IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S389 of 2011

BETWEEN

BRITISH AMERICAN TOBACCO AUSTRALASIA LIMITED
First Plaintiff

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED
Second Plaintiff

BRITISH AMERICAN TOBACCO AUSTRALIA LIMITED
Third Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
Defendant

PHILIP MORRIS LTD'S SUBMISSIONS (INTERVENING)

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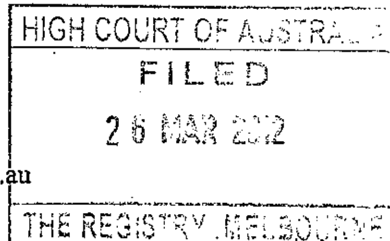

Part I: Certification

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

Part II: Basis of intervention

2. Philip Morris Limited (**PML**) intervenes in this matter, in the interests of the plaintiffs, pursuant to leave granted by Gummow J {CB 88}.

Part III: Statement of applicable constitutional and legislative provisions

3. PML adopts the plaintiffs' statement of applicable provisions.

Part IV: Statement of issues

4. These submissions address questions 1 and 2 of the questions reserved {CB 17} and
10 address only the Registered Trade Marks {CB 10}, the BAT Goodwill {CB 10-12}[1] the BAT Packaging {CB 12} and BATA's cigarettes {CB 10-11} (collectively, the **BAT Property**).[2] The ultimate question is whether s 15(1) of the TPP Act operates so that the Act does not apply to the BAT Property.

Part V: Argument

5. By virtue of the TPP Act and TPP Regulations, the Commonwealth obtains the identifiable benefit and advantage of comprehensive control of the exploitation of the BAT Packaging, BATA's cigarettes, the Registered Trade Marks and BAT Goodwill, as well as the exclusion of the plaintiffs from their exploitation of the BAT Property. That acquisition engages s 15(1) of the TPP Act, so that the TPP Act does not apply to
20 the BAT Property.

6. That suite of property is the commercial core of the plaintiffs' (and PML's) "branded" business. That property and its exploitation drives commercial advantage in that it identifies the origin of the plaintiffs' products and serves to differentiate between their own products and those of their competitors and illicit products. PML's coordinate property and its exploitation serve the same purpose. The TPP Act and TPP

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[1] The BAT Goodwill is generated by the use of the Registered Trade Marks and the Winfield Get-Up in the manner identified at {CB 10-12}.

[2] PML pleads coordinate property as to registered trade marks, signs, packs and cigarettes: {PMCB 3-5, 65-66}.

Regulations, which "commoditise" the plaintiffs' (and PML's) products, strike at that commercial core and acquire their property otherwise than on just terms.

A. The use of the BAT property before the TPP Act and TPP Regulations

7. Presently, BATA lawfully uses the Registered Trade Marks and the Winfield Get-Up on its goods – the BAT Packaging and BATA's cigarettes[3] – and on invoices, statements, letterheads and in business documents and trade publications.[4] Those are the only lawful uses BATA may make of that property.[5]

8. The present use of the Registered Trade Marks and the Winfield Get-Up on the BAT Packaging and BATA's cigarettes is the only meaningful way the plaintiffs can exploit
10 their property and the only remaining economically beneficial use of it. The purpose of a trade mark used in relation to goods is to distinguish one person's goods from another person's goods in the course of trade.[6] At present, the only substantial way that distinguishing role can be carried out is by using the Registered Trade Marks and the Winfield Get-Up on the goods themselves. Such uses are the highest and best uses of the Registered Trade Marks, the Winfield Get-Up, the BAT Packaging and BATA's cigarettes.

B. The TPP Act and the TPP Regulations (the plain packaging laws)

9. The plain packaging laws create criminal offences in relation to the manufacture, supply, sale and purchase of tobacco products and packaging that do not comply with
20 the "tobacco product requirements".[7]

10. One of the central "tobacco product requirements" is that no trade marks or marks may appear anywhere on a pack, otherwise than as "permitted" by the TPP Act or the TPP Regulations.[8] All that may be done is to apply a "brand name" "business name", "company name" or "variant name" (collectively, the **names**) to the packs, provided

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3 BATA predominantly uses the Registered Trade Marks and Winfield Get-Up on the top, bottom, one side and 70% of the front surface area of the packs; and on the cigarettes. Most of the balance of the surface area of the packs is presently required to be used for the display of health warnings: *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (2004 Regulations).

