

**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**No. S389 of 2011**

BETWEEN:

**British American Tobacco  
Australasia Limited  
First Plaintiff**

AND:

**British American Tobacco  
(Investments) Limited  
Second Plaintiff**

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AND:

**British American Tobacco  
Australia Limited  
Third Plaintiff**

AND:

**The Commonwealth of Australia  
Defendant**

**SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE  
STATE OF QUEENSLAND (INTERVENING)**

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**I. CERTIFICATION**

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

**II. BASIS OF INTERVENTION**

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

**III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED**

3. Not applicable.

**IV. APPLICABLE LEGISLATION**

4. The applicable legislation is identified in the submissions of the plaintiffs and the defendant.

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11 April 2012

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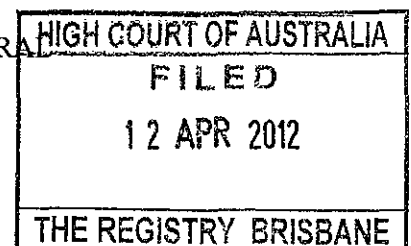
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V. ARGUMENT

5. The Attorney-General adopts Commonwealth's submissions concerning the absence of any acquisition of the plaintiffs' trade marks and other statutory rights, and the inherently defeasible nature of the rights.<sup>1</sup> Acceptance of the Commonwealth's submissions on these points would make it unnecessary to consider the Commonwealth's alternative submissions concerning s 51(xxxi) of the Constitution.
- 10 6. If, however, it becomes necessary to consider those alternative submissions, the Attorney-General submits that:
- (a) a law can be characterised as being a law with respect to an acquisition of property within s 51(xxxi) irrespective of whether it is a proportionate means of achieving a legitimate purpose and irrespective of whether the acquisition is a necessary consequence or incident of those means; and
  - (b) the concept of 'just terms' requires compensation based upon the value of the property acquired rather than what is a fair dealing between the person whose property is acquired and Australian community.
- 20 7. The Attorney-General further submits that s 15 of the *Tobacco Plain Packaging Act 2011* ('TPP Act') does not improperly delegate legislative power to the judiciary and is a valid law.
- (a) **Proportionality analysis is not appropriate to characterisation of law as a law for the acquisition of property**
8. The Commonwealth has advanced an alternative argument to the effect that a Commonwealth law cannot ordinarily be characterised as effecting an acquisition of property within the meaning of s 51(xxxi) where:
- 30 (a) the law has a legitimate (non-infringing) legislative purpose other than the acquisition of property;
- (b) the legislative means are appropriate and adapted, or proportionate, to the achievement of that purpose; and
- (c) the acquisition of property is a necessary consequence or incident of those legislative means.<sup>2</sup>
9. The Attorney-General submits that this argument should be rejected.
- 40 10. First, it is inconsistent with the ordinary principles of characterisation. It is well established that if a law, in its legal or practical operation, has a sufficient connection with a legislative head of power, then it is a law with respect to that

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<sup>1</sup> Commonwealth submissions, paras 44-78.

<sup>2</sup> Commonwealth submissions, para 83.

head of power.<sup>3</sup> Furthermore, it is well established a law can have several characters.

11. Section 51(xxxi) operates to qualify or condition the other heads of power in the manner explained by Dixon CJ in *Attorney-General (Cth) v Schmidt*.<sup>4</sup> In that respect it acts as a guarantee of property. Otherwise, however, s 51(xxxi) is like any other head of power. It is therefore unclear why the characterisation of a law as one with respect to the acquisition of property is precluded because the means chosen by the Commonwealth are proportionate to achieving a legitimate purpose and the acquisition is a necessary or incidental step in achieving that purpose.<sup>5</sup> Such a view would appear to deny that a law can have several characters.<sup>6</sup> It would also seem to downplay the significance of the words 'for *any purpose* in respect of which the Parliament has power to make laws' in s 51(xxxi).

12. Secondly, the Commonwealth's reliance on the judgment of Brennan J in *Cunliffe v Commonwealth*<sup>7</sup> for its departure from the ordinary principles of characterisation is unwarranted. In *Cunliffe*, his Honour said:<sup>8</sup>

20 Another category of case in which proportionality is relevant to validity arises when the impugned law invokes the support of a legislative power that is qualified by an express or implied limitation...A law will not be supported by a 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.*

13. His Honour added:<sup>9</sup>

30 If the means adopted by a law are disproportionate to a purpose or object which is within power, those means are not "appropriate and adapted" to achieving that purpose or object. If the means are excessive, the purpose or object which the law in fact achieves does not "pervade and explain the operation of the law to an extent that warrants the overall characterisation of the law as one with respect to"

<sup>3</sup> *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16].

