IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S389 of 2011

BETWEEN:

British American Tobacco Australasia Limited
ACN 002 717 160
First Plaintiff

British American Tobacco (Investments) Limited
BCN 00074974
Second Plaintiff

British American Tobacco Australia Limited
ACN 000 151 100
Third Plaintiff

and

The Commonwealth of Australia
Defendant

SUBMISSIONS OF THE PLAINTIFFS

Part I: Publication of Submissions

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

Part II: Issues Arising in the Proceedings

2. The issues arising in these proceedings are:

   (a) *First*, whether, apart from s. 15 of the *Tobacco Plain Packaging Act* 2011 (Cth) (**TPP Act**), some or all of the provisions of the *TPP Act* would effect an acquisition of any, and if so what, property of the plaintiffs or any of them otherwise than on just terms (within the meaning of s. 51(xxxi) of the *Constitution*.

   (b) *Secondly*, whether s. 15 of the TPP Act is a valid law of the Commonwealth.

Part III: Notices under Section 78B of the *Judiciary Act* 1903 (Cth)

3. The plaintiffs have served notices under s. 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Material Facts

4. The material facts are set out in Section A of the Questions Reserved dated 27 February 2012.

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Part V: Plaintiffs' Argument

A. *"Property"* within the meaning of s 51(xxxi) of the Constitution:

5. Section 51(xxxi) of the Constitution is a constitutional protection of property rights[1] and is to be accorded a liberal construction.[2] The constitutional protection afforded by s 51(xxxi), "extends to every species of valuable right and interest"[3], to "any tangible or intangible thing which the law protects under the name of property"[4], and to "innominate and anomalous interests".[5]

6. For the purposes of the present case, the concept of "property" employed in s 51(xxxi) of the Constitution invites attention to the bundle of rights and powers recognised and endorsed by the law over a thing or resource.[6] Accordingly, the first step in the analysis in connection with the application of s 51(xxxi) is to identify the relevant bundle of rights asserted by the plaintiffs (together and individually, **BAT**) as property enjoying the constitutional protection.[7]

B. BAT's property:

7. The property rights asserted by BAT as having been acquired by the *TPP Act* can be categorised under three headings –

   (a) statutory intellectual property rights arising under the *Trade Marks Act 1995* (Cth), the *Patents Act 1990* (Cth), the *Designs Act 2003* (Cth) and the *Copyright Act 1968 (Cth)*;

   (b) rights in connection with goodwill and reputation established in connection with the sale to the public of cigarettes using distinctive "get-up" associated with the "Winfield" brand; and

   (c) rights in connection with the physical materials which comprise the cigarettes, and the retail packaging of the cigarettes that it sells.

8. Each of those categories of rights will be considered in turn.

B.1 BAT's statutory intellectual property rights:

9. BAT alleges four types of statutory intellectual property rights: first, its registered trade marks under the *Trade Marks Act* (Questions Reserved, A2); secondly, its patent under the *Patents Act* (Questions Reserved, A3); thirdly, its registered design under the *Design Act*

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[1] *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 270 per Dixon J; *Smith v ANL Ltd* (2000) 204 CLR 493 at 501, [9] per Gaudron and Gummow J.

[2] *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201 – 202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Telstra Corporation v Commonwealth* (2008) 234 CLR 210 at 230, [43] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 359, [87] per French CJ; *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 at 169, [43] per French CJ, Gummow and Crennan JJ, and see also, 212 – 213, [185] per Heydon J (dissenting in result).

[3] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *Telstra Corporation Limited v Commonwealth* (2008) 234 CLR 210 at 232, [49] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.

[4] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 295 per McTeiman J; *Mining Act Case* (1999) 196 CLR 392 at 486, [274] per Callinan J.

[5] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J.

[6] *Yanner v Eaton* (1999) 201 CLR 351 at 366 – 367, [17] – [20] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; at 388 – 389, [85] - [86] per Gummow J; *Telstra Corporation v Commonwealth* (2008) 234 CLR 210 at 230 – 231, [44].

[7] *Attorney General (NT) v Chaffey* (2007) 231 CLR 651 at 664, [22] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

(Question Reserved, A4); and fourthly, copyright in certain images (which copyright the Commonwealth does not admit) (Question Reserved A6).

10. ***BAT's trade marks***: The registered owner of a trade mark has the exclusive right to use or authorise others to use the trade mark in relation to the goods in respect of which it is registered (here, tobacco).[8] The concept of "use" of a trade mark involves use on or in relation to goods to distinguish the goods from other's goods.[9] A trade mark is personal property[10] and the registered owner of a trade mark may deal with it as the absolute owner.[11] The proprietary nature of a trade mark inheres in the denotation of "trade mark" in s 51(xviii) of the Constitution.[12]

11. ***BAT's patent***: A patentee has, subject to the *Patents Act*, an exclusive right to "exploit" the invention, and to authorise others to do so.[13] Relevantly, because BAT's inventions are products for the purposes of the definition of "exploit", the right to "exploit" includes the right to make, hire, sell or otherwise dispose of the product, use or import it, or keep it for the purpose of doing any of those things.[14] BAT's rights to exploit, and to authorise others to exploit, are personal property.[15] Again, their proprietary nature inheres in the constitutional concept of a patent as expressed in s 51(xviii) of the Constitution.[16]

12. ***BAT's design***: The registered owner of a design has the exclusive right to make or offer to make a product, in relation to which the design is registered, which embodies the design.[17] The registered owner also has, in relation to such a product, the exclusive right to import, to sell, hire or otherwise dispose of, to offer to sell, hire or otherwise dispose of, to use such a product in any way for the purposes of any trade or business, and to keep such a product for purposes of doing any of those things, and to authorise another to do any of those things.[18] The rights of the owner of a registered design are personal property.[19]

13. ***BAT's copyright***: BAT asserts copyright in images (**BAT images**) depicted on the packaging of Winfield branded cigarettes (see Questions Reserved at [13]) which the Commonwealth contests on the basis they are not "original artistic work[s]" within the meaning of s 32 of the *Copyright Act* because they are mere variations on the existing get-up of the Winfield brand of cigarettes. However, "[t]here is no rule that an artistic work based on another cannot for that reason alone attract a distinct copyright".[20] Originality in

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[8] *Trade Marks Act*, s 20(1).

[9] *Trade Marks Act*, sections 7(4) and 17; *E&J Gallo Winery v Lion Nathan Australia Pty Limited* (2010) 241 CLR 144 at 162, [41] – 163, [43] per French CJ, Gummow, Crennan and Bell JJ.

[10] *Trade Marks Act*, 21.

[11] *Trade Marks Act*, s 22.

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

[13] *Patents Act*, s 13(1).

[14] See the definition of "exploit" in the Dictionary to the *Patents Act*. See also *Northern Territory v Collins* (2008) 235 CLR 619 at 629, [37] per Hayne J, and at 648, [122] per Crennan J.

[15] *Patents Act*, s 13(2).

[16] *Grain Pool of Western Australia v Commonwealth* (2001) 202 CLR 479 at 496, [24] – [25] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[17] *Designs Act*, s 10(1)

[18] *Designs Act*, s 10(1).

[19] *Designs Act*, s 10(2).

[20] *Interlego AG v Croner Trading Pty Limited* (1992) 39 FCR 348 at 379 per Gummow J.

the context of the *Copyright Act* requires only that the work be the product of independent intellectual effort; novelty or inventiveness is not necessary.[21] The agreed facts identify the authors of the BAT images (see Questions Reserved at [15]), and it may be readily inferred that those authors expended intellectual effort in creating the images such as to satisfy the requirement of "[o]riginal artistic work" in s 32 of the *Copyright Act*. If there is any real issue about originality, then that issue would have to be tried.

14. Let it be assumed that BAT has copyright in the BAT images: it would follow that BAT has the exclusive right to reproduce, publish or communicate to the public those images, or authorise another to do so.[22] Those rights are personal property.[23]

10 **B.2 BAT's goodwill and reputation:**

15. The second category of property relied on by BAT is the goodwill and reputation it has developed by reason of the sale of cigarettes using the distinctive get-up associated with the "Winfield" brand (see Question Reserved, section A5).

16. Goodwill and reputation, specifically goodwill and reputation arising from the use in the course of a business of distinctive marks or get-up, is recognised as a species of property,[24] the proprietary right being the legal right or privilege to conduct a business in a particular way by particular means.[25] The proprietary nature of the rights associated with goodwill and reputation lies in the jurisdiction of equity to enjoin the invasion of that reputation or goodwill by conduct that constitutes the tort of passing off.[26] In this way,
20 the proprietary interest in goodwill and reputation is akin to the proprietary interest in confidential information which has been recognised as within the scope of the constitutional protection afforded by s 51(xxxi).[27]

B.3 BAT's retail packaging:

17. The third category of property relied on by BAT is its property in the physical chattels which constitute the retail packaging in which it sells cigarettes and the cigarettes themselves (see Questions Reserved, paragraph A7). This species of property is separate to any intellectual property rights arising in connection with them.[28] The bundle of rights associated with a chattel that constitute property in that chattel are classically identified as the rights to possess, use, enjoy and dispose of the chattel.[29]

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[21] *IceTV Pty Limited v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at 474, [33] and 478, [48] per French CJ, Crennan and Kiefel JJ.

[22] *Copyright Act*, ss 13(2), 14 and 31(1)(b).

[23] *Copyright Act*, s 196(1).

[24] *AG Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273 at 283 – 284 per Lord Parker; *Conagra Inc v McCain Foods (Aust) Pty Limited* (1992) 33 FCR 302 at 366 per Gummow J; *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 615, [23], and at 617, [30] per Gaudron, McHugh, Gummow and Hayne JJ; *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 68, [48] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby , Hayne and Callinan JJ, citing *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 33 per Windeyer J.

[25] *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 617, [30], fn (44) per Gaudron, McHugh, Gummow and Hayne JJ.

[26] *Orange Crush (Australia) Ltd v Gaterell* (1928) 41 CLR 282 at 292 per Isaacs J; *Colbeam Palmer Ltd v Stock Affiliates* (1970) 122 CLR 25 at 34 per Windeyer J; *Conagra Inc v McCain Foods (Aust) Pty Limited* (1992) 33 FCR 302 at 366 per Gummow J.

[27] *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 119 – 122 per Gummow J; on appeal, the Full Court not deciding (1991) 28 FCR 291 at 305 per Sheppard, Wilcox and Pincus JJ.

[28] *Pacific Film Laboratories Pty Limited v Commissioner of Taxation* (1970) 121 CLR 154 at 165 – 168 per Windeyer J; *Breen v Williams* (1996) 186 CLR 71 at 126 – 127 per Gummow J.

[29] W Hohfeld, "Some Fundamental Conceptions as Applied in Judicial Reasoning" 23 *Yale Law Journal* 16 (1913) at 22 – 23. See also, *Waterhouse v Minister for the Arts and Territories* (1992) 43 FCR 175 at 185 per Black CJ and Gummow J.

C. Outline of the key features Tobacco Plain Packaging Act and Tobacco Plain Packaging Regulations:

18. The operative parts of the *TPP Act* appear in Part 2 of Chapter 2. Division 1 and 2 of Part 2 (ss 18 to 26) specify requirements for tobacco products and the retail packaging of tobacco products.

19. Section 18 of the *TPP Act* prescribes physical features of retail packaging. Section 18(1)(a) prohibits the retail packaging of tobacco products from having, on its outer surfaces, decorative ridges, embossing, or other irregularities of shape or texture or any other embellishments, other than as permitted by the regulations. Section 18(1)(b) requires that any glues or adhesives used in manufacturing be transparent and not coloured.

20. Section 18(2) requires cigarette packs and cartons to be rigid and made of cardboard, be rectangular, have surfaces meeting at firm 90 degree angles and have rigid, straight and not rounded, bevelled or otherwise shaped or embellished edges.

21. Section 18(3) requires that the opening to a cigarette pack or carton have only a flip-top lid, hinged at the back and with straight edges and not rounded, bevelled or otherwise shaped or embellished in any way. Regulation 2.1.1 of the *Tobacco Plain Packaging Regulations 2011* (**TPP Regulations**) specifies the dimensions of a cigarette pack, prohibits it from having an opening that can be re-closed or re-sealed after opening other than a flip-top lid, and requires the flip-top lid to be hinged only at the top of the pack.

22. Section 19 of the *TPP Act* governs the colour and finish of retail packaging for cigarette packets. It requires them to have a matt finish and to be such colour as may be prescribed by the regulations, or otherwise a drab dark brown. Regulation 2.2.1 of the *TPP Regulations* requires the outer service of tobacco packaging to be the colour known as Pantone 448C, which is a drab dark brown colour.

23. Section 20 of the *TPP Act* prohibits any trade mark and any "mark" (line, letters, numbers, symbols, graphics or image) from appearing anywhere on the retail packaging of tobacco products, but permits "the brand, business or company name for the tobacco products, and any variant name for the tobacco products" and other legislative requirements or trade mark or marks permitted by the regulations to appear on the retail packaging for tobacco products.

24. Section 21 of the *TPP Act* requires any brand appearing on the retail packaging of a tobacco product to comply with the requirements prescribed by the regulations. Regulation 2.4.1 of the *TPP Regulations* requires brands appearing on cigarette packs or cartons to appear in a particular font (called Lucinda Sans) and size, in the case of a brand or business name in 14 point size and in the case of variant name 10 point size, with the first letter capitalised and the remainder in lower case, in a normal weighted regular font and in a colour known as Pantone Cool Gray 2C. Section 21(2) of the *TPP Act* provides that a brand must only appear once on the front, top and bottom of a cigarette pack and only on that surface, and across one line only, horizontally and in the arrangement specified by the table in s 21(3) of the *TPP Act*.

25. Section 22 of the *TPP Act* requires plastic or other wrappers to be transparent and not coloured, marked, textured or embellished in any way, and prohibits trade marks or other marks appearing on the wrapper. Section 23 prohibits inserts or onserts for retail packaging of tobacco products other than as permitted by the regulations, s 24 prohibits noises or scents, and s 25 prevents retail packaging of tobacco products from changing after sale.

26. Section 26 of the *TPP Act* prohibits any trade mark or mark from appearing on tobacco products (which, as defined, would include cigarettes) other than as permitted by the regulations. Regulation 3.1.2 of the *TPP Regulations* permits only that a cigarette be marked with an alphanumeric code that (inter alia) must not constitute tobacco advertising and promotion or represent, or be related in any way to, the brand or variant name of the cigarette.

27. Chapter 3 of the *TPP Act* creates a series of offences and also provides for civil penalties. Division 1 of Part 2 of Chapter 3 of the *TPP Act* creates a series of offences concerning retail packaging of tobacco products which do not comply with the *TPP Act*. The sale, offering or supply of a tobacco product in packaging which does not comply with the requirements of the *TPP Act* is an offence (s 31(2)), and also attracts a civil penalty (s 31(5)). The purchase of a tobacco product packaged in a manner which does not comply with the requirements of the *TPP Act* is an offence and attracts civil penalty, except where it is purchased for a person's personal use (s 32). A person who packages a tobacco product for retail sale which does not comply with the requirements of the *TPP Act* commits an offence and is liable for a civil penalty (s 33). A person who manufactures packaging which is used for tobacco products which does not comply with the requirements of the *TPP Act* commits an offence and is liable for a civil penalty (s 34). A person who manufactures tobacco products and contracts for another to package that product which packaging does not comply with the requirements of the *TPP Act* commits an offence and is liable for a civil penalty unless it took all reasonable steps to ensure that the packaging complies with the *TPP Act* (s 35). Section 36 of the *TPP Act* provides, in effect, that the wholesaler of tobacco products to another commits an offence and is liable to a civil penalty if, at the time of the sale, it does not have in place a contract with the purchaser prohibiting the purchaser from supplying the tobacco product for retail sale, except in packaging which complies with the *TPP Act*. Each of those offences is both an offence of strict liability and fault based offence, with differential penalties attaching to each.

28. Division 2 of Part 2 of Chapter 3 of the *TPP Act* concerns tobacco products which do not comply with the requirements of the *TPP Act*. The sale, offer or supply (s 37), the purchase other than for personal use (s 38), and the manufacture of a non-compliant tobacco product (s 39) are offences (both of strict liability and fault based), and also attract civil penalties.

29. Part 3 of Chapter 3 of the *TPP Act* creates a series of offences and contains civil penalty provisions which mirror those in Part 2, but by or in relation to constitutional corporations. Included in the offences created by Part 3 of the *TPP Act* is s 45 which creates an offence of manufacturing retail packaging which carries "the trade mark, brand, business name or company name or other identifying mark of a constitutional corporation" in which tobacco products are packaged by a person other than the manufacturer, and which does not comply with the requirements of the *TPP Act*.

30. Section 49 of the *TPP Act* provides to the effect that the offences creates by Part 2 and Part 3 of Chapter 3 of the *TPP Act* do not apply in relation to tobacco products which are for export.

31. Chapter 4 creates a series of investigatory powers for "authorised officers" under the *TPP Act*, including entering and searching premises with the consent of the occupier or with a warrant and requiring information or documents to be produced. Chapter 5 provides for the making of civil penalty orders for contraventions of the *TPP Act* and for the issuing of infringement notices for contraventions of the civil penalty provisions.

D. Statutory information standards:

32. The *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (**2004 Information Standard**) requires cigarette retail packaging to carry certain warning messages and explanatory messages. In the case of cigarette retail packaging manufactured or imported after the commencement of the 2004 Information Standard, but before 1 March 2006, cigarette retail packages must carry in rotation on their face one of six warning messages set out in Schedule 1 (eg., SMOKING CAUSES LUNG CANCER) covering between 15% - 25% of the front of the package, and an accompanying explanatory message on the back of the package covering between 20 – 33% of the surface area of the back (see Part 3).

33. In the case of cigarette retail packaging manufactured or imported after 1 March 2006, retail cigarette packaging must carry on its face one of 14 specified warning messages and corresponding graphic covering at least 30% of the surface area of the front face and a warning message, corresponding graphic and explanatory message on the back covering at least 90% of the back. The explanatory message refers to the Quitline telephone service, contains the "Quitline logo" and the website "www.quitnow.info.au" (see Part 4, Division 3).

34. The *Competition and Consumer (Tobacco) Information Standard* 2011 (**2011 Information Standard**) commenced on 1 January 2012, but applies to tobacco products supplied after 30 November 2012 (see Reg 1.5). The 2011 Information Standard identifies 14 combinations of a warning statement (eg., SMOKING HARMS UNBORN BABIES), a graphic, an explanatory message and an information message which are required to be displayed on the cigarette packaging (see Parts 3 and 4). The warning statement and graphic must cover at least 75% of the front of the retail packaging in the arrangement specified (see Reg 9.13). The warning statement, graphic and explanatory message must cover at least 90% of the back of the retail packaging in the arrangement specified (see Reg 9.19). The specified explanatory message refers to the Quitline telephone service and the website "www.quitnow.info.au". In the case of the graphic appearing on the back of the package, it must have an overlay of the "Quitline logo".

E. Acquisition of property:

35. Section 15 of the *TPP Act* provides as follows –

> **15 Acquisition of property**
>
> (1) This Act does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms.
>
> (2) In particular, if, apart from this section, this Act would result in such an acquisition of property because it would prevent the use of a trade mark or other sign on or in relation to the retail packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark or sign may be used on or in relation to the retail packaging of tobacco products, or on tobacco products, subject to any requirements that may be prescribed in the regulations for the purposes of this subsection.
>
> Note: Offences and civil penalties apply to the supply, purchase and manufacture etc. of tobacco products that do not comply with any requirements specified in the regulations (see Chapter 3).
>
> (3) To avoid doubt, any tobacco product requirement (within the meaning of paragraph (a) or (b) of the definition of tobacco product requirement) that does not result in such an acquisition of property continues to apply in relation to:
>
> (a) the retail packaging of tobacco products; and

(b) the appearance of tobacco products.

36. BAT contends that the operation of the *TPP Act* results in an acquisition of property, thus engaging s 15.

37. For there to be an acquisition of property within the meaning of s 51(xxxi), it is necessary, but not sufficient, for the owner of the property in question to demonstrate that legislation "adversely affects or terminates a pre-existing right that [he or she] enjoys in relation to his [or her] property".[30] In this case, as the summary of the legislative and regulatory regime set out above demonstrates, the plaintiffs will be unable to use or exploit their trade marks, patents, designs, copyright and get-up in connection with the sale of cigarettes or in any meaningful or substantive fashion, or to exercise any meaningful or substantive control over the appearance of cigarette packets and cigarettes owned by them.

38. In the result, the only pictures or images that will appear on BAT's cigarette packets will be those required by the 2011 Information Standard (this is because it is the 2011 Information Standard which will apply when Part 2 of the *TPP Act* commences). The messages, pictures and images required to be included on the plaintiffs' cigarette packets by the *TPP Act*, the *TPP Regulations* and the 2011 Information Standard will appear in the absence of the plaintiffs' trade marks, patents, designs, copyright and get-up (save to the extent of brand or variant names complying with the various requirements as to font, size and the like).

39. It follows that, even though the plaintiffs have not been formally deprived of their trade marks, patent, design, copyright, get-up, goodwill and rights in their packaging, they have been "in a real sense, although not formally, stripped of the possession and control" of their property.[31] The Commonwealth has, in other words, deprived the plaintiffs of the "reality of proprietorship"[32] or "everything that made [that property] worth having"[33]. The extent of the restriction on the plaintiffs' use of their property is plainly, it is submitted, capable of characterization as an acquisition.[34]

40. Nevertheless, it may be accepted that, in order to constitute an "acquisition" within the meaning of s 51(xxxi), "it is not enough that [the] legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be".[35]

41. For present purposes, there are three important matters to note in relation to that requirement –

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[30] *Tasmanian Dam Case* (1983) 158 CLR 1 at 145 per Mason J.

[31] *Bank of NSW v. Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J.

[32] *Bank of NSW v. Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J.

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

[34] See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 415 per Stephen J.

[35] *Tasmanian Dam Case* (1983) 158 CLR 1 at 145 per Mason J. See also *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Guadron JJ; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 185 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304 per Mason CJ, Deane and Gaudron JJ; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 634 per Gummow J; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 360-1, [90] per French CJ and at 422, [298] per Kirby J; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 179-180, [81]-[82] per French CJ, Gummow and Crennan JJ and at 201-2, [147] per Hayne, Kiefel and Bell JJ.

(a) *First*, the word "acquisition" is not to be "pedantically or legalistically restricted to a physical taking of title or possession".[36] That is to say, because the "property" protected by s 51(xxxi) extends to "innominate and anomalous interests", the notion of "acquisition" cannot be confined to "traditional conveyancing principles and procedures".[37]

(b) *Secondly*, the "interest in property" that it is necessary to show has been acquired (in the sense of gained) by the Commonwealth or some other person does not need to "correspond precisely with what was taken".[38]

(c) *Thirdly*, it will be sufficient to demonstrate that the Commonwealth or some other party has acquired an "interest in property" if they have obtained "some identifiable benefit or advantage relating to the ownership or use of property".[39]

42. Taken together, those matters demonstrate that the requirement that there be an "acquisition", rather than a mere "taking", is concerned, as a matter of substance, with whether the Commonwealth or some other person has received some part of the benefit that inured to the former owner, as the owner of the acquired property.[40] It is not concerned, as a matter of form, with whether the Commonwealth or some other person has had transferred to them a recognized proprietary interest or estate of the former owner.

43. So, to take the most obvious example from the case law, in *Georgiadis*, the cause of action against the Commonwealth that was extinguished did not in any sense vest in the Commonwealth. The extinguishment of the cause of action, however, relieved the Commonwealth of a liability to pay money to which it would otherwise have been subject. In substance, therefore, the extinguishment of the cause of action resulted in the acquisition from the plaintiff of an amount of money equal to the Commonwealth's liability. Relief from that liability constituted a "direct benefit or financial gain" to the Commonwealth.[41]

44. It is important to observe, however, that a benefit or advantage of the necessary kind may extend beyond the augmentation of the Commonwealth's, or some other person's, assets or rights. The extinguishment or sterilization of one person's property may directly confer a benefit of the requisite nature upon another without any rights being conferred on that (or indeed any) person. For example, in the *Tasmanian Dam Case* Deane J gave the example of legislation prohibiting any presence (including by the Commonwealth) on land within a certain distance of a defence establishment. His Honour considered that legislation of that nature would acquire the property of neighbouring landowners, by securing to the Commonwealth the benefit of the use of the land in its unoccupied state.[42]

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[36] *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 184 per Deane and Gaudron JJ.

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

[38] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305.

[39] *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 185 per Mason CJ, Deane and Gaudron JJ. It follows that the apparent conflict between the many statements that an interest of a "proprietary nature" needs to be acquired, and Deane J's "hesitant" conclusion in *Tasmanian Dam Case* (1983) 158 CLR 1 at 286 may be more apparent than real. See also *Smith v ANL Ltd* (2000) 204 CLR 493 at 548-9, [173] per Callinan J and *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 233, [229] per Heydon J (dissenting in result).

[40] The concern of s 51(xxxi) with matters of substance rather than form, and the resulting liberal approach to the construction of its terms, has been stated by the Court over many years: see *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 360, [89] per French CJ and the cases cited at footnote (219).

[41] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 197 at 305 per Mason CJ, Deane and Gaudron JJ.

[42] *Tasmanian Dam Case* (1983) 158 CLR 1 at 283-4 per Deane J.

45. In the present case, therefore, it does not matter that the plaintiffs' trade marks, copyright, registered design, patent, get-up, goodwill and rights in their packaging have not been transferred to the Commonwealth or any other person. It is enough that the Commonwealth and other persons will receive a substantial part of the benefit that inured to the plaintiffs as the owner of that property, amounting to, "some identifiable benefit or advantage relating to the ownership or use of property"[43].

46. The practical sterilization of the plaintiffs' property, by reason of the prohibition of the principal and most valuable use of that property (namely, use of the trade marks, copyright images, registered design and patent and get up in and on the retail packaging of cigarettes, and on the cigarettes themselves), confers upon the Commonwealth a benefit.[44] That benefit arises at a number of different levels:

(a) *First*, and most fundamentally, there is a *per se* benefit that arises by ensuring that particular intellectual property may not be used in a particular way. The owner of intellectual property (just like the owner of land) may put it to a variety of uses for a variety of purposes, or not, as it chooses. An owner of property may enter into an agreement, for reward, with another person not to use that property at all or in certain ways. Equally, an owner of property may wish, for their own purposes, not to use their property.[45] The fact that property is not used actively does not alter the fact that it is being "used". In this case, the Commonwealth has secured to itself one of the fundamental rights of an owner of property: namely, the right to use property by refraining from deploying it for certain purposes. That is the direct acquisition of a fundamental aspect of the property right previously enjoyed by the plaintiffs.

(b) *Secondly*, the prohibition on the use of the plaintiffs' intellectual property is coupled with positive requirements as to the physical appearance of the plaintiffs' cigarette packets (including as to shape, size, colour, content of written messages, and font and size of written messages). The benefit of the prohibition on the use of the plaintiffs' intellectual property is thus a critical aspect of a scheme whereby the Commonwealth has reserved to itself the right to dictate every aspect of the appearance of BAT's cigarette packets. It is thus not a "bare" prohibition on use, but a prohibition enabling the Commonwealth to impose its own design, labelling and get-up on BAT's cigarettes and their packets.

(c) *Thirdly*, and connected with the second benefit, the assumption by the Commonwealth of the right to prevent the use of the plaintiffs' intellectual property will inevitably project any and all messages that the Commonwealth legislates from time to time to include on the plaintiffs' cigarette packets. Upon the commencement of Part 2 of Chapter 2 of the *TPP Act* those benefits will initially be manifested in the requirements in relation to the appearance of cigarette packets found in the 2011 Information Standard Information.

(d) *Fourthly*, and connected with the third benefit, certain of the messages required to be printed on the plaintiffs' cigarette packets advertise a service operated by various entities called "Quitline". The increased prominence of that advertising by

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

[44] The level of restriction in this case makes it very different to, e.g., *Waterhouse v Minister for the Art and Territories* (1993) 43 FCR 175. See the discussion in, e.g., *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 635 per Gummow J, and *Smith v ANL Ltd* (2000) 204 CLR 493 at 505-6, [23] per French CJ.

[45] See *Council of the City of Newcastle v. Royal Newcastle Hospital* (1957) 96 CLR 493; *Council of the City of Newcastle v. Royal Newcastle Hospital* (1959) 100 CLR 1 at 3 – 4 (PC); *Western Australia v. Ward* (2002) 213 CLR 1 at 340, [807] per Callinan J; *Mining Act Case* (1999) 196 CLR 392 at 488, [281] per Callinan J.

reason of the prohibition on use of the plaintiffs' intellectual property confers a benefit on both the Commonwealth and the Quitline service providers.

(e) *Fifthly*, the Commonwealth obtains the right to dictate the appearance and content of the plaintiffs' cigarette packets (including by requiring the plaintiffs to print the Commonwealth's, and others', messages thereon) without any obligation to pay for the design, printing or publicity benefit thereby obtained. To that extent, the Commonwealth, Quitline service providers, and others receive a direct financial benefit as a result of the *TPP Act* scheme.

(f) *Sixthly*, and generally, the prohibition on use is said by the Commonwealth to enable to Commonwealth to achieve particular objectives of its own. That is to say, the Commonwealth has acquired the right of the plaintiffs, as owners of the intellectual property in question, not to use their property in order to achieve the Commonwealth's own ends. Those objectives and ends are at least partly set out in s 3 of the Act, and the attempt to achieve them by prohibiting the use of certain intellectual property is a direct benefit to the Commonwealth.

47. In the result, the Commonwealth has assumed control over a substantial aspect of the plaintiffs' property, business, goodwill and reputation. That description of the benefits accruing to the Commonwealth (and others) by reason of the prohibition of all practical uses of the plaintiffs' intellectual property makes clear, however, that there is yet a further dimension to the benefit accruing to the Commonwealth. By securing the benefit of the plaintiffs' rights to use their property by refraining from deploying it in particular ways or for certain purposes, the Commonwealth has been able to assume complete control over the get-up and appearance of BAT's cigarettes and their packaging.

48. The right of a person to control the form, appearance and content of material printed on cigarette packets and cigarettes that they own is plainly one aspect of the bundle of proprietary rights comprising ownership of the packet and the cigarettes within (or, alternatively, one facet of the legally endorsed concentration of power over the packet, and the cigarettes).[46] The legislative scheme as a whole, therefore, operates to deprive the plaintiffs of a substantial property interest in their cigarettes and cigarette packets, vesting that same interest in the Commonwealth.

49. For these reasons, even if the narrowest conception of "interest in property" were to be adopted, under the *TPP Act*, the Commonwealth has acquired the following interests in the plaintiffs' property –

(a) the right to determine that the plaintiffs' intellectual property will not be used for all practical purposes; and

(b) the right to dictate the appearance of the plaintiffs' cigarettes and packets.

50. If it is accepted, however, that it is sufficient for the plaintiffs to demonstrate that the Commonwealth has obtained "some identifiable benefit or advantage relating to the ownership or use of property", then the benefits described in detail above satisfy that requirement.

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[46] See *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-1, [44] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.

F. Modification of statutory property rights:

51. There is no general principle that the contingency of legislative modification of statutory rights removes them from the protection of s 51(xxxi).[47] There is no analogy between the statutory property rights arising under the *Trade Marks Act*, *Copyright Act*, *Patents Act*, *Designs Act* which BAT asserts in this case, and other statutory entitlements which have been held to be outside the protection of s 51(xxxi) because they are inherently susceptible to variation. The latter entitlements include the right to claim statutory benefits (Medicare);[48] licences to exploit natural resources or interests in natural resource management plans;[49] permission to explore off-shore for petroleum;[50] and statutory workers' compensation entitlements.[51] Statutory intellectual property rights have been consistently identified in this Court as rights which are not so fragile or insubstantial as to fall outside the protection of s 51(xxxi) of the Constitution.[52] Those rights suffer from no "congenital infirmity".[53] They are expressly stated to be property in the statutes which create them. They rest on a constitutional concept of intellectual or industrial incorporeal property that finds expression in s 51(xviii).[54] In the case of trade marks[55] and (possibly) copyright,[56] they find their origin in the common law and, in the case of patents, may be traced to the Statute of Monopolies of 1623.[57]

G. TPP Act does not provide "just terms":

52. Justices of the Court have repeatedly expressed the view that the requirement of "just terms" attendant on a valid acquisition of property pursuant to s 51(xxxi) of the Constitution requires the payment of compensation representing the value of the property rights acquired: "[u]nless it be shown", Brennan J stated, "that what is gained is full compensation for what is lost, the terms cannot be found to be just".[58] Rich J,[59]

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[47] *Attorney General (NT) v Chaffey* (2007) 231 CLR 651 at 664, [24], per Gleeson CJ, Gummow, Hayne and Crennan JJ; *Telstra Corporation v Commonwealth* (2008) 234 CLR 210 at 232, [49] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.

[48] *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 242 – 245 per Brennan J, and at 260 – 262 per McHugh J.

[49] *Minister for Primary Industries and Energy v Davey* (1993) 47 FCR 151 at 163 – 165 per Black CJ and Gummow J; *Bienke v Minister for Primary Industries and Energy* (1995) 63 FCR 567 at 581 – 585 per Black CJ, Davies and Sackville JJ.

[50] *Commonwealth v WMC Resources Limited* (1998) 194 CLR 1 at 20, [24] per Brennan CJ; at 38, [86] per Gaudron J; at 56, [144] – 58, [151] per McHugh J; at 69 - 70, [181] and 73, [194] – [197] and 75, [203] per Gummow J;

[51] *Attorney General (NT) v Chaffey* (2007) 231 CLR 651 at 665, [30] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

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

[53] *Commonwealth v WMC Resources Limited* (1998) 194 CLR 1 at 75, [203] per Gummow J.

[54] *Grain Pool of Western Australia v Commonwealth* (2001) 202 CLR 479 at 496, [24] – [25] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[55] *Colbeam Palmer Ltd v Stock Affiliates Pty Limited* (1968) 122 CLR 25 at 33 per Windeyer J.

[56] *Pacific Film Laboratories Pty Limited v Federal Commissioner of Taxation* (1970) 121 CLR 154 at 166 per Windeyer J.

[57] *Bristol Myers Co v Beecham Group Ltd* [1974] AC 646 at 677 – 678 per Lord Diplock.

[58] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 311.

[59] *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 106 - 107; *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 459 at 527; *Commonwealth v Huon Transport Pty Limited* (1945) 70 CLR 293 at 306-307.

Starke J,[60] Latham CJ,[61] Williams J[62] and, more recently, Gleeson CJ,[63] Kirby J,[64] Callinan J[65] and Heydon J[66] have all expressed views to a similar effect.

53. The *TPP Act* provides for no compensation for the property rights it affects by its application, and provides for no mechanism by which compensation can be determined and paid. Section 15(2) appears to acknowledge (at least implicitly) that "just terms" are not provided by the *TPP Act* at least to the extent that it prevents the use of a trade mark, or other sign in relation to the retail packaging of tobacco products. But the Commonwealth contends to the effect that the *TPP Act* provides "just terms" because the *TPP Act* "constitutes fair dealing" between the Australian nation, and BAT and other tobacco manufacturers, importers and distributors by reason of the following matters –

(a) tobacco smoking is a cause of serious, even fatal illnesses which is harmful to the public and the public interest;

(b) the property rights acquired by the *TPP Act* are used in connection with the promotion of tobacco products, and to maintain and increase their consumption and are the principal means of pursing those goals;

(c) there is a rational and cogent basis for believing that plain packaging of tobacco products will reduce the incidence of people commencing smoking, increase the efficacy of health warnings and reduce an apprehended risk that cigarette packaging misleads smokers; and

(d) brand names can still be used on tobacco packaging in the form prescribed by s 21 of the *TPP Act* and by s 28 of the *TPP Act* trade marks used in relation to tobacco products are preserved (albeit sterilized).

54. The Commonwealth's contention reduces to the proposition that an acquisition of property without compensation can nonetheless be on "just terms" if the acquisition does not go too far and serves, or is thought to serve, a higher public interest, such as reduction of the incidence of smoking and the health conditions attendant on it. To make good this proposition the Commonwealth seeks to put before the Court a voluminous bundle of documents which are said to demonstrate the adverse health affects of consuming tobacco products and the likelihood of plain packaging reducing the incidence of smoking (Questions Reserved at A11).

55. The material which the Commonwealth seeks to put before the Court will be of no assistance in the determination of the Questions Reserved. The Commonwealth's contention is bad in principle and unsupported by authority, and the materials it relies on are irrelevant to the determination of any issue before the Court.

56. BAT does not accept that the *TPP Act* will be effective to reduce the incidence of smoking. However, for the purposes of argument in this case, let it be assumed in favour

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[60] *Johnston Fear & Kingham & The Offset Printing Company Pty Limited* (1943) 67 CLR 314 at 328; *Nelungaloo Pty Limited v Commonwealth* (1948) 75 CLR 495 at 547; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 300.

[61] *Johnston Fear & Kingham & The Offset Printing Company Pty Limited* (1943) 67 CLR 314 at 323; *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 459 at 523 - 524.

[62] *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 83; *Johnston Fear & Kingham & The Offset Printing Company Pty Limited* (1943) 67 CLR 314 at 333; *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 459 at 537.

[63] *Smith v ANL Ltd* (2000) 204 CLR 493 at 501, [9].

[64] *Commonwealth v WMC Resources Limited* (1998) 194 CLR 1 at 102 - 103, [262]; *Smith v ANL Ltd* (2000) 204 CLR 493 at 531, [111].

[65] *Commonwealth v Western Australia* (1999) 196 CLR 392 at 489, [286]; *Smith v ANL Ltd* (2000) 204 CLR 493 556, [194].

[66] *ICM Agriculture Pty Limited v Commonwealth of Australia* (2009) 240 CLR 140 at 216 - 217, [193].

of the Commonwealth, that the propositions about the health effects of smoking and the efficacy of plain packaging it wishes to establish by the documents it seeks to put before the Court are correct. Even then there is nothing peculiar about the *TPP Act*. Every acquisition of property effected by the Commonwealth pursuant to s 51(xxxi) may be assumed to (or be thought to) serve the public interest.[67] However, the merits of the acquisition are irrelevant to the issue of "just terms".[68] It is the furtherance of the public interest that provides the occasion for the requirement that "just terms" be provided; it does not provide a basis for diluting or eliminating the terms to be provided to the property owner. As Brennan J observed, in terms later approved by Gleeson CJ,[69] "[i]n determining the issue of just terms, the Court does not attempt a balancing of interests of the dispossessed owner against the interests of the community at large".[70] The animating principle behind s 51(xxxi) is that the cost of the pursuit of the interests of the community at large where it involves an acquisition of property should fall on the community and not on select property owners.[71] This principle finds its foundation in the rule of law and the requirements of democratic accountability and can be traced back, at least, to the Magna Carta.[72] It has been rigidly insisted upon by this Court even in wartime where property was acquired for the purpose of the very defence of the nation.[73] The proposition that the requirement of "just terms" in s 51(xxxi) can be met by pursuit of some abstract notion of justice or fairness at large and not by the provision of just recompense to the owner of the acquired property was rejected by this Court in *Smith v ANL Limited* as "stretch[ing] beyond its legal endurance the concept of 'just terms' ".[74] The Commonwealth's contentions on "just terms" in this case should likewise be rejected.

57. The Commonwealth appears to place reliance on the decision of this Court in *Grace Bros Pty Limited v Commonwealth*[75] and the remarks of Dixon J and Kitto J in *Nelungaloo v Commonwealth.*[76] But on proper analysis they provide no support for any proposition that the constitutional requirement of "just terms" for the acquisition of property can be satisfied in the absence of compensation for the property acquired.

58. In *Grace Bros v Commonwealth* the *Land Acquisition Act 1906* (Cth) was attacked as not effecting acquisition of land on just terms because (first) land was to be valued at a date prior to the date of acquisition; (secondly) the valuation did not permit account to be taken of special value to the owner; and (thirdly) the interest rate was inadequate. There was no question that compensation was payable: the issue was whether the Act provided for compensation that was just. It was in rejecting the contentions directed to the

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[67] *Smith v ANL Limited* (2000) 204 CLR 493 at 529, [103] per Kirby J.

[68] *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 - 404 per Barwick CJ.

[69] *Smith v ANL Limited* (2000) 204 CLR 493 at 500 - 501, [8].

[70] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310 - 311.

[71] *Commonwealth v WMC Resources Limited* (1998) 194 CLR 1 at 101, [258] per Kirby J; *Commonwealth v Western Australia* (1999) 196 CLR 392 at 461 - 462, [194] per Kirby J; *Smith v ANL Limited* (2000) 204 CLR 493 at 501, [9] per Gleeson CJ; at 529 - 530, [101] - [104] per Kirby J; at 541 - 542, [156] and at 544, [190] per Callinan J. *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 at 207, [176] per Heydon J.

[72] *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 104 per Rich J; *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 at 208, [177] - 212, [184] per Heydon J.

[73] *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 584 per McTiernan J.

[74] (2000) 204 CLR 493 at 513, [50] per Gaudron and Gummow JJ. See also, Gleeson CJ at 500, [8]; at 531, [111] - 532, [112] per Kirby J; at 556, [195] - 557, [198] per Callinan J.

[75] (1946) 72 CLR 269.

[76] (1947) 75 CLR 495; (1952) 85 CLR 545.

adequacy of the compensation that Dixon J stated that, "[t]he inquiry must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country", and that, "justice to the subject .. [does not] demand a disregard of the interests of the public or of the Commonwealth".[77] However, there was no suggestion in *Grace Bros v Commonwealth* that "just terms" could involve the acquisition of property without compensation.

59. *Nelungaloo v Commonwealth* concerned acquisition of wheat pursuant to a wartime commodity marketing pool the regulations governing which entitled the grower to a distributable share in the proceeds of the pool. Dixon J[78] expressed the view, inconsistently with an earlier decision of this Court,[79] and to which he did not give effect, that a distribution to a grower of an amount from the pool set according to what was considered a reasonable return on the wheat and not the market value from time to time, may satisfy the requirement of "just terms" in s 51(xxxi). Dixon J supported his view by noting that s 51(xxxi) "rests on the somewhat general and indefinite conception of just terms, which appears to refer to what is fair and just between the community and the owner of the thing taken", and that, "[u]nlike compensation, which connotes full money equivalence, 'just terms' are concerned with fairness".[80] However, Dixon J nowhere suggested that fairness for an acquisition of property could be satisfied without compensation.

60. *Nelungaloo v Commonwealth* returned to this Court, after an aborted appeal to the Privy Council.[81] Application was made on its return for a certificate to appeal to the Privy Council under s 74 of the Constitution. In that context, Kitto J was concerned to emphasise the "specially Australian character" of the standard of "just terms" in s 51(xxxi)[82]. Referring to the earlier remarks of Dixon J, Kitto J commented that "[t]he standard of justice postulated by the expression 'just terms' is one of fair dealing between the Australian nation and an ... individual in relation to an acquisition of property for a purpose within the national legislative competence".[83] However, nothing in Kitto J's judgment suggests that that "standard of justice" could be satisfied in the absence of any compensation for the acquisition of property.

H. The provision of "just terms" is not incongruous or inconsistent:

61. As a general proposition, the Parliament's power to make laws for the acquisition of property derives from s 51(xxxi) alone, with the power of acquisition being abstracted from the content of the other heads of legislative power.[84] In some cases, however,

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[77] (1946) 72 CLR 269 at 290 - 291. See also, at 279 per Latham CJ, at 285 per Starke J, at 295 per McTiernan J.

[78] Who was one of three dissenters.

[79] *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77.

[80] (1947) 75 CLR 495 at 569.

[81] The appellant had not obtained a certificate from the High Court under s 74 of the Constitution: (1950) 81 CLR 144.

[82] (1952) 85 CLR 545 at 600.

[83] (1952) 85 CLR 545 at 600. See also, Dixon J at 569.

[84] *WH Blakeley Pty Ltd v Commonwealth* (1953) 87 CLR 501 at 520-1 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-2 per Dixon CJ; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-2 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 per Barwick CJ and 407 per Gibbs J; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gummow JJ; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 283 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 per

Parliament does have the power to make laws for the acquisition of property, free of any obligation to provide just terms.

62. Some heads of power clearly, and on their face, contemplate the power to acquire property other than on just terms (the obvious examples being the taxation power and the bankruptcy and insolvency power). The power of acquisition is not abstracted from those powers, and is thus able to be exercised free of the obligation to provide just terms.[85] Other heads of power do not, on their face, evince a general intention to authorize acquisitions of property otherwise than on just terms, but nonetheless plainly contemplate particular kinds of laws that are inconsistent with any requirement that just terms be provided. The clearest example is laws specifying a penalty for breach of a substantive provision.[86]

63. Generally, if the application of the just terms requirement of s 51(xxxi) would be "inconsistent" or "incongruous", then it will not apply.[87] That is because "to characterize certain exactions of government (such as levying of taxation, imposition of fines, exaction of penalties or forfeitures, or enforcement of a statutory lien) as an acquisition of property would be incompatible with the very nature of the exaction. ... It cannot therefore have been the purpose of s 51(xxxi) to apply to such exactions an obligation to provide 'just terms'."[88]

64. There is no reason why the provision of just terms for the acquisition of BAT's property by the *TPP Act* would be incompatible with the very nature of the law. The *TPP Act* acquires BAT's property in what is said to be an attempt to achieve a general social benefit. In those circumstances, it is recognized that "the benefits for society should not ordinarily have to be paid for by private individuals, corporations or States which lose their property as a result of the legislation".[89]

I. Validity of section 15 of the TPP Act:

65. In some circumstances, although it will rarely be a desirable legislative drafting technique,[90] incorporating the language of a Constitutional provision into a statute will not raise any question of invalidity.[91] Nevertheless, the use of s 51(xxxi) in this case presents two specific difficulties, each of which, in BAT's submission, renders the *TPP Act* invalid.

66. The first difficulty is that, by stating that the scope of the operation of the *TPP Act* will be determined by reference to a provision of the Constitution, Parliament has provided for

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Mason CJ, Deane and Gaudron JJ and 320 per Toohey J; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 184-5 per Deane and Gaudron JJ.

[85] *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 567-8 per Gaudroon J and at 593 per Gummow J; *Smith v ANL Ltd* (2000) 204 CLR 493 at 511, [43] per Gaudron and Gummow JJ.

[86] See generally *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408-9 per Gibbs J.

[87] *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J; R *v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 488 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ; R*e Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126, [60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

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

[89] *Smith v ANL Ltd* (2000) 204 CLR 493 at 529-530, [103] per Kirby J. See also *Smith v ANL Ltd* (2000) 204 CLR 493 at 501, [9] per Gaudron and Gummow J, and *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 364, [103] per French CJ.

[90] R *v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 199 per Barwick CJ.

[91] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 390-1, [200] per Gummow and Hayne JJ.

the operation of the *TPP Act* to depend upon a conclusion of Constitutional law. The reality is, therefore, that the scope of operation of the *TPP Act* will vary with the Constitutional jurisprudence of this Court from time to time. Because the doctrine of *stare decisis* operates differently in relation to the interpretation of the Constitution compared with ordinary laws,[92] the result is to introduce a meaningful degree of uncertainty and impermanence in relation to the operation of the *TPP Act*. That is particularly so, given that s 51(xxxi) is a provision of the Constitution that has regularly generated close decisions.

67. Two consequences flow from this –

(a) *First*, Parliament has not defined the scope of operation of the *TPP Act* with sufficient clarity or certainty such that the Act qualifies as a "rule of conduct or a declaration as to power, right or duty".[93] That is to say, whether or not a person is subject to the provisions of the *TPP Act* is not revealed sufficiently plainly by the combined operation of the Act, the Constitution, and the law expounding s 51(xxxi) so as to qualify as a "law" within the meaning of s 51.

(b) *Secondly*, by making the operation of the *TPP Act* depend on the judicial determination of the scope of a Constitutional provision as to which there may be genuine interpretive choices, Parliament has conferred upon this Court the (legislative) task of creating criminal liability, rather than merely adjudicating its existence. That is to say, Parliament has abdicated its responsibility to mark out the limits of the operation of legislation (and the existence of criminal liability), and instead has required the Court to undertake that role. In so doing, Parliament has impermissibly vested legislative power in a Chapter III court.

68. The second difficulty relates to the way in which s 51(xxxi) is used to limit the operation of the *TPP Act*.

69. The effect of s 15(1) is to require the Court to give the *TPP Act* every valid operation it may have, and no invalid operation. But this is done without any attempt to "read down" the operative provisions of the *TPP Act*, or any requirement that the resulting range of applications of the *TPP Act* be one that could be discerned to have been intended by Parliament.

70. In the result, by the device of s 15, the *TPP Act* is said to achieve what could only be accomplished with a standard reading down provision by unlikely coincidence.[94]

71. In fact, s 15(1) "requires the Court to perform a feat which is in essence 'legislative and not judicial'".[95] That is, it requires, in the absence of a standard or test that may be applied for the purpose of limiting the law, the Court to re-write legislation.

Part VI: Applicable Constitutional Provisions etc

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[92] See, e.g., *Damjanovic and Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390 at 396 per Barwick CJ; *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 378 per Barwick CJ; *Queensland v Commonwealth (Second Territories Case)* (1977) 139 CLR 585 at 593-4 per Barwick CJ, 600-1 per Gibbs J, 610 per Jacobs J; *Stevens v Head* (1993) 176 CLR 433 at 461-2 per Deane J; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 351, [68] per French CJ.

[93] *Commonwealth v Grunsheit* (1943) 67 CLR 58 at 82 per Latham CJ; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-3, [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

[94] *Dowal v Murray* (1978) 143 CLR 410 at 424 per Stephen J.

[95] *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ, citing R *v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 676 per Evatt and McTiernan JJ. See also, e.g., *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 94, [251] per Gummow, Crennan and Bell JJ; *Momcilovic v* R [2011] HCA 34 at [398]-[399] per Heydon J (dissenting in result).

72. See Annexure A.

Part VII: Orders

73. BAT submits that the questions reserved should be answered –

(a) **Question 1:** Apart from s15 of the *TPP Act*, the provisions of the *TPP Act* would result in an acquisition otherwise than on just terms of the following property of the plaintiffs (each being property within the meaning of s 51(xxxi) of the Constitution): the Registered Trade Marks, the Design, the Winfield Get-Up, copyright in the BAT Images, BAT Goodwill and BAT Packaging (as those terms are defined in the Questions Reserved) and the registered patent set out in Annexure E1 to the statement of claim.

(b) **Question 2:** No.

(c) **Question 3:** Apart from s15, all of the *TPP Act*.

(d) **Question 4:** All of the *TPP Act*.

(e) **Question 5:** The defendant pay the plaintiffs' costs of the Questions Reserved.

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DATE FILED: 26 March 2012

ANNEXURE A

APPLICABLE CONSTITUTIONAL PROVISIONS ETC.

1. The following constitutional provisions, statutes and regulations are relevant to the Questions Reserved in their current form.

2. Section 51(xxxi) of the *Constitution*:

51. Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

3. *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations* 2004 (Cth) (copy attached).

4. *Tobacco Plain Packaging Act* 2011 (Cth) (copy attached).

5. *Tobacco Plain Packaging Regulations* 2011 (Cth) (copy attached).

6. *Competition and Consumer (Tobacco) Information Standard* 2011 (Cth) (copy attached).