging, and that control is one aspect of the proprietary rights comprising ownership[12], is not to characterise the power or interest vested in the Commonwealth by operation of the TPP Act. Even allowing for the ambiguity inherent in the term "property"[13], the exercise of a regulatory power by the state as to manner of sale is not capable of assumption by third parties in the manner customarily associated with a property right. It is an exclusively and uniquely government function. On the plaintiffs' analysis, any consumer protection or product standard legislation dictating the nature and content of material to be printed on the packaging of goods sold by private manufacturers would effect an acquisition of property. That characterisation is not affected by questions of degree.

9. The third, fourth and fifth categories of benefit or advantage which the plaintiffs assert all relate to the government messages, pictures and images appearing on the plaintiffs' cigarette packets.[14] The plaintiffs submit that the Commonwealth has assumed the right to project its own messages onto their cigarette packets; that the Quitline advertising will assume increased prominence by reason of the various prohibitions and restrictions on the plaintiffs' marks; and that the Commonwealth has obtained the right to require the plaintiffs to print messages on the plaintiffs' cigarette packets without any obligation to pay for that benefit. The fact that legislation may put some other person or organisation in a position to derive a benefit is not sufficient to amount to a commensurate benefit or advantage accruing to that person or organisation.[15] It may be observed at the outset that there is no direct relationship between the extinguishment of the plaintiffs' asserted property rights as effected by the TPP Act and the projection of government messages on cigarette packets. The TPP Act contemplates, but does not require, the inclusion

---

11 A non-compliant packet may involve liability for criminal or civil penalties but there is no provision in the TPP Act for forfeiture.

12 Submissions of the Plaintiffs, par 48.

13 *Yanner v Eaton* (1999) 201 CLR 351 at 388-389 [85] per Gummow J; cited in *Santos Ltd v Chaffey* (2007) 231 CLR 651 at 664 [23] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

14 Submissions of the Plaintiffs, pars 46(c), (d) and (e).

15 As the Full Federal Court observed in *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 586-587, a direct relationship is required to show a transfer of value or benefit from one person to another so as to constitute an acquisition of property for the purposes of pl 5l(xxxi). In that case, the complex interaction of regulatory and market forces that gave some operators an advantage over others was considered to fall far short of that requirement.

of government messages on retail tobacco packaging.[16] The *Competition and Consumer (Tobacco) Information Standard 2011* (**2011 Information Standard**)[17] prescribes requirements for government messages. There is also no basis for a conclusion that added prominence of government messages, as opposed, for example, to a mere impact upon the aesthetic appeal of cigarette packets, will in fact result from the prohibitions upon use of the plaintiffs' intellectual property.[18]

10. The appropriation of private media for the purpose of disseminating public information was considered by Brennan J in *Australian Capital Television Pty Ltd v Commonwealth [No 2].*[19] After referring to the formulations in the *Tasmanian Dam Case* and *Ex parte Meneling Station*, his Honour observed that it was immaterial to the operation of pl 51(xxxi) that the legislation reduced the value of a broadcaster's licence, because "the beneficiaries of the free time provisions acquire none of the rights or privileges conferred by a broadcaster's licence. The beneficiaries acquire a statutory right to have their election broadcasts transmitted free of charge. That is a right to the services of the broadcaster; it is not a proprietary right."[20] The asserted benefits in the third, fourth and fifth categories are considerably more ephemeral than those in *Australian Capital Television.* Unlike the political parties in that case, the promotion (or enhanced promotion) of their messages, "free of charge" or otherwise, is not a matter over which the Commonwealth or Quitline will have any direct control. If such promotion happens at all, it will be as an incident of the plaintiffs' decision from time to time to sell tobacco products.

---

16 TTP Act, s 20(3)(b) ('relevant legislative requirement' is defined in s 4).

17 The 2011 Information Standard was made under s 134 of Schedule 2 of the *Competition and Consumer Act 2010*. It commenced operation on 1 January 2012. Labelling in compliance with the standard will be required on all tobacco products from 1 December 2012. Until then, labelling that complies with the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (**2004 Information Standard**) is taken as complying with the 2011 Information Standard (see ss 1.2, 1.5(3) and 1.5(4) of the 2011 Information Standard). The 2004 Information Standard is presently 'picked up' by legislation in New South Wales (*Public Health (Tobacco) Act*, s 5), Victoria (*Tobacco Regulations*, reg 8), Queensland (*Health Regulations*, reg 162), Western Australia (*Tobacco Products Control Regulations*, reg 32) and the Northern Territory (*Tobacco Control Act* (NT), s 12 & *Tobacco Control Regulations, reg. 16*).

18 The 2011 Information Standard involves no substantial change from the 2004 Information Standard to requirements for the depiction of the Quitline Logo or the presentation of information regarding Quitline.

19 (1992) 177 CLR 106 at 166 (McHugh J agreeing at 245). The issue was not considered by Mason CJ, Deane, Toohey and Gaudron JJ. Under the legislation, broadcasters were statutorily bound to provide free broadcasting time to the political parties and other groups and persons to whom free time units were allocated.

20 Dawson J expressed a similar view (at 198-9), also drawing a distinction between the licence and the services which the licence holder could provide for reward. That the legislation precluded the broadcasters from being able to earn substantial sums of money, and that broadcasting time was a saleable commodity, did not lead to the conclusion that either the Authority or any person entitled to take advantage of the free time took a benefit of a proprietary nature. However one might characterise the "benefit or advantage" accruing to the Commonwealth or Quitline under the operation of the TPP Act, it is not proprietary in nature.

11. The final category of benefit or advantage which the plaintiffs assert is that the prohibition on use has allowed the Commonwealth to achieve its own objectives, including the improvement of public health.[21] As has already been observed, the sterilisation of property by proscription or prohibition for public purposes or objectives in the manner adopted by the TPP Act does not confer a proprietary interest on the Crown.

B. A law "with respect to" the acquisition of property

10

12. A law which effects an acquisition of property is not necessarily a law "with respect to" the acquisition of property within pl 51(xxxi) of the Constitution and invalid if it fails to provide just terms.[22] The authorities identify a number of circumstances in which an acquisition of property will fall outside the scope of s 51(xxxi).[23] They include:(a) where the concept of compensation is incongruous with the acquisition in question; and (b) where the law is not one for the acquisition of property as such, but is rather part of and incidental to a general regulatory scheme aimed at the adjustment of competing rights and liabilities.

20

13. It is well settled that certain laws effecting acquisitions will nevertheless be outside pl 51(xxxi) where the law has that effect in circumstances which make the notion of fair compensation for the property acquired incongruous.[24] Thus, a law which effects an acquisition of property in the technical and mechanical sense is not necessarily a law "with respect to" the acquisition of property within pl 51(xxxi). The foundation for the principle has been expressed in a number of ways. It has been said that the guarantee does not apply to laws of that type because upon a reading of the provision as a whole, certain categories of law cannot
30 permit of just terms and therefore cannot be laws "with respect to ... the acquisition of property" as that term is used in the guarantee.[25]

---

21 Submissions of the Plaintiffs, par 46(f).

22 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 189-190 per Deane and Gaudron JJ; *Health Insurance Commission v Peverill* (1993-94) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 308 per Mason CJ, Deane and Gaudron JJ.

23 See, for example, the summary appearing in R Dixon, *Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s. 51(xxxi) of the Constitution*, (2005) Sydney Law Review 639 at 645, 650-651.

24 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 219-220 per McHugh J; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306-307 per Mason CJ, Deane and Gaudron JJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 569 per Gaudron J (Toohey J concurring) and at 595 per Gummow J; *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 198 per Gaudron J, at 253 per McHugh J, and at 297 per Gummow J (Hayne J agreeing).

25 *Re Director of Public Prosecutions; Ex parte Lawler* (1993-94) 179 CLR 270 at 285 per Deane and Gaudron JJ.

Otherwise, the Commonwealth would have no power to make laws with respect to basic matters of governance. The principle has also been put in terms of the absurdity that would result if the legislature could make provision for such matters as taxation or the exaction of a fine only on just terms.[26]

14. This Court has also stated that laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest are not within pl 51(xxxi).[27]

15. The two principles are not entirely distinct or mutually exclusive. As Gleeson CJ and Kirby J observed in *Airservices Australia v Canadian Airlines* (referring to Brennan J in *Mutual Pools* at 179-181), pl 51(xxxi) does not abstract the power to prescribe the means appropriate and adapted to the achievement of an objective falling within another head of power "where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed".[28] That reasoning is apposite to both the incongruity exception and the "regulatory scheme" exception. It is also evident that notions of incongruity may be closely related to the need for "a genuine adjustment of the competing rights claims or obligations of persons in a particular relationship".[29]

16. Against that background, the TPP Act operates in two, related, ways: it prohibits various approaches to packaging of tobacco products for sale; and it imposes detailed and restrictive packaging requirements that must be met for the lawful sale of such products. In each respect the laws are essentially laws of prohibition. The question then becomes whether laws

---

[26] *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J. His Honour observed that the principle has been applied variously to laws imposing fines and penalties, laws providing for the forfeiture of prohibited imports, laws for taxation, laws for the sequestration of property of a bankrupt, and laws authorising the condemnation of prize. There is no suggestion that the class is closed, and no reason why the principle cannot have operation to other categories of law for which the notion of fair compensation for the property acquired is incongruous. See also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 177-178 per Brennan J.

[27] *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1 at 283 per Deane J; *Australian Tape Manufacturers v Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corp* (1993-94) 179 CLR 297 at 306-307 per Mason CJ, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 171-172 per Mason CJ, at 180 per Brennan J, and at 189-90 per Deane and Gaudron JJ; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 180-181 per Gleeson CJ and Kirby J, at 200 per Gummow J, and at 304 per Hayne J.

[28] (1999) 202 CLR 133 at 180 [98]. The Submissions of Van Nelle go too far to the extent they suggest that appropriateness and adaptation have no place in determining the application of the guarantee (at pars 5 and 6).

[29] *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [494]-[500] per Gummow J. McHugh J addressed the matter exclusively in terms of relevance and incongruity at [341] and [345].

of that type fall within the overlapping categories of exception described above.

17. There is a line of authority from the United States to the effect that certain laws of prohibition are exempt from the operation of the requirement for just compensation. In *Mugler v Kansas* 123 US 623 (1887), the Supreme Court considered a challenge to a law prohibiting the brewing and sale of intoxicating liquors. The Court observed (at [668]-[669]) that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit". This result followed notwithstanding that the prohibited use had not been unlawful at the time the property was created. While the Supreme Court has subsequently expressed limits on this principle of "harmful use", those limits are concerned principally with circumstances where regulation deprives real property of all economically beneficial use.[30] In the case of personal property, the state's traditionally high degree of control over commercial dealings permits that new regulation may render that property economically worthless if its only productive use is sale or manufacture for sale.[31]

18. It was that line of reasoning Stephen J addressed in *Trade Practices Commission v Tooth & Co Ltd*[32], and observed: "Throughout the history of the regulation of urban life in the interests of public health and amenity the resultant restrictions had not been regarded as takings which entailed compensation for any compulsory acquisition of the title to property or of the enjoyment of its possession".[33] This is a narrower proposition than the notion that where private property is "affected with a public interest" it is subject to regulatory control by the state.[34]

19. It may be accepted that something more than characterisation as a law which prohibits and penalises obnoxious or undesirable practices is required to take the TPP Act outside the operation of pl 51(xxxi). That additional factor may be found in the incongruity or absurdity that would result if the legislature could impose prohibitions and requirements

---

30 *Lucas v South Carolina Coastal Council* 505 US 1003 (1991) at 1026; *Lingle v Chevron* 544 US 1 (2005); *Loretto v Teleprompter Manhattan CATV Corp.* 458 US 419 (1982). While *Lingle* found that a test in terms whether the legislation "substantially advances [a government purpose]" was not appropriate for determining whether a regulation effected a Fifth Amendment taking, it endorsed the limits expressed in *Lucas*: cf Submissions of Van Nelle, par 29.