<sup>4</sup> (1961) 105 CLR 361 at 371-372 (Dixon CJ).

<sup>5</sup> Compare *Smith v ANL Ltd* (2000) 204 CLR 493 at 533 [120] (Hayne J): 'Section 51(xxxi) empowers parliament to make laws *with respect to* the acquisition of property and, of course, it follows that the connection between the subject of the head of legislative power and the law can be as broad as the expression "with respect to" encompasses' (original emphasis).

<sup>6</sup> *Airservices Australia v Canadian Airlines* (2001) 202 CLR 133 at 247-250 [333]-[339] (McHugh J); *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 231 [223] (Heydon J). See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 387 [187] (Gummow and Hayne JJ).

<sup>7</sup> (1994) 182 CLR 272.

<sup>8</sup> (1994) 182 CLR 272 at 323-324 (emphasis added).

<sup>9</sup> (1994) 182 CLR 272 at 324.

the subject matter of the power, to adopt the language of Deane J in *Richardson v Forestry Commission*.

14. The Commonwealth derives from these observations support for its view that a law that satisfies its broad principle will not be characterised as a law with respect to the acquisition of property under s 51(xxxi).<sup>10</sup>

15. Justice Brennan's observations, however, should not be read as suggesting that proportionality will form part of the characterisation of any law that may infringe an express or implied limitation. Such a view would be contrary to authority. In *Bourke v State Bank of New South Wales* ('*Bourke*'),<sup>11</sup> the Court held that ss 52 and 52A of the *Trade Practices Act 1974* (Cth) were invalid to the extent that they purported to apply to a State bank engaged in banking not extending beyond the limits of the State concerned. That was because those provisions infringed the exclusion on State banking in s 51(xiii) of the Constitution. No member of the Court suggested, however, that proportionality was relevant to that outcome. Nor did any member of the Court think it relevant that the object of ss 52 and 52A was not to prevent State banking but was to prevent misleading and unconscionable conduct. As *Bourke* demonstrates, it is wrong to assume that a proportionality analysis must form part of characterising a law with respect to a head of power such as s 51(xxxi).

16. Thirdly, the Commonwealth's formulation would undermine the status of s 51(xxxi) as an important guarantee of property rights.<sup>12</sup> It would allow for acquisitions to be exempted from s 51(xxxi) by reference to indeterminate criteria such as whether an acquisition is an 'incident' of the legislative means employed. Yet as Kirby J observed in *Smith v ANL Ltd*:<sup>13</sup>

30 Describing the deleterious impact on pre-existing property rights with various adjectives such as "incidental", "peripheral" or "consequential" hardly yields a useful *discrimen* by which to discharge the obligation of constitutional characterisation of the law as s 51(xxxi) requires when its provisions are invoked.

17. His Honour in that case rejected the submission that the incidental nature of the acquisition and the subject matter of the law meant that the law should not be characterised as being with respect to s 51(xxxi).<sup>14</sup>

40 18. Justice Callinan in the same case was even more emphatic about the effect of s 51(xxxi) on incidental acquisitions:<sup>15</sup>

<sup>10</sup> Commonwealth submissions, para 82.

<sup>11</sup> (1990) 170 CLR 276.

<sup>12</sup> See the authorities referred to in paragraph 25 below.

<sup>13</sup> (2000) 204 CLR 493 at 529 [100].

<sup>14</sup> (2000) 204 CLR 493 at 528 [99], 530 [108].

<sup>15</sup> (2000) 204 CLR 493 at 551 [180] (emphasis added).

The operation of the Constitution *may not be subverted because an activity might only produce a proscribed consequence incidentally*, or because it occurs as a result of an enforcement process undertaken under some other purported head of power.

19. Finally, the Commonwealth's formulation does not account for an important difference between s 51(xxxi) and other guarantees or limitations. Unlike s 92 and the implied freedom of political communication, s 51(xxxi) of the Constitution is already subject to a number of settled exceptions. It does not, for example, apply to taxes, the disposition of bankrupt property, or the imposition of forfeitures or penalties. These exactions have never been within the scope of acquisitions for which just terms were to be provided. As Gummow, Kirby, Hayne, Heydon and Crennan JJ explained in *Theophanous v Commonwealth*:<sup>16</sup>

Such exactions are, and long before the Commonwealth were, regular features of the law in England, the Australian colonies and now of the Commonwealth. It cannot therefore have been the purpose of s 51(xxxi) to apply to such exactions an obligation to provide "just terms".

