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 IN REPLY OF VAN NELLE TABAK NEDERLAND BV & IMPERIAL TOBACCO AUSTRALIA LIMITED (INTERVENING)

HIGH COURT OF AUSTRALIA
FILED
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THE REGISTRY SYDNEY

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Part I Publication of submissions

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

Part II Argument

A The nature of the property in issue

2. The Commonwealth seeks to advance a superficially attractive submission to the effect that constitutional significance attaches to a taxonomic scheme drawing distinctions between "positive rights", "negative rights" and residual freedoms. However, like other attempts to impose rigid rules of classification in this area,[1] that argument is unduly narrow and based upon a system of classification comprised of porous categories that leak into one another. For the following reasons, it does not assist to decide the issues that arise in this matter.

3. First, the Commonwealth's argument elevates the importance of a "positive" right to use the relevant subject of property. However, that is of limited value as a criterion of property in that it is simultaneously over-inclusive and under-inclusive. As to the former, it cannot explain the well established notion that a mere licence to use does not create any interest in the property to which it relates.[2] As to the latter, there are many forms of proprietary interest, including those outside the realm of intellectual property, which consist only of a "negative" right - for example, a restrictive covenant.[3] Further complicating the Commonwealth's suggested conceptual re-ordering of the notion of property, there are known to the common law other proprietary interests which are neither clearly "positive" nor "negative" in nature – for example the common by reason of vicinage.[4] The exercise of the "privileges"[5] of native title may be seen to pose a similar autochthonous perplexity for the Commonwealth's bifurcated universe of "positive" and "negative" rights – particularly given that it depends upon a notion of ownership which is "primarily a spiritual affair rather than a bundle of rights".[6]

4. Secondly, the limited explanatory power of the Commonwealth's proposed analysis leads to the contrasting points made by this Court in *Yanner* and *Telstra*[7] – that is that property consists "primarily"[8] in control over access to a thing or a resource. None of that (nor Van Nelle's argument) depends upon drawing a distinction between "positive rights of use" and other "negative" rights. Indeed, far from forming the oppositional elements of some form of dichotomy, those matters are rather properly conceived of as aspects of but a single concept. The relationship between the existence of such a power of control and the use that may be made of the thing or resource is conveniently captured by Professor Merrill:

> If A can exclude B, C, D,....N from Blackacre, then A is in a position to determine that no one other than A or those given permission by A may enter onto Blackacre or encroach on Blackacre ....In short, A's right to exclude with respect to Blackacre leads directly to A's right to dictate the uses of Blackacre, because no one else will be in a position to interfere with the particular uses designated by A.[9]

5. A materially identical approach is evident in Deane J's discussion of the buffer zone around a defence facility in *Tasmanian Dam*. Importantly, as his Honour observed, whilst neither the owner nor the Commonwealth would in such a case possess any "right...to actively use" the land affected, the Commonwealth would acquire the "benefit of use of the land in its unoccupied state".[10] That is, the Commonwealth's "negative right" would nevertheless be a power to determine the use of the land.[11]

6. As Van Nelle submitted in chief, it is therefore necessary to look beyond the artificial and formalistic

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[1] See *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 (***Telstra***) at 232 [49] per curiam.

[2] *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 (***WMC***) at 71 [188] per Gummow J.

[3] See *Commonwealth v Tasmania* (1983) 158 CLR 1 (***Tasmanian Dam***) at 286-7 per Deane J.

[4] Which has been described variously as consisting of a "right" (*Newman v Bennett* [1981] 1 QB 726 at 734 per Waller LJ) or the "mutual forbearance of adjoining commoners to fence" *Halsbury's Laws of England*, Volume 13 (2009) 5th edn at 431 (so understood, that right might equally be described as a "residual freedom" – see further below).

[5] The term preferred by Gummow J in *Yanner v Eaton* (1999) 201 CLR 351 (***Yanner***) at 384 [74].

[6] *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 (***Meneling Station***) at 358 per Brennan J cited in *Yanner* at 373 [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

[7] And by Van Nelle in its submissions in chief.

[8] See, adopting a passage from K Gray "Property in Thing Air" *Cambridge Law Journal* 50(2) (July 1991) (**Gray**), Gleeson CJ, Gaudron, Kirby and Hayne JJ in *Yanner* at 366 [18].

[9] T Merrill. "Property and the Right to Exclude" 77 *Nebraska Law Review* 730 (1998) at 741. See also the seminal article by Felix Cohen "Dialogue on Private Property" (1954) 9 *Rutgers LR* 357 at 370-1.

[10] *Tasmanian Dam* at 283 per Deane J.

[11] See also Crennan and Kiefel JJ in *Phonographic Performance Company of Australia Limited v Commonwealth* [2012] HCA 8 (***Phonographic***) at [109].

construct of "positive rights of use" and their supposed "negative" counterparts and analyse the substance of the property in issue and the legal and practical operation of the relevant legislative scheme.[12] As a matter of substance and having regard to its legal and practical operation, the *Trade Marks Act 1995* (Cth) (**TM Act**) conferred upon BAT the power to dictate the relevant uses that might be made of the Registered Trade Marks.[13] A similar analysis may be applied to the BAT Goodwill, which (as submitted by Van Nelle in its submissions in chief at [13]) conferred upon BAT a significant degree of control over the access of other persons to the various matters comprising the Winfield Get Up. Equally, considered as a matter of substance, those powers have been radically transfigured by the legal and practical operation of the *Tobacco Plain Packaging Act 2011* (Cth) (**TPP Act**), such that (from the date of commencement of the operative
10 provisions) it will be the Commonwealth (and not BAT) which dictates the uses that may be made of those subjects of property.