4 *Tobacco Advertising Prohibition Act 1992* (Cth).

5 {CB 13 at [21]}.

6 *Trade Marks Act 1995*, s 17. A ground for rejecting an application for registration of a trade mark is that it is not capable of distinguishing the applicant's goods or service in respect of which the trade mark is sought to be registered from the goods or services of other persons: *Trade Marks Act 1995*, s 41.

7 TPP Act, Pt 2 of Ch 2 (and further prescribed by the TPP Regulations).

8 TPP Act, s 20.

the application complies with s 21 of the TPP Act and the Regulations. The scope of the Registered Trade Marks and Winfield Get-Up, which constitute signs for the purposes of the TPP Act, is significantly broader than the scope of the names alone.[9] Likewise, the rights of use in relation to the Registered Trade Marks and the Winfield Get-Up are significantly broader than the rights in relation to the names alone.[10] If a registered trade mark cannot be used in conformance with the plain packaging laws,[11] it can not be used. Further, the Winfield Get-Up cannot be used at all. In that way, the names are not coextensive with the Registered Trade Marks and the Winfield Get-Up[12] and may only appear on the BAT Packaging in a manner tightly controlled and
10 narrowly prescribed by the Commonwealth.

11. That the intention of the plain packaging laws is to ensure the "non-use" of the BAT Property is confirmed by the provisions of Div 3 of Pt 2 of Ch 2 and by the Minister's second reading speech, which referred to the TPP Act as being "designed to remove" the Registered Trade Marks and the Winfield Get-Up from the BAT Packaging and BATA's cigarettes.[13]

Characterisation of the TPP Act

12. Whether s 15(1) of the TPP Act operates is first and foremost a question of construction – that is, whether the operation of the TPP Act "would result in an acquisition of property from a person otherwise than on just terms".[14]

20 13. Absent just terms, all that is required for the operation of s 15(1) is that there be an acquisition of property.[15] The proper construction of s 15(1) does not require consideration of the scope of the Commonwealth's legislative power under ss 51(i), (xx) and (xxix) of the Constitution.[16] Nor does it require consideration of the proportionality (however that test might be framed) between the means of the TPP Act and the objects sought to be achieved, nor of the purpose of the means. There is no

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9 TPP Act, s 20(3).

10 In relation to the Registered Trade Marks, see *Trade Marks Act 1995*, ss 7, 20.

11 See, eg {CB 29}.

12 See Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011 at 13: "Trade marks that will be allowed include, for example, the Quitline trade mark which is required under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* and any brand, business or company name or variant name trade marks that can appear whilst still complying with the detailed requirements of the Bill and regulations".

13 Commonwealth of Australia, House of Representatives, *Hansard* (Minister for Health and Aging, Ms Roxon, 6 July 2011) at 7708.

14 The phrases "acquisition of property" and "just terms" are defined in the TPP Act.

15 Paragraphs 20 and 21 of the defence proceed on the assumption that there is an acquisition.

16 Accordingly, the matters alleged in paragraphs 20 and 21 of the defence are simply irrelevant to the operation of s 15(1) of the TPP Act, properly construed.

additional question presented by the proper construction of s 15(1) that requires the Court to determine whether s 51(xxxi) "applies" (whatever that might mean).

14. In any event, the TPP Act is a law with respect to the acquisition of property for the purposes of s 51(xxxi). Were it otherwise, as the Commonwealth contends, s 51(xxxi) would be rendered a dead letter because it would provide no protection of any kind in the face of an assertion by the Commonwealth of an overriding public interest otherwise within its power. Five points may be made in this regard.

15. *First*, any reliance on the *dicta* of Brennan J in *Mutual Pools & Staff Pty Ltd v Commonwealth*,[17] must include the important qualification that "where the sole or dominant character of a provision is that of a law for the acquisition of property, it must be supported by s 51(xxxi)". The "practical and legal operation"[18] of the plain packaging laws is to prohibit the plaintiffs from all substantial uses of the BAT Property and to give control over that property to the Commonwealth. All of the provisions of the plain packaging laws (and particularly the criminal provisions and the "tobacco product requirements") are directed at this end. That they do so for the ostensible purpose of "improving public health" does not alter the character or practical effect of the provisions. Their sole or chief objective is the acquisition of the BAT Property.