20. Since the courts can determine whether other exceptions exist by reference to the historical treatment of particular exactions and by analogy with those already recognised,<sup>17</sup> there is no necessity for a further broad principle that would exempt the Commonwealth from having to pay just terms whenever the means which it chooses are adjudged proportionate to achieving a legitimate purpose and the acquisition is a necessary or incidental step in achieving that purpose.<sup>18</sup>

**(b) 'Just terms' requires compensation**

21. The Commonwealth submits that even if the TPP Act can be characterised as an acquisition of property under s 51(xxxi), the measure of just terms is to be determined by what is fair between the individual and the Australian nation or government.<sup>19</sup> It relies, among other authorities, on the description of 'just terms' offered by Kitto J in *Nelungaloo Pty Ltd v Commonwealth*.<sup>20</sup>

<sup>16</sup> (2006) 225 CLR 101 at 126 [60].

<sup>17</sup> Such analogical developments, it is submitted, should have regard to the purposes served by s 51(xxxi), including the protection of settled expectations.

<sup>18</sup> The Commonwealth formulation, with its incorporation of incidental or consequential steps, and the use of the term 'ordinarily', would seem to share many of the same indeterminacies that afflict some of suggested exceptions in the case law. See, for example, *Smith v ANL Ltd* (2000) 204 CLR 493 at 551-552 [180]-[181] (Callinan J) (criticising the formulation in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 189-190 that a law would not generally provide for an acquisition of property if it created or modified rights as an 'incident of, or as a means of 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').

<sup>19</sup> Commonwealth submissions, para 96 (referring to *Grace Bros v Commonwealth* (1946) 72 CLR 269 at 290-291 (Dixon J)).

<sup>20</sup> (1952) 85 CLR 545 at 600.

The standard of justice postulated by the expression “just terms” is one of fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence.

22. The Commonwealth’s submissions should not be accepted.
- 10 23. First, the criterion of fair dealing between the Australian nation or government and the person deprived of property is ‘somewhat obscure’.<sup>21</sup> That criterion suggests that, in some cases, no compensation may be required because the property owner has been treated fairly. It also suggests that, in some cases, fairness to the nation may require compensation to be markedly less than the value of the property acquired by the government. Yet it is unclear how judges are to divine when fairness between the individual and the Australian nation demands these results. That is a reason for concluding that the criterion should not play a role in determining what ‘just terms’ means in s 51(xxxi).
- 20 24. Secondly, the application of that criterion to reduce compensation is difficult to reconcile with the historical background to s 51(xxxi). The words ‘just terms’ in that section were derived from the Fifth Amendment’s requirement of ‘just compensation’.<sup>22</sup> The framers were also familiar with the common law principle that where a legislature acted to affect property rights, it gave the owner ‘full indemnification and equivalent for the injury thereby sustained’.<sup>23</sup> Against this background, s 51(xxxi) should be seen as entrenching a requirement to compensate adequately for the compulsory acquisition of property. Once that is done, there is no reason for importing the criterion of fair dealing into s 51(xxxi) as a means of limiting compensation. Put differently, ‘just terms’ in s 51(xxxi) is concerned with ensuring that the  
30 Commonwealth grants compensation equivalent to the value of the property acquired; it cannot warrant granting some lower measure of compensation or no compensation at all because of an amorphous concept of fair dealing between the property owner and the nation.
25. Thirdly, and relatedly, the fair dealing criterion is inconsistent with the purpose of s 51(xxxi). It is now well recognised that s 51(xxxi) functions as an important guarantee of private property.<sup>24</sup> In *Clunies Ross v Commonwealth*, for example, Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ said:<sup>25</sup>

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<sup>21</sup> *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 235 [238] (Heydon J).

<sup>22</sup> *Andrews v Howell* (1941) 65 CLR 255 at 282 (Dixon J); *Australian Apple and Marketing Board v Tonking* (1942) 66 CLR 77 at 106 (Rich J).

<sup>23</sup> Blackstone, *Commentaries on the Laws of England*, Clarendon Press, Oxford, 3<sup>rd</sup> ed, 1768, Vol 1, p 139; Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901), p 641; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 356 [76] (French CJ). See also *Smith v ANL Ltd* (2000) 204 CLR 493 at 546-547 [168] (Callinan J).

<sup>24</sup> See, for example; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane and Gaudron JJ); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 168 (Mason CJ), 180 (Brennan J), 184-185 (Deane and Gaudron JJ); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241 (Brennan J);

[T]he plenary grant of legislative power contained in s.51(xxxi) has assumed the status of a constitutional guarantee of just terms and is to be given the liberal construction appropriate to such a constitutional provision.

26. Similarly, in *Smith v ANL Ltd*, Gleeson CJ said:<sup>26</sup>

10 The guarantee contained in s 51 (xxxi) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by s 51 (xxxi) it must pay for them, or in some other way provide just terms of acquisition.

27. Given the status of s 51(xxxi) as a constitutional guarantee, the criterion of fair dealing between the individual and the nation should not be used to minimise or eliminate the requirement for compensation. To do so would undermine the very protection that s 51(xxxi) was intended to afford.

28. Finally, these views are supported by statements in a number of authorities. In *Georgiadis v Australian and Overseas Telecommunications Corporation*, for example, Brennan J stated:<sup>27</sup>

30 In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it can be show that what is gained is full compensation for what is lost, the terms cannot be found to be just.

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<sup>25</sup> *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 277 (Brennan J) and 283-285 (Deane and Gaudron JJ); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 (Mason CJ, Deane and Gaudron JJ), 312 (Brennan J), 320 (Toohey J); *Victoria v Commonwealth* (1996) 187 CLR 416 at 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [12] (Brennan CJ), [45] (Toohey J), [77] (Gaudron J), [181], [194] (Gummow J), [237], [252]-[253], [256]-[257], [259] (Kirby J); *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 193 [147] (Gaudron J); *Smith v ANL Ltd* (2000) 204 CLR 493 at 500 [7], 501 [9] (Gleeson CJ), 520 [74] (Kirby J), 542 [157], 555 [193] (Callinan J); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 663 [21] (Gleeson CJ, Gummow, Hayne and Crennan J); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at 232 [49] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

<sup>26</sup> (1984) 155 CLR 193 at 202 (citations omitted).

<sup>27</sup> (2000) 204 CLR 493 at 501 [9].

(1994) 179 CLR 297 at 310-311.

29. In *Smith v ANL Ltd*, Gleeson quoted these remarks with approval.<sup>28</sup> Statements to like effect can also be found in several other cases.<sup>29</sup> It is submitted that they should be preferred to the authorities on which the Commonwealth relies, which place undue reliance upon the difference between the requirements for 'just terms' in s 51(xxxi) and the requirement of 'just compensation' in the Fifth Amendment.

10 30. Accordingly, if a law is characterised as being with respect to an acquisition of property under s 51(xxxi), it must allow for compensation for the value of the property acquired. Insofar as the Commonwealth maintains that compensation can be reduced or eliminated by reference to the concept of a fair dealing between the Australian nation and the individual, that submission should be rejected.

**(c) No impermissible delegation of legislative power**

20 31. The plaintiffs claim that s 15 of the TPP Act is invalid because it makes the operation of the TPP Act depend upon conclusions of constitutional law regarding s 51(xxxi) of the Constitution, thereby injecting 'a meaningful degree of uncertainty and impermanence' into the operation of the TPP.<sup>30</sup> They claim that the result is that Parliament has not enacted a law within the meaning of s 51 of the Constitution and that Parliament has improperly delegated the task of marking out the limits of the TPP Act to the judiciary.<sup>31</sup>

32. These submissions should be rejected.

30 33. First, there is no constitutional bar upon legislation that may be uncertain or unclear in its operation. The Commonwealth Constitution contains no textual equivalent to the 'due process' clause in the Fifth Amendment to the United States Constitution, which strikes down laws that fail to 'define [a] criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited' or that fail to establish guidelines to prevent 'arbitrary and discriminatory enforcement' of the law.<sup>32</sup> Nor can such requirements be gleaned from the words of s 51.<sup>33</sup>

34. Indeed, there are many examples of Commonwealth provisions the operation of which may prove uncertain or unclear in some cases, but which are plainly

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<sup>28</sup> (2000) 204 CLR 493 at 501 [8].

<sup>29</sup> *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 85 (Williams J), 106-107 (Rich J); *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 at 306-307 (Rich J); *Smith v ANL Ltd* (2000) 204 CLR 493 at 529-530 [103]-[104], 531 [111] (Kirby J), 557 [198] (Callinan J). See also *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 32 [67] (Toohey J).

<sup>30</sup> Plaintiffs' submissions, para 66.

<sup>31</sup> Plaintiffs' submissions, para 67.

<sup>32</sup> *Kolender v. Lawson* 461 US 352 at 357 (1983); *City of Chicago v Morales* 527 US 41 at 65-66 (1999).

<sup>33</sup> Compare *R v Hughes* (2000) 202 CLR 535 at [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *R v Smith* [1974] 2 NSWLR 586 at 588-589.



laws. Thus, s 79 of the *Judiciary Act 1903* (Cth) is valid, although it ‘picks up’ current State and Territory laws subject to the Constitution and other Commonwealth laws and may therefore generate uncertainty about whether particular State or Territory laws apply to a court exercising federal jurisdiction.<sup>34</sup> Similarly, s 51AA of the *Trade Practices Act 1974* (Cth) was valid,<sup>35</sup> although it prohibited corporations from engaging in conduct that was ‘unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories’ and therefore left the law in a state of development. The same conclusion applies to the *Commonwealth Places (Application of Laws) Act 1970* (Cth), which applies State laws to Commonwealth places.<sup>36</sup> The fact that a person may have difficulty in determining the operation of an Act therefore does not mean that Parliament has failed to make a law under s 51 of the Constitution.

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35. Secondly, s 15 of the TPP Act does not abdicate the legislative role or require the judiciary to exercise a legislative function. It is true that Parliament cannot give courts a discretion or choice as to the content of federal law.<sup>37</sup> But s 15(1) does not do this. It recognises that it is the role of the courts, not the legislature, to determine whether the TPP Act infringes s 51(xxxi) of the Constitution. In the event that there is an infringement, it stipulates how the Act is to apply. That again reflects the traditional division of functions between courts and the legislature. The effect of s 15 is akin to that of severability provisions such as s 15A of the *Acts Interpretation Act 1901* (Cth). Such provisions allow the courts to read down laws so as not to apply to circumstances that are beyond constitutional power;<sup>38</sup> but whether a particular law can be read down or is completely invalid depends on the intention of the legislature, which can be discerned from ‘the terms of the law or from its subject matter’.<sup>39</sup> The only relevant distinction between these provisions and s 15 is that the latter addresses the possibility of the TPP Act infringing a specific constitutional restriction; namely, that in s 51(xxxi) of the Constitution.

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<sup>34</sup> See *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593-594 [72]- [74] (Gleeson CJ, Gaudron and Gummow JJ); *Solomons v District Court* (NSW) (2002) 211 CLR 119 at 135 [24]-[29] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

<sup>35</sup> *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491. The application of s 51AA (although not its validity) was considered in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51. For another example of a law the content of which may vary according to the case law relating to s 92 of the Constitution, see s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth).

<sup>36</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373 at 487.

<sup>37</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373 at 486; *Momcilovic v The Queen* (2011) 85 ALJR 957 at [169] (Gummow J).

<sup>38</sup> For examples, see *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 (reading down the word ‘person’ so as not to include a federal judge) and *Victoria v Commonwealth* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (reading down legislation so that it did not apply to cases covered by the *Melbourne Corporation* principle).

<sup>39</sup> *Victoria v Commonwealth* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

That difference cannot result in s 15 lacking the character of a law or in somehow delegating legislative power to the judiciary.

10 36. Thirdly, the authorities from the United States reinforce these conclusions. Both State and federal courts have found 'fallback' provisions, which only take effect if legislation is found to be unconstitutional, to be valid. In *Missouri v Duren*, for example, the Supreme Court of Missouri rejected a contention that a section providing for an alternative punishment if the death penalty was declared unconstitutional amounted to an improper delegation of legislative power to the judiciary.<sup>40</sup>

37. More importantly, in *Bowsher v Snyder*,<sup>41</sup> the Supreme Court of the United States applied a provision that only took effect if certain parts of a federal statute were found to be unconstitutional (as they were). Chief Justice Burger, who wrote for the majority, observed that the fallback provision obviated the need to consider severability and was 'fully operative as a law'.<sup>42</sup>

20 38. Finally, there is no basis for suggesting<sup>43</sup> that Commonwealth statutes that use certain constitutional criteria that may generate judicial disagreement (such as an acquisition of property otherwise than on just terms) may not constitute a law under s 51, but Commonwealth statutes that use other constitutional expressions less prone to generating such disagreement (such as trading or financial corporations) will. If the latter is permissible, so is the former.

39. For these reasons, the BAT plaintiffs' submissions about s 15 of the TPP Act are without foundation.

30 Dated: 11 April 2012

  
for

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<sup>40</sup> 547 SW 2d 476 at 481 (1977).

<sup>41</sup> 478 US 714 (1986).

<sup>42</sup> 478 US 714 at 734-735 (1986). One author has remarked that there is 'no plausible argument that Congress violates federal nondelegation principles whenever it enacts a substitutive fallback provision': see Michael C Dorf, 'Fallback Law' (2007) 107 *Columbia Law Review* 303 at 326.

<sup>43</sup> Plaintiffs' submissions, para 66.