7. It is true, but only trivially so, that the TPP Act seeks to preserve continuing registration of the Registered Trade Marks and will not permit others now to use them.[14] But the same may be said of the facts of *Newcrest* where the plaintiffs' mining leases were not extinguished and neither the Commonwealth nor any other party was in a position to exercise the rights or powers previously held by the plaintiffs.[15]

8. Nor does anything turn upon the further distinction which the Commonwealth seeks to draw between "property" and the area of residual freedom.[16] That analysis appears to conceive of property interests as isolated islands of rights, cut off from the broader Australian legal system. It immediately breaks down upon the necessary acceptance of the (trite) proposition that there is no "absolute" right of use of
20 any form of property, including land. Such use is necessarily subject to both the general law[17] and statute[18]. Similarly, the registration of a trade mark does not carry with it the right to "use the mark anywhere in Australia and under all conditions"[19] and, in particular, does not confer a right to use the mark where its use would be deceptive or confusing so as to support a passing off action.[20] So understood, the Commonwealth's submission at [48] requires the following corrective: the "freedom to use all forms of property, including, but not limited to, trade marks depends upon other laws" and the area of "residual freedom" left by those laws.

9. Further, and more fundamentally, any such freedom has been constrained by operation of the TM Act and the common law such that BAT and BAT alone can determine how it is to be exercised. The point may be further illustrated by reference to this Court's consideration of the nature of property in a somewhat
30 different constitutional context – in *Harper v Minister for Sea Fisheries*[21] it was said that the licensing system "converted" that which had formerly been in the public domain - the unfettered right of the public to exploit the Tasmanian abalone fisheries.[22] That "right", being a "public not a proprietary right",[23]

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[12] *Telstra* at 232 [49] per curiam; *ICM Agriculture Limited v Commonwealth* (2009) 240 CLR 140 (***ICM***) at 198 [38] per Hayne Kiefel and Bell JJ.

[13] That is, use as a mark (s20 TM Act).

[14] See Commonwealth submissions (**CS**) [51]. Of course, with the effluxion of time, the same may not be true of the Winfield Get Up, in so far as it consists of matters other than those registered trade marks – a matter which is seemingly acknowledged by the Commonwealth (Commonwealth Submissions (**CS**) [66])

[15] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (***Newcrest***) at 530 per Brennan CJ and at 635 per Gummow J. Indeed, in terms which apply equally to the present case, Brennan CJ observed that the proclamations did not effect an acquisition of Newcrest's leaseholds nor whatever property Newcrest might have had in the subjacent minerals – they rather "sterilised the benefits which Newcrest might otherwise have derived from possession of those leases".

[16] CS [48], [51], [64]-[70].

[17] For example, the law of nuisance.

[18] For example zoning laws or the laws in issue in *Penn Central Transport Co v New York City* 438 US 104 (1978) (***Penn Central***) which prohibited the proprietor from developing the airspace above the land.

[19] *Leach v Wyatt* (1931) 48 WN (NSW) 173 at 175 per Harvey CJ in Eq and *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 (***Campomar***) at 74 [65] per curiam. The exclusive right of use in s20(1) of the TM Act is rather to be understood as the right to use as a trade mark, in the sense of distinguishing goods of a registered owner form the goods of others and indicating a connection in the course of trade between the goods and the registered owner: *E&J Gallo Winery v Lion Nathan* (2010) 241 CLR 144 at 163 [42] per French CJ, Gummow, Crennan and Bell JJ and *Koninklijke Philips Electronics NV v Remington Products Australia Pty Limited* (2000) 100 FCR 90 at 98-99 [10] per Burchett J.

[20] *Campomar* at [65] 74. Although unnecessary to decide (given that the issue of whether a trade mark confers "negative" or "positive" rights is immaterial) the authorities said to support the Commonwealth's submissions concerning the absence of a "positive" right to use are properly understood as going no further than these narrower propositions (note also the distinction drawn in s20(1)(a) and (2) of the TM Act). The Commonwealth's submissions are overstated.

[21] (1989) 168 CLR 314 (***Harper***).

[22] *Harper* at 325 per Mason CJ, Deane and Gaudron JJ.

undoubtedly falls into the Commonwealth's category of a residual freedom. However, once more illustrating the instability and lack of utility of the Commonwealth's proposed taxonomy, that status was altered upon the commencement of the licensing system and a new interest of a proprietary nature created.[24] The TM Act (or its statutory predecessors) and the law of passing off similarly applied a constraint to that which was formerly merely a "residual freedom" to sell one's goods and conduct one's business using such packaging as one wished. That historical provenance is irrelevant given that BAT now exercises control over the relevant subjects of property.

10. The Commonwealth and the NT also assert that some form of temporal difficulty arises as regards aspects of BAT's claim, by reason of the fact that it seeks to invoke the protection of s51(xxxi) for property in the packaging which does not yet exist. That submission should be rejected. Section 51(xxxi) applies notwithstanding the fact that the impugned law: does not directly acquire property by force of its own terms; does not create a power in some person to acquire property; and does not come into operation upon the acquisition of property.[25] It applies to <u>all</u> laws <u>with respect to</u> acquisition on other than just terms, however disguised or circuitous it may be.[26] It could hardly be the case that the Commonwealth, notwithstanding the width of its application, could circumvent the guarantee by engaging in prospective divestiture (for example, a legislative requirement that a car manufacturer provide to the government, free of charge, every tenth car to be manufactured in the future).[27] The Commonwealth's appeal to what was decided in the *Industrial Relations Act Case*[28] misunderstands what was there decided – the statutory immunities provided for by the legislation in issue in that case meant that the putative "property" was no more than a hypothetical "interest in the abstract". From the time any future cause of action accrued, there inhered in that property the limitation marked by the area of the immunity. The restrictions in issue here do not in that same sense define and limit the property in the box to be vested in BAT. It is only by determining to use its box as "retail packaging" for a "tobacco product"[29] that the restrictions are attracted.

B Benefit

11. The Commonwealth criticises Van Nelle for the "over-exploitation" of the notion of control. Such "over-exploitation" as exists involves no more than the application of the reasons of four members of this Court in *Yanner* and of all members of the Court in *Telstra*. For the reasons given by Van Nelle in chief at [18]-[25], it follows from that reasoning that the control or power to exclude conferred upon the Commonwealth by the TPP Act is determinative of whether there has been an acquisition in this case. That may be put in two (equally valid) ways. On BAT's argument, the control the Commonwealth has acquired may be regarded as a relevant identifiable or measureable benefit or advantage.[30] Van Nelle puts the argument somewhat differently, submitting that it is the degree of control acquired by the Commonwealth which determines whether that there has been an acquisition; and that the various identifiable or measurable advantages "relating to the ownership or use of property"[31] identified in [25] of Van Nelle's submissions in chief are sufficient to indicate that the Commonwealth's control or power to exclude has crossed the threshold of "acquisition of property".

12. In seeking to avoid the conclusion that there has been an acquisition, the Commonwealth asserts that there is "no analogy with legislation that displaces the authority of an owner of property and places that property under the control of another who has complete powers of disposition" (seeking to distinguish the *Bank Nationalisation Case*[32] at 348). That submission fractures at each step. BAT's authority or power of control has indeed been displaced for the reasons given by Van Nelle in its submissions in chief at [24]. The

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[23] *Harper* at 330 per Brennan J.

[24] At 325 per Mason CJ, Deane and Gaudron JJ and see also Brennan J at 335.

[25] *PJ Magennis Pty Limited v Commonwealth* (1949) 80 CLR 382 at 402 per Latham CJ and *ICM* at 166 [32] per French CJ, Gummow and Crennan JJ.

[26] *ICM* at 199 [139] per Hayne, Kiefel and Bell JJ and the authorities there referred to.

[27] If correct, the Commonwealth's submission may also require reconsideration of *Newcrest*, where the mineral lease might be variously characterised as: a liberty given to Newcrest to go on to the land and get certain things there <u>if it could find them</u>; a right to appropriate minerals <u>when severed from the land</u>; or a sale of minerals reserved to the Crown <u>to be taken</u> by the lessee: see Gummow J in *Newcrest* at 616, referring to *Gowan v Christie* (1873) LR 2 Sc & Div 273 at 284; *Wade v NSW Rutile Mining Co Pty Limited* (1989) 121 CLR 177 at 192 per Windeyer J and *Commissioner of Stamp Duties (NSW) v Henry* (1964) 114 CLR 322 at 330 per Kitto J.

[28] *Victoria v Commonwealth* (1996) 187 CLR 416 (***Industrial Relations Act Case***).

[29] See the definitions in s4 of the TPP Act.

[30] See, applying a similar analysis, Heydon J in *ICM* at 234 [232]-[233] and Kirby J in *Commonwealth v Western Australia* (1999) 196 CLR 392 (***WA Mining Case***) at 457-459 [184]-[187].

[31] *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 (***Mutual Pools***) at 185 per Deane and Gaudron JJ.

[32] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (***Bank Nationalisation Case***) at 348 per Dixon J.

Commonwealth will, from the commencement of the legislative scheme, exercise a substantial degree of control over the relevant subjects of property. Indeed, something more should be said about the extent and nature of that control. Apart from the government's messages and other legislative requirements, the only marks or trade marks which may appear on the pack are the brand name, business or company name and variant name (s20(1) and (3)(a)) and such other marks or trade marks permitted by the Commonwealth through the making of regulations (s20(3)(c)).[33] The Commonwealth has the power to make regulations prescribing further requirements for any such name, mark or trade mark which appears on the packaging (ss21(1) and 27(1)(a)) and to determine the colour of the inner and outer surfaces of the packaging (s19(2)(b)). It is possible, for example, that (subject only to any limitation derived from the objects or terms of the TPP Act) the required font size of the limited word marks BAT is currently permitted to use could be further reduced and the required colour of the words in those names made so close to the background colour of the pack as to render them an entirely insignificant feature of the Packaging which is difficult even to discern.[34] The required size of the health warnings could then be further increased to take advantage of that increased space. Alternatively, at its discretion, the Commonwealth could by combined exercise of the powers conferred by the *Competition and Consumer Act 2010* (Cth) **(CC Act)** and the regulation making powers conferred by the TPP Act determine to restore the capacity of BAT to use some or all of its current get up and trade marks, perhaps on conditions to be further provided for in the regulations. In those circumstances, save perhaps for the power of disposition, the Commonwealth's power over the relevant subjects of property is in substance equivalent in kind, intensity and amplitude to that of a proprietor.[35]

13. The absence of a power of disposition does not assist the Commonwealth. It is true that a power of that nature was effectively conferred by the impugned legislation in *Bank Nationalisation*. However, as Mason J observed in *Meneling Station*,[36] assignability (and by implication the power of disposition) is not in all circumstances an essential characteristic of a right of property. To suggest otherwise involves the misconceived conflation of property status and proprietary consequence.[37] Indeed, that is of particular importance when one takes into account the distinctly different and public benefits or advantages that flow from property in the hands of a polity as opposed to an individual (see Van Nelle's submissions in chief at [22]). To return to the example of the buffer zone around the defence facility given by Deane J in *Tasmanian Dam* – the Commonwealth would there acquire no power to dispose of the land, nor is the benefit of use of the land in its unoccupied state something that could readily be assigned (it being of no value, except to the occupant of the defence facility). As Professor Gray observes,[38] the difficulties that would arise from the application of the circular reasoning of status and consequence in that situation is avoided when it is understood that the free standing criterion of excludability (which is undoubtedly satisfied here) determines whether the Commonwealth has acquired property.

14. The Commonwealth's remaining submissions mischaracterise the issue as being "whether there is a <u>benefit in the nature of property</u> to another person" (CS [73], emphasis added). That involves the same circular reasoning – the requirement to consider whether the Commonwealth or another has received a benefit "<u>relating to</u> the use or ownership of property" makes clear that those benefits are conceptually distinct from the property itself. It is necessary to carefully distinguish between: (1) property (legally endorsed power or control over things or resources); (2) the subject of property (the things or resources themselves); and (3) the benefits which are derived from the exercise of control (which do not, in and of themselves, constitute property). For the reasons given by Van Nelle in chief at [18]-[25], each of the benefits identified and rejected by the Commonwealth at [73]-[75] may be seen to correspond with or correlate to what was taken from BAT – the necessary correspondence is supplied by the fact that they each depend upon the Commonwealth holding a similar degree of control to that formerly held by BAT. To use its own turn of phrase (derived from *Schmidt*[39]), by the exercise of that control the Commonwealth seeks to conscript the pack into the use and service of the Crown.

15. The suggestion that something may turn upon the "not for profit" status of Quitline service

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[33] The current form of the *Tobacco Plain Packaging Regulations 2011* (Cth) **(TPP Regulations)** do not provide for any such mark or trade mark to appear. For an example of how the TPP Act and TPP Regulations with enlarged health warnings compliant with the *Competition and Consumer (Tobacco) Information Standard* (2011) (Cth) **(2011 Standard)** will operate with respect to a packet of Winfield cigarettes, see Exhibit 3 referred to in paragraph 35(c) of the Questions Reserved.

[34] Which might find a textual foothold in s3(2)(b) of the TPP Act.

[35] Contra CS at [78] and the NT at [7]. Contrary to what is said by the NT at [10], there is, for that reason, no relevant analogy to be drawn with *Australian Capital Television Pty Limited v Commonwealth [No 2]* (1992) 177 CLR 106.

[36] *Meneling Station* at 342.

[37] Gray at 301.

[38] Gray at 301.

[39] *Attorney General of the Commonwealth v Schmidt* (1965) 105 CLR 361 (***Schmidt***) at 348 per Dixon CJ – see CS [74].

providers (CS [75]) is not to the point. The same could be said of the defence forces and most other emanations of the Commonwealth. If anything, that further illuminates what is meant by the notion that there need not be precise correspondence between what was taken and the benefit received.

C Inherently susceptible of variation

16. The Commonwealth's submissions that BAT's rights under the TM Act are "inherently susceptible of variation" are an appeal to the apocryphal slow boiling frog – reciting a "very long history of the statutory regulation of the packaging and labelling of all sorts of products" and various restrictions applying to tobacco products, the Commonwealth seeks to characterise the TPP Act as "but the latest step in controlling regulation and sale of tobacco". Like the frog, BAT has failed, to its peril, to extricate itself and 10 its trade marks from the pot being slowly boiled by the legislature. The difficulty with that submission is that it rests upon the equally apocryphal notion that other (true or more substantial) property rights are not vulnerable to regulatory legislation. For the reasons given by Van Nelle in its submissions in chief at [14] to [17] and above, that is demonstrably false, even in the case of land. Yet the internal logic of the Commonwealth's submission leads inexorably to the conclusion that those other interests must also fail to engage the protection of s51(xxxi). That proposition need only be stated to be rejected.

17. None of the restrictions upon which the Commonwealth relies has imposed a constraint of the nature in issue here (see Van Nelle's submission in chief at [17]). Nor was there some form of "congenital infirmity" which afflicted those rights from the time of their grant and made them subject to restrictions of the nature imposed by the TPP Act.[40] The current case is even further from *Newcrest*, where the leases were 20 subject to a proviso that the Crown could, without compensation to Newcrest, resume any portion of the surface of the land for "any...public purpose whatsoever" (which, if exercised, would have had the same practical effect of excluding Newcrest from carrying on its operations for the recovery of minerals).[41] That was not an obstacle to the engagement of s51(xxxi) in that case – the position is *a fortiori* in the present matter. The mere fact that there has been a recurrent legislative balancing of the perceived interests of the public and that of tobacco companies does not support the proposition that the rights in issue here are inherently unstable or susceptible of variation.[42]

18. It may also be noted that the Commonwealth cites but two instances of legislative requirements for "plain packaging" in support of this submission. Neither concerns tobacco products. More fundamentally, properly understood, neither required plain packaging.[43]

30 D The novel regulatory submission

19. The Commonwealth, the ACT and the NT and the amicus advance various arguments in support of the Commonwealth's novel regulatory exception. Those arguments are put on a number of bases which are said to "overlap".[44] None is compelling and for the reasons below should not be accepted.

A uniform approach to constitutional guarantees

20. The Commonwealth asserts that one can construct from a diffuse range of (largely obiter) comments made by members of this Court a "manifestation of a general approach to characterisation" which operates uniformly here and in the context of the express guarantees in ss92 and 99 and the implied freedom of political communication.

21. As Van Nelle submitted in chief, the primary difficulty with that submission is that the unanimous 40 decision of this Court in *Theophanous*[45] stands directly in its path. As this Court there said, the boundary to

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[40] *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 (***WMC***) at 75 [204] per Gummow J.

[41] See Gummow J at 618-9.

[42] *Phonographic* at [96] per Crennan and Kiefel JJ – contra ACT at footnote 61.