31 *Lucas v South Carolina Coastal Council* 505 US 1003 (1991) at 1028; *Andrus v Allard* 444 US 51, 66-67 (1979) (prohibition on sale of eagle feathers).

32 (1979) 142 CLR 397 at 412-416.

33 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 413. But see Mason J at 427-428 to the effect that something more than characterisation as a law which prohibits and penalises obnoxious or undesirable practices was required in order to avoid the operation of the guarantee.

34 See *Airservices Australia v Canadian Airlines* at (1999) 202 CLR 133 at 299 [498]-[499].

regulating the packaging and appearance of tobacco products only on payment of just terms. First, it would not be possible to calculate "just terms" in any meaningful sense in circumstances: where the plaintiffs' right to sell tobacco products is not curtailed; where the manner in which the statutory intellectual property rights could be deployed was already subject to significant restriction; and where any diminution in the value of the plaintiffs' asserted property rights would result from the complex interaction of regulatory and market forces. Secondly, to require the payment of compensation for a restriction on the plaintiffs' ability to promote harmful tobacco products would be inconsistent with the fulfilment of a legitimate regulatory object pursuant to the exercise of the relevant heads of Commonwealth legislative power.

20. The second factor taking the TPP Act outside the operation of pl 51(xxxi) is its character as a law which provides for "the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest".[35] Its relevant character is to balance the rights of manufacturers of tobacco products against the rights of consumers and potential consumers to be protected from the harmful effects of tobacco products. That satisfies the relevant test of whether the law is concerned with a genuine adjustment of competing rights in a particular relationship or area of activity.[36] The plaintiffs are in no different position in this respect from manufacturers and sellers of such commodities as liquor, fireworks and dangerous goods. Merchants operating in those markets are always subject to a form of sovereign risk in the sense that the freedom to deal in those products is susceptible to regulatory constraints. Schemes in relation to those products have addressed not only such matters as packaging and the manner in which the product is presented for sale, but also the content and composition of the product itself. The proposition may be tested by considering the position had the Commonwealth simply banned the sale of cigarettes. Legislation in those terms would equally have sterilised the plaintiffs' asserted property rights; but such a law could not properly be characterised as one with respect to the acquisition of property.

21. That analysis bears some relationship to the observation made by Dixon J in *British Medical Association v Commonwealth* to the effect that the protection in pl 51(xxxi) is not concerned with the general commercial and economic position occupied by traders.[37] Following the commencement of the packaging requirements on 1 October 2012, the plaintiffs, as manufacturers and traders, must decide whether they will or

---

35 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 189-190 per Deane and Gaudron JJ.

36 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 167 per Dawson J. See also at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

37 (1949) 79 CLR 201 at 269-271. The principle was endorsed by Gummow J in *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 298 [494].

will not continue to supply their commodities subject to the prohibitions and packaging requirements fixed by the Commonwealth, the legislative scheme having brought about that situation. The effect of those prohibitions and requirements may well be a diminution in sales, profit and the value of the statutory intellectual property rights, but those matters do not fall within the protection of pl 51(xxxi).

22. The TPP Act is sustained by the external affairs power.[38] The various prohibitions and requirements in relation to tobacco packaging and products are a necessary or characteristic feature of the means by which the TPP Act seeks to achieve the objectives detailed in s 3 of the Act. Those objectives are to restrict the plaintiffs' ability to promote harmful tobacco products. The means adopted in the legislation are narrowly confined, and appropriate and adapted to achieving those objectives. The objective of the legislation is not "solely or chiefly the acquisition of property" and the sole or dominant character of the legislation is not that of "a law for the acquisition of property". A law with that character is valid without just terms even if one corollary of its operation is the acquisition of some proprietary interest.[39] That result may be supported on the ground of incongruity or that the legislation constitutes a general regulatory scheme.

Dated: 5 April 2012

M P Grant
Solicitor-General

R H Bruxner

Telephone: (08) 8999 6682
Facsimile: (08) 8999 5513
Email: michael.grant@nt.gov.au

38 And, to the extent necessary, those powers described in TPP Act, s 14.

39 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 181 per Brennan J.