16. *Secondly*, a law will not be characterised as one with respect to the acquisition of property if the law is one with respect to taxation,[19] bankruptcy,[20] customs[21] or if it imposes a fine or forfeiture[22] such that the imposition of a requirement of just terms would be inconsistent or incongruent with the very notion or concept of the law. Such laws are clearly encompassed in another power. No case has held that such incongruity can arise in relation to the trade and commerce power, the corporations power or the external affairs power. Indeed, if the Commonwealth's novel defence were to be correct, then *Minister of State for the Army v Dalziel*[23] was wrongly decided as the taking of possession of the land for occupation by the United States Armed Forces during wartime must be a clear example of a "proportionate" law made under the defence power.

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17 (1994) 179 CLR 155 at 180-181.
18 *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at [49].
19 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638, 649.
20 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373.
21 *Burton v Honan* (1952) 86 CLR 169.
22 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *Cheatley v R* (1972) 127 CLR 291.
23 (1944) 68 CLR 261.

17. *Thirdly*, it is the requirement to provide "just terms" that must be inconsistent or incongruous with the law.[24] It can be readily seen why a requirement of "just terms" for a taxing law or a forfeiture law would defeat the very purpose of the law: one law would give back what the other law takes away. But there is nothing about the means identified in s 3(2) of the TPP Act, or the "purpose of the means" identified by the Commonwealth, that would be "annihilated" or that would weaken the normative effect of a rule of conduct that prohibits the use of marks and signs if just terms were provided.[25] Unlike the tax and forfeiture laws, there is nothing incongruous in requiring the Commonwealth to provide just terms for the acquisition of the BAT
10 Property.

18. *Fourthly*, "an acquisition of property is no less an acquisition of property because it also has a regulatory or other public purpose."[26]

19. *Fifthly*, the Commonwealth has not identified – either in its defence or through the agreed facts – the particular "constitutional facts" that it says are established by the morass of documents to which it refers nor the particular purpose for which those facts must be found. If the "constitutional facts" consist of or include those in paragraphs 17(a)-(c) of the defence, it is plain they are not facts of a kind susceptible to constitutional fact finding but are predictions about a future state of affairs {CB 52}. The Commonwealth appears to want to present as "constitutional facts" what are
20 really "adjudicative facts". Even so, those documents and their contents are irrelevant to the question of whether s 15(1) of the TPP Act operates and thus no occasion can arise for this Court to consider those documents or what might be said to be established by them. Further, the predictions and opinions contained in those documents are contested by the plaintiffs and the interveners. Any resolution of that contest would have to take place following a remitted trial.

C. "Acquisition of property"

20. The phrase "acquisition of property", as used in s 15(1) of the TPP Act, has the same meaning as that phrase has in s 51(xxxi). The concept is concerned with matters of substance rather than form and is to be given a liberal construction appropriate to its
30 status as a constitutional guarantee of just terms.[27]

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24 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285 (Deane and Gaudron JJ).

25 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 278 (Brennan J).

26 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [103] (French CJ).

27 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [87], [89], citing *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276, 284-285 and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 509.

"Property"

21. The term "property" in s 51(xxxi) of the Constitution extends to every species of valuable right and interest, and is to be construed liberally.[28] It includes anomalous interests not recognised as proprietary in law or equity.[29]

22. For the purpose of identifying "property", it may be helpful to speak of a "bundle of rights" or of "a legally endorsed concentration of power over things and resources".[30] The latter conception comprises "rights of control over access to, and exploitation of, [a] place or thing".[31] What is encompassed by that phrase is the power to control the benefits of exploitation. So, in this case, the "property" at issue is best analysed as the power to control the benefits of the Registered Trade Marks and Winfield Get-Up, as well as the surface area of the BAT Packaging and BATA's cigarettes.[32]

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23. The BAT Packaging and BATA's cigarettes are property protected by s 51(xxxi) because they may be exploited by exercising rights to control all aspects of the appearance of those containers and cigarettes.

24. Intellectual property rights are doubtless property that is protected by s 51(xxxi).[33]

25. That the Registered Trade Marks are statutory rights does not take them outside s 51(xxxi). A law that reduces the content of subsisting statutory exclusive rights attracts s 51(xxxi).[34] That is well accepted in relation to copyright and patents and the reasoning applies equally to registered trade marks. The *Trade Marks Act 1995* clearly establishes a regime[35] pursuant to which registered trade marks are personal

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[28] *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290 (Starke J); see also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349-350 (Dixon J); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Telstra Corporation v Commonwealth* (2008) 234 CLR 210 at 230 [43]; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 196 [131] (Hayne, Kiefel and Bell JJ), 214-215 [189] (Heydon J, in dissent).