[43] The first instance involves no more than a legislative requirement that the words "margarine" or "margarine cheese" appear on packaging: See s5 *Margarine Act 1887* (UK) and ss5 and 6 of the *Sale of Food and Goods Act 1899* (UK). It did not prevent the application of get up or trade marks to that packaging. It did not, as the Commonwealth suggests, "[prohibit]...the sale of margarine or margarine cheese in other than plain packaging". The second instance concerns sections 20 and 21 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW). Neither section prevents the use of trade marks or get up on any internal packaging, or upon the publication itself. Section 21 does not prevent the display of trade marks or get up in association with a relevant publication at the point of sale at all, provided that the publication is sold in a restricted publications area. Section 20 (read with s13A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and the definition of "plain opaque material" in the Guidelines for the Classification of Publications 2005 made under section 12 of that Act) does not prevent trade marks and get up associated with the title of the publication (for example, a masthead which utilises a word trade mark represented in a stylised font) from being displayed at the point of sale or delivery, unless the title itself is unsuitable for public display.

[44] CS [81], referring to the obiter comments of Mason CJ in *Mutual Pools* at 189 per Deane and Gaudron JJ.

[45] (2006) 225 CLR 1 ***(Theophanous)***.

the application of the just terms requirement of s51(xxxi) is marked by the "criterion" of such an application being "inconsistent" or "incongruous". That may, on occasion, raise "borderline cases" involving "difficult questions of judgment", but will (as the examples there given indicate – taxation, imposition of a fine, exaction of penalties or forfeitures and enforcement of statutory liens) more generally be readily resolved on the basis that provision of just terms would be absurd in the case of a "law of that kind". Nowhere was it there suggested that some form of proportionality inquiry was to be applied to resolve those questions, even in a borderline case. Indeed, the emphasis placed upon the inquiry as to whether laws of a particular kind involve acquisitions which do not permit of just terms[46] is antithetical to such a suggestion. Such an inquiry proceeds by reference to categories of laws at a level of generality and permits of no consideration as to whether the particular law is proportionate or appropriate and adapted to a particular end. If, the issue was rather to be resolved on the Commonwealth's proposed uniform characterisation approach, this Court would have said so.

22. To the extent a proportionality inquiry has any application, it arises only (having first concluded that the measure was not a law with respect to the acquisition of property) at the subsequent stage of determining whether the relevant provision is reasonably incidental to the exercise of another head of power (the application of proportionality even in that context being a controversial proposition, which remains unsettled). But one does not conflate that latter inquiry with the first – as McHugh J observed in *Airservices*[47] at 250 [339] (see Van Nelle in chief at [28]). For that, as his Honour had earlier observed, appears to reflect the misconceived search for the sole or dominant character of a law.[48] It is apparent that this Court adopted his Honour's reasoning and suggested approach in *Theophanous.*

23. Seeking to avoid the sole characterisation heresy, the Commonwealth says that it is in fact engaged in no more than the "principled articulation" of the ground actually covered by s51(xxxi), drawing upon the reasons of Dixon CJ in *Schmidt* at 371. His Honour there referred (in addition to forfeitures and penalties) to laws providing for the disposition of the property of a bankrupt (made under s51(xvii). To that, one might readily add the laws of the kind identified in *Theophanous* and laws relating to enemy property (s51(vi)) (see Mason CJ in *Mutual Pools* at 170, upon which the Commonwealth places considerable reliance). Each of those examples is readily explicable under the so called "abstraction principle" identified by Dixon CJ in *Schmidt*, recognising that what is involved in its application is no more than a principle of construction and subject to an indication of contrary intention.[49] The identification of that contrary intention is to be undertaken by reference to the touchstone of inconsistency and incongruity identified in *Theophanous* – one does not need to erect upon that settled principle a proportionality inquiry to discern that the provision of just terms in such cases would be incongruous.[50]

24. Further, apart from asserting that it is incorrect and overstated, the Commonwealth does not grapple with Van Nelle's argument that s51(xxxi) by its terms and nature is fundamentally different from the other constitutional guarantees which the Commonwealth seeks to use as analogies. Yet the authorities the Commonwealth relies upon point to that same difficulty. For example, in *NEDCO*,[51] Mason J's reasons proceed from the observation that s92 is (notwithstanding its language) a "qualified freedom" and does not "prevent the enactment of laws which are no more than regulatory". By its very terms, s51(xxxi) does not prevent the enactment of such laws. It does no more than impose a condition of just terms on the making of such measures. Brennan J's discussion in *Cunliffe*[52] similarly proceeds from the basis that the cases in which proportionality is relevant arise "because legislative power is restricted by a limitation".[53] But, as is apparent from his reference to cases involving s92 and the implied freedom, his Honour did not have in mind a case where a limitation once engaged only conditionally restricts legislative power. In such a case, the occasion for the application of the Commonwealth's "proportionality test" does not in fact arise, particularly given that s51(xxxi) proceeds upon the assumption that every acquisition will involve the achievement of "legitimate" public or regulatory objects.[54]

Incompatibility with established authority

25. A further difficulty arises from the fact that acceptance of the Commonwealth's submission would require reconsideration of earlier settled authority, which no party seeks to re-open. For example, to adopt

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[46] *Theophanous* at 124-125 [56] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

[47] *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 (***Airservices***).

[48] Contra ACT at [23], [29] and [34].

[49] *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at 386-387 [185]-[186] per Gummow and Hayne JJ.

[50] See similarly Heydon J in *ICM* at 226-227 [218].

[51] *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 607 Mason J.

[52] *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***).

[53] *Cunliffe* at 323 per Brennan J.

[54] For the reasons given in Van Nelle's submissions in chief at [4]-[10] and [27].

the Commonwealth's criteria at [83], the laws in *Newcrest*: (1) had a legitimate (non-infringing) legislative purpose other than the acquisition of property (including the performance of Australia's international obligations under s51(xxix)[55]); (2) could be described as reasonably appropriate and adapted or proportionate to the achievement of that purpose (it might be relevant in that regard that the Commonwealth did not take the more drastic step of extinguishing the plaintiff's mineral leases); and (3) could be seen as a necessary consequence or incident of those legislative means (necessary, on the Commonwealth's formulation, not meaning "indispensible"[56]). The same may be said of *Smith* and *Georgiadis*[57], which involved regulatory schemes adjusting rights and claims between employers and employees, and which were said in each case to provide for improvements over the pre-existing
10 compensation scheme.[58]

26. It is no answer to say that some distinction is to be drawn between cases involving the "acquisition of property for an identified public purpose" as opposed to those which involve acquisition as a "necessary incident of regulation of conduct that serves the public interest" (CS [94]). That simply re-states the problem and simultaneously introduces a further opaque criterion (regulation of conduct), the application of which is indeterminate. For example, would one apply the Commonwealth's novel principle to *Newcrest* on the basis that Newcrest's mining activities were conduct requiring regulation in the public interest? Or would the case fall outside that principle on the basis that there was in substance an acquisition of property for a public purpose? The position is no clearer in *Smith* and *Georgiadis*. It would seem to be arguable that the capacity to bring legal proceedings at all or in a given time period is conduct, which was "regulated" in a
20 manner said to serve the public interest. Indeed, that is particularly so in *Smith*, given the view expressed by some members of the Court[59] that the effect of the legislation was to modify rather than replace Mr Smith's common law rights.

27. That submission may also be seen to be a Trojan horse concealing the approach of the US takings authorities, which draw bright lines between "regulatory takings" and various other categories of taking, which the Commonwealth itself describes as "complex" (at [85]). That "complexity" is considerable and involves the application of variously formulated tests to an array of a priori categories,[60] forming a body of law which has been described as a "crazy quilt pattern" of rulings.[61] The suggestion that s51(xxxi) should be approached in that way is alarming. A similar thought seems to underpin the Commonwealth's submission that the decision in *Pumpelly v Green Bay Company*[62] is "inapposite" because it fell within "a special class of
30 case" concerned with the physical destruction of land.[63] That fractured approach has never formed part of this Court's s51(xxxi) jurisprudence. The issue of if and when regulation of property infringes s51(xxxi) is rather a matter to be dealt with, applying the entirely orthodox textual approach identified in Van Nelle's submissions in chief[64] and developed further below – that is, by reference to whether the restrictions imposed are of a sufficient magnitude to enter into the field of an "acquisition of property".

Noxiousness

28. A further notion that seemingly pervades or animates many of the arguments of the Commonwealth, the NT,the ACT and the amicus, is that certain trading activities involving the use of property may be characterised for constitutional purposes as harmful to "members of the public or public health" or as involving a "noxious" use of that property. It is said by the Commonwealth (as an element of a narrower
40 submission at [84]) that it may acquire property without compensation, if that acquisition is no more than a necessary consequence or incident of a restriction on trading activity, where that restriction is reasonably necessary to prevent harm caused by that trading activity to public health – to invalidate a restriction upon such an activity or use in the absence of compensation to those whose "harmful activity would be restricted" would, it is said, be "profoundly incongruous". In so far as that involves a similar proportionality inquiry to the broader submission at CS [82], it suffers from the same defects identified above. But the

[55] See Gaudron J at 563-4.

[56] At [81], referring to *Airservices* at 180 [98] per Gleeson CJ and Kirby J.

[57] *Smith v ANL Ltd* (2000) 204 CLR 493 (***Smith***) and *Georgiadis v Australian and Overseas Telecommunication Corporation* (1994) 179 CLR 297.

[58] See eg *Smith* at [54] 514 per Gaudron and Gummow JJ and *Georgiadis* at 310 per Brennan J.

[59] See Gleeson CJ at 500 [7], Kirby J at 527-528 [94]-[96] and Callinan J at 555-556 [194]-[195] and compare with Gaudron and Gummow JJ at 512 [45].

[60] See *Lingle v Chevron USA Inc* 544 US 528, 538 (2005) (***Lingle***) and J Nowak and R Rotunda, *Constitutional Law* (8th ed, 2010) (**Nowak**) at 552.

[61] See Nowak at 553 and the authority there referred to.

[62] 80 US 166, 177 (1872).

[63] CS [85], footnote 223.

[64] See [21] and footnote 63.

notion of noxious or harmful use as a matter of constitutional significance is also one which requires further examination.

29. As the NT and the amicus acknowledge, that notion is one which is derived from the line of United States authority commencing with *Mugler v Kansas*.[65] The Commonwealth is more circumspect in that regard, but nevertheless submits that the principle "accords" with that line of authority. The Commonwealth's circumspection is appropriate. For the following reasons, such "accordance" as exists indicates that the Commonwealth's suggested principle is not one which should be applied in the context of s51(xxxi).

30. First, as Professors Nowak and Rotunda have observed "[a]lthough *Mugler* has never been overruled by the Supreme Court...the Court has judiciously ignored the broad language of *Mugler* in cases where non-
10 acquisitive governmental action has been found to be a taking".[66]

31. Secondly, the issue in *Mugler* was whether there had been a violation of the Due Process Clause in the Fourteenth Amendment.[67] For the reasons given by Van Nelle in its submissions in chief at [29], that area is not a productive source of analogies for the purposes of s51(xxxi). Indeed, the Supreme Court has more recently observed in *Lucas*[68] that the harmful or noxious use analysis was "simply the progenitor" of a test concerned to establish whether the impugned regulation "substantially advances legitimate state interests" (which, as was held in *Lingle*, has no relevance to the issue of whether there has been a taking, but rather arises only as an element of due process or the public use question).[69] The Court also there observed that the "noxious use logic" cannot be used as a touchstone to distinguish regulatory takings which require compensation from those which do not.[70]

20 **32.** Thirdly, it is incorrect to suggest that an unalloyed form of the noxious use doctrine has been accepted in Australia.[71] It is true that in *Tooth*[72] Stephen J accepted that such matters may provide "some guidance".[73] However, Mason J expressly disagreed with a submission which bears some analogy to that put by the Commonwealth in this case and held (explaining the outcome in *Belfast Corporation v OD Cars Ltd*[74] – on which the amicus also relies), that it is one thing to say that a law which is merely regulatory and does not provide for the acquisition of title to property is not a law with respect to the acquisition of property; it is quite another to say that a law which <u>does</u> provide for the compulsory acquisition of title to property and which happens to be regulatory is not a law with respect to the acquisition of property.[75]

33. Deane J referred with apparent approval to Stephen J's comments in *Tooth* in his reasons in *Tasmanian*

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

[66] Nowak at 552.

[67] See *Mugler* at 657.

[68] *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) (***Lucas***).

[69] See *Lucas* at 1023-4. To the extent the NT suggests otherwise (at footnote 30), it is incorrect. *Lucas* also confirms that the noxious use doctrine is related to the Supreme Court's jurisprudence concerning the police powers of the States. The accommodation of that doctrine in an Australian constitutional context poses difficulties of its own: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 475-6 [96]-[97] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

[70] At 1026 and contra the amicus at [12]. It is true that, in a regulatory takings case which does not involve the deprivation of all economically beneficial use, it is nevertheless relevant to consider the "character of the governmental action" as one of the *Penn Central* factors. However, that does not involve an inquiry into the relative "goodness" of the action; it involves no more than the determination of whether the alleged taking was via regulation or physical invasion (*Penn Central* at 124; *City of Coeur d'Alene v Simpson*, 136 P.3d 310, 318, footnote 5 (Idaho 2006)). In any event, as the Supreme Court made clear in *Lingle*, that is merely a matter which "may" be relevant in discerning whether a taking has taken place– the "primary" factor, upon which the *Penn Central* inquiry turns "in large part" (albeit not exclusively) is the "magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests" or, put another way, "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations" (*Lingle* at 888, 889). To the extent the Federal Appeals Court held otherwise in *Rose Acre Farms v United States* 559 F3d 1260, 1281 (2009), it seems to have given insufficient attention to the clear statement in *Lingle* of the "primacy" of the matters related to economic impact (contra CS [85]).

[71] Contra CS [85]; NT [18] and ACT [28].

[72] *Trade Practices Commission v Tooth* (1979) 142 CLR 397 (***Tooth***).

[73] Referring to the dissenting judgement of Brandeis J in *Pennsylvania Coal Co v Mahon* 250 US 393 (1922) (***Pennsylvania Coal***) and a passage from *Corpus Juris Secundum* "Eminent Domain", para 6.

[74] [1960] AC, 518-520.

[75] At 428. The submission was also seemingly rejected by Barwick CJ (dissenting) at 403-4, who found the authorities upon which Stephen J relied not to be of assistance (at 405). The other members of the Court did not express a view on the issue – contrary to what is suggested by the ACT in footnote 58, Gibbs J determined the issue on the basis that the provisions were akin to a penalty or forfeiture.

Dam,[76] but the manner in which his Honour understood that passage requires closer analysis. It is clear (see particularly at 283) that his Honour saw the critical question as being whether a "mere" prohibition or regulation confers a benefit upon the Commonwealth so as to amount to an acquisition. No part of his Honour's reasoning appeared to depend upon the characterisation of the object to be served by the regulation or the nature of the activities or use of property proposed to be undertaken by Tasmania (although the flooding of land included on the World Heritage List or causing damage to sites of particular significance to Indigenous Australians could equally be said to involve "noxiousness" or "public harm", unless those terms are understood in a more narrow sense than that proposed by the Commonwealth). Rather, his Honour went on to consider essentially two matters: first, did the relevant prohibitions or
10 restrictions sufficiently impair the relevant property interests so as to engage s51(xxxi);[77] secondly, in the case of those provisions where there was sufficient impairment to engage the guarantee,[78] was there a material benefit gained by the Commonwealth so as to indicate that there had been an acquisition.

34. That orthodox, textually based approach (is there an "acquisition of property") is entirely consistent with subsequent authority, emphasising that (particularly in a case of regulation of the uses of property) the degree of impairment of a proprietary interest may be insufficient to attract the operation of s51(xxxi).[79] As submitted by Van Nelle in chief,[80] such matters could be expected to exclude from the scope of s51(xxxi) most cases involving some form of requirement to display a warning on packaging.[81] However, <u>all</u> of those issues are to be determined as elements of the inquiry as to whether a measure can be characterised as a law with respect to the acquisition of property, not as some form of ex-post facto savings test requiring an
20 inquiry into proportionality. There is an inexact analogy to be drawn with the proposition (applied in other jurisdictions in the context of constitutional bills of rights) that a proportionality inquiry is inapposite where one is dealing with an "internal limit on rights" – that is, those limitations which determine whether a right is implicated in the first place.[82]

35. To the extent it has any purchase in an Australian context, the noxious use doctrine could go no further than the manner in which it is now understood in the context of regulation depriving land of any economic value: that is, that there can be no acquisition of an interest which the putative owner did not in fact possess and therefore no obstacle to prohibiting uses of property that could be restrained under the law of private nuisance or by the government under its "complementary power to abate nuisances that affect the public generally".[83] To take an example given by the Supreme Court in *Lucas*, an owner of a lake would not
30 be entitled to compensation if denied the requisite permit to engage in a landfilling operation when that would have the effect of flooding others' land - for such a use is and was always unlawful. But that has no application here,[84] given that BAT's uses of its property are and have been entirely lawful.

36. Fourthly, perhaps the most significant point which is to be derived from the United States regulatory takings cases for present purposes, is that made by Holmes J (writing for the majority in *Pennsylvania Coal*) – that is, consistent with what has been said above, when regulation reaches a "<u>certain magnitude</u>, in most if not in all cases, there must be an exercise of eminent domain" (emphasis added).[85] That, rather than the "noxious" use principle applied in Brandeis J's dissenting reasons in that case, is the approach that is evident in the Australian authorities (subject to the further issue of there having been acquisition by the Commonwealth or another). On the other hand, it is not readily accommodated within the Commonwealth's
40 proportionality approach. For even when regulation reaches that threshold magnitude and a benefit relating to the use or ownership of property has been received, there would nevertheless remain a secondary inquiry as to whether the measure bears some form of proportionate relationship to the object of avoiding harm to human health.

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[76] At 284.

[77] 284-5.

[78] The *World Heritage (Western Tasmania Wilderness) Regulations* and s11 of the *World Heritage Properties Conservation Act 1983* (Cth) (read with the relevant declaration) – see at 285-8.

[79] *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 at 184-185 per Black CJ and Gummow J; *Smith* at 505-506 [23] per Gaudron and Gummow JJ; *Wurridjal* at 440 [365] per Crennan J; *Phonographic* at [111] per Crennan and Kiefel JJ.

[80] Van Nelle submissions in chief at [21], footnote 63.

[81] Contra the NT at [8].

[82] S Gardbaum "Limiting Constitutional Rights" 54 *UCLA Law Review* 789 (2007) at 801 and 811 and A Barak *Proportionality: Constitutional rights and their limitations* Cambridge Press (2012) at 153-4.

[83] *Lucas* at 1027 and 1029.

[84] Contra ACT at [25] and the amicus at [17]-[18].

[85] At 413. See, to similar effect, his Honour's reasons at 415.

E Constitutional facts

37. If Van Nelle's submissions above and in chief are accepted, no occasion arises for the making of findings regarding the "constitutional facts" for which the Commonwealth contends. As Van Nelle submitted in chief, the nature of the factual inquiries proposed by the Commonwealth is, of itself, a further reason for rejecting the Commonwealth's ex post facto regulatory exception. It is not to the point, in that regard, that the Parliamentary Committee did not accept contrary views regarding the likely efficacy of plain packaging (CS 42) – the existence and nature of that controversy indicates the difficulties associated with the Commonwealth's invitation to this Court to substitute its predictive judgement for that of the legislature. If those submissions are not accepted then Van Nelle adopts the submissions of BAT at [6] – the matter
10 should be remitted as envisaged under Question 2 of the Questions Reserved.

F Just terms and Section 15 of the TPP Act

38. As regards these issues, Van Nelle adopts the submissions in reply of BAT at [31]-[32].

G Proposed variations to the questions reserved

39. The Commonwealth raises no procedural objection to Van Nelle's proposal to vary the terms of the Questions Reserved. Nor does BAT, nor any of the interveners. As to those questions that relate to the validity of the *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) (**2011 Standard**) and the provisions of the CC Act, the Commonwealth merely asserts that Van Nelle's argument is without substance. That is incorrect for the reasons given in [1]-[2] of Annexure A to Van Nelle's submissions in chief. Although for different reasons, the NT similarly submits (at [19]) that "it would not be possible to
20 calculate 'just terms' in any meaningful sense" as regards the acquisition effected by the TPP Act. That is also true of the 2011 Standard and the provisions of the CC Act.

40. As regards the proposed questions concerning the so-called "Henry the Eighth Clause" it is not to the point that regulations have yet to be made under that provision. The question of validity is to be answered at the level of the exercise of legislative power. The manner in which the executive exercises the power thus conferred will have no bearing on that question,[86] and it is therefore incorrect to assert that its consideration is premature. As to the substantive issue, it is also incorrect to assert that that matter is foreclosed by earlier authority – although Kitto J's obiter comments in *Giris*[87] may be understood to be premised upon the notion of abdication of legislative power, the submissions of Van Nelle are put on a distinctly different basis (as the Commonwealth acknowledges at CS [110]).[88] The rejection of the
30 submission that there had been an impermissible abdication of legislative power in *Permanent Trustee*[89] and in *Dignan*[90] do not foreclose those arguments and no leave to re-open those authorities arises. Further, the enactment in issue in *Dignan* provides a useful point of contrast, in that it conferred power to override by regulation the provisions of <u>other</u> enactments.[91] That reveals the peculiar vice of s231A. Contrary to what is submitted by the Commonwealth at [110], s231A cannot be said to be confined to the subject matter scope and purposes of the TM Act – unlike *Dignan*, within the field of operation of that provision, the Governor General is expressly authorised to make regulations which may be paramount to that enactment and yet entirely antithetical to the statutory scheme it creates.

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[86] *Wotton v Queensland* [2012] HCA 2 at [22] per French CJ, Gummow, Hayne, Crennan and Bell JJ and *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175 [398] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

[87] *Giris Pty Limited v Federal Commissioner of Taxation* (1969) 119 CLR 365.

[88] [4] and [5] in Attachment A to Van Nelle's submissions in chief.

[89] *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 at 4210-421 [77] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

[90] *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan* (1931) 47 CLR 73 (***Dignan***).

[91] Section 3 of the *Transport Workers Act 1928* (Cth), which conferred power to make regulations having the force of law "notwithstanding anything <u>in any other Act</u>" (emphasis added).