

No S409 of 2011

BETWEEN
JT INTERNATIONAL SA

Plaintiffs

AND

COMMONWEALTH OF AUSTRALIA

Defendant

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**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

- 20 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:
 - 30 (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;¹
 - (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.²

Part III: Leave to intervene

- 40 4. Leave to intervene is not required.

¹ Defence, par 13 at Demurrer Court Book (CB) 18.

² Defence, par 15 at CB 19.

Part IV: Applicable constitutional provisions, statutes and regulations

5. See Annexure A to the submissions of the plaintiffs in No S389 of 2011 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.³ It must accrue to the acquirer (or third party) *qua* owner.⁴ 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.⁵ 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.⁶ 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 plaintiff. In submission, the plaintiff identifies three legislative purposes, the pursuit of which is said sufficient to confer the requisite advantage.⁷

³ *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).

⁴ 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].

⁵ *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 145 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.

⁶ *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.

⁷ Submissions of the Plaintiff, pars 33-40.

7. The first purpose is the improvement of public health, with an anticipated reduction in expenditure by the Commonwealth on health care.⁸ That benefit is not proprietary in nature. In any event, 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. There must be a correspondence between the ownership or use of the thing taken and the nature of the benefit or advantage obtained.⁹ 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 51(xxxi). There is no direct relationship between the extinguishment of the plaintiff's property rights as effected by the TPP Act and the anticipated reduction in costs. Where, as here, that result is dependent upon the complex interaction of regulatory, social and market forces the relationship is too remote to sustain the necessary correspondence.¹⁰
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8. The second purpose which the plaintiff asserts is an improvement in the effectiveness of health warnings mandated by Commonwealth law.¹¹ That benefit is not proprietary in nature. 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]*.¹² 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."¹³ The same conclusion may be drawn in relation to any increasing efficacy of the Commonwealth health warnings. In any
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⁸ Submissions of the Plaintiff, par 35.

⁹ See, for example, *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 184-185 per Deane and Gaudron JJ, at 223 McHugh J; *Smith v ANL Ltd* (2000) 204 CLR 493 at 499-500 per Gleeson CJ.

¹⁰ *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 586-587.

¹¹ Submissions of the Plaintiff, par 36.

¹² (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.

¹³ 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.

event, and as the plaintiff concedes, the TPP Act contemplates, but does not require, the inclusion of government messages on retail tobacco packaging.¹⁴ The *Competition and Consumer (Tobacco) Information Standard 2011 (2011 Information Standard)*¹⁵ prescribes requirements for government messages.

9. The third purpose is to give effect to obligations under the Convention on Tobacco Control.¹⁶ That benefit is not proprietary in nature. There is no authority in support of the proposition that the furtherance of the Commonwealth's foreign policy objectives is sufficient to amount to a commensurate benefit or advantage. The result in *Commonwealth v Tasmania (Tasmanian Dam Case)*, at least, is inconsistent with that proposition.
10. On this issue, the intervener also relies on its Submissions filed in No S389 of 2011.

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

- 20 11. 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.¹⁷ The authorities identify a number of circumstances in which an acquisition of property will fall outside the scope of s 51(xxxi).¹⁸ 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.

¹⁴ TTP Act, s 20(3)(b) ('relevant legislative requirement' is defined in s 4).

¹⁵ 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).

¹⁶ Submissions of the Plaintiffs, par 37.

¹⁷ *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.

¹⁸ 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.

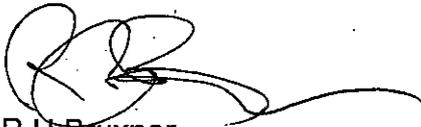
12. The regulatory purpose and operation of the TPP Act cannot be characterised as an element of the separate and general regulatory scheme governing trademarks.¹⁹ There is a clear divergence between the purpose and operation of legislation which effectively proscribes certain conduct concerning the manner in which a particular product may be presented for sale, and the purpose and operation of legislation which regulates the relationship between private individuals and corporations concerning the commercial exploitation of intellectual property.
- 10 13. On this issue, the intervener otherwise relies on its Submissions filed in No S389 of 2011.

Dated: 5 April 2012



M P Grant
Solicitor-General

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R H Bruxner

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

¹⁹ Submissions of the Plaintiff, par 43-44.