[29] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349-350 (Dixon J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 246-247 (Brennan J) and 282-283 (Deane J).

[30] *Telstra v Commonwealth* (2008) 234 CLR 210 at 230-231 [44].

[31] *Western Australia v Ward* (2002) 213 CLR 1 at 93 [88] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); Kevin Gray, "Regulatory Property and the Jurisprudence of the Quasi-Public Trust" (2010) 32 *Sydney Law Review* 221 at 223-224.

[32] *Telstra Corporation v Commonwealth* (2008) 234 CLR 210 at 230-231 [44]; *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); Kevin Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 268, 274, 294, 299, 304.

[33] *Australian Tape Manufacturers Association v Commonwealth* (1993) 176 CLR 480 at 499-500 (Mason CJ, Brennan, Deane and Gaudron JJ); *Trade Marks Act 1995*, ss 17, 20 and 21 and Pt 12.

[34] *Attorney-General (Northern Territory) v Chaffey* (2007) 231 CLR 651 at 664 [24] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

[35] *Trade Marks Act 1995*, ss 17, 20 and 21 and Pt 12.

property that is assignable, and under which the registered owner has power to deal with the trade mark as its absolute owner (including by licensing another to use the rights conferred by registration). The owner has an exclusive and positive right to use the trade mark.[36] The Registered Trade Marks were not inherently susceptible to variation in any relevant sense. The TPP Act is not a law of general application. Any contention to the contrary by the Commonwealth would take all statutory rights outside the scope of s 51(xxxi). A provision in the *Trade Marks Act* that denies an application for registration[37] is of a wholly different character to a law that denies the purpose and benefits of a mark once registered (which amounts to a *de facto* deregistration).[38]

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26. Further, the "common law trade marks" – the Winfield Get-Up – together with the Registered Trade Marks, were used to generate goodwill and reputation which are species of property. They are creatures of equity which established a form of property in a mark gained by use and reputation.[39]

"Acquisition"

27. "Acquisition" is to be construed liberally.[40] For s 51(xxxi) to be attracted, it is not necessary for the Commonwealth to have acquired an interest in property. All that is necessary is that the Commonwealth should have acquired an "identifiable benefit or advantage relating to the ownership or use of the property."[41] It is also not necessary for the benefit received by the Commonwealth to correspond precisely (in appearance, value or characterisation) with what was taken.[42]

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28. Consistently with the characterisation of property stated in *Western Australia v Ward* as "rights of control over access to, and exploitation of, [a] place or thing"[43], the taking

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36 *Trade Marks Act 1995*, s 20(1).

37 See, eg, *Trade Marks Act 1995*, s 42.

38 TPP Act, s 28.

39 *Campomar v Nike International* (2000) 202 CLR 45 at 68 [48] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 33 (Windeyer J).

40 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 360 [89].

41 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 179 [82] (French CJ, Gummow and Crennan JJ).

42 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304.

43 *Western Australia v Ward* (2002) 213 CLR 1 at 93 [88] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

of control over the benefits of exploitation can constitute an acquisition for the purposes of s 51(xxxi).[44]

29. The level of control that will amount to an acquisition is a question of "substance and degree".[45] It is not the case that every interference with an owner's control of property by regulation amounts to an acquisition. But acquisition does occur where the law effectively deprives the owner of control of the property (even if formal ownership remains) and where benefits from the deprivation of control are obtained by the Commonwealth or others. Some meaningful area of liberty and decision concerning the property must be left to the owner to avoid the conclusion of acquisition.

10 30. The Commonwealth causes the packs to have an appearance specifically designed to promote and facilitate its objectives and messages. That is done by clearing the faces of the BAT Packaging of all Registered Trade Marks and Winfield Get-Up "to ensure that no other design features detract from the impact of the plain packaging requirements".[46] The TPP Act also sterilises the Registered Trade Marks and the Winfield Get-Up by denying to BATA the last remaining way in which that property could be exploited. Then, through the 2004 Regulations and the 2011 Standard, the Commonwealth mandates how the BAT Packaging is to be exploited, including by use of the graphic health warnings (**GHWs**) and the Quitline trademarks {CB 15-16}. Both the Commonwealth, through an enhanced capability to place its GHWs on the
20 packs, and the Anti-Cancer Council of Victoria, through the enhanced benefit to the Quitline trade marks achieved by removing competing marks, receive identifiable benefits or advantages from that taking of control.

31. The plain packaging laws thus constitute an "effective sterilisation of the rights constituting the property in question."[47] Prior to the plain packaging laws, it was BATA who exercised "regulatory control"[48] over the Registered Trade Marks, the Winfield Get-Up, the BAT Packaging and BATA's cigarettes in deciding how they would be exploited. The plain packaging laws give the Commonwealth comprehensive "regulatory control" over that property. Having taken that control, the Commonwealth (through the plain packaging laws) only affords to BATA such
30 limited uses as the Commonwealth is prepared to allow it to exercise. That,

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[44] See *Minister for the Army v Dalziel* (1948) 68 CLR 261 at 285-287 (Rich J), 290 (Starke J), 295 (McTiernan J), 299 (Williams J), *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 346-351 (Dixon J); *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175.

[45] *Smith v ANL Ltd* (2000) 204 CLR 493 at 504-505 [22] (Gaudron and Gummow JJ).

[46] Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011 at 13.

[47] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 635 (Gummow J).

[48] Kevin Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 268, 277.

substantially, consists of "permission" to use names on a pack but only in a location, font, size and colour determined by the Commonwealth.

32. The Commonwealth's concentration of power over the benefits of exploitation of the BAT Property is clear. The use of trade marks and get up on goods is precisely where the "reality of proprietorship"[49] of such property lies. Those rights are denied to BATA by the Commonwealth. This is not a law of general application that "merely" restricts or controls a particular use of the plaintiffs' resources.[50] All uses of the Registered Trade Marks and the Winfield Get-Up are controlled by the Commonwealth. The Commonwealth thus acquires the right to control access to the benefits of use of those resources. Moreover, the Commonwealth exercises complete control over the exploitation of the surfaces of the BAT Packaging and BATA's cigarettes by controlling their appearance. The plain packaging laws effect a permanent exclusion of the Registered Trade Marks and the Winfield Get-Up (in their fullest form) from the packs and cigarettes. BATA has no residual rights in relation to the surface area of the packs and cigarettes, other than such "permissive" grants as are made by the Commonwealth under the TPP Act. The Commonwealth thereby acquires exclusive possession of the surface areas of the packs and cigarettes.

33. The Commonwealth's control over the benefits of exploitation may be demonstrated in another way. Where BATA had rights to exclude others from using the Registered Trade Marks and Winfield Get-Up, enforceable through statutory and general law remedies, the Commonwealth now has rights of exclusion enforceable through criminal law. BATA's rights to preclude others from using its property are meaningless where it cannot itself have the benefits of its resources and where the real risk to a person who uses its property are criminal sanctions, not a civil action.

D. Otherwise than on just terms

34. Section 51(xxxi) involves a compound concept of "*acquisition of property on just terms*".[51] The just terms guarantee ensures that owners of property, compulsorily acquired by government, are not required to sacrifice property for less than its worth.[52]

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49 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 348-349 (Dixon J); *Telstra Corporation v Commonwealth* (2008) 234 CLR 210 at 232 [48].

50 *Cf Commonwealth v Tasmania* (1983) 158 CLR 1 at 283 (Deane J).

51 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290 (Dixon J); *Smith v ANL Limited* (2000) 204 CLR 493 at 512-513 [48] (Gaudron and Gummow JJ), 532-533 [118] (Hayne J), 549-550 [176] (Callinan J); *Telstra Corporation v Commonwealth* (2008) 234 CLR 210 at 230 [43].

52 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-311 (Brennan J).

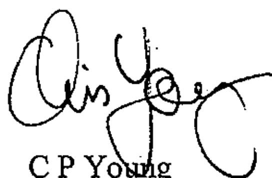
35. Here, no terms – whether just or otherwise – are provided to the plaintiffs in return for the conferral of control over its property..

36. "Just terms" requires "full compensation for what was lost".[53] Although some latitude is permitted as to the form of compensation,[54] "fair and just" compensation must still be provided.[55] The purpose of the "just terms" requirement is to protect the person whose property is acquired; it is not a tool to avoid compensation by reference to some asserted overriding public interest. Paragraph 22(b) of the defence is subversive of that purpose.[56]

E. Operation of s 15(1) of the Act

10 37. The TPP Act results in the acquisition of the BAT Property otherwise than on just terms. Accordingly, s 15(1) is engaged and the TPP Act does not apply to the BAT Property.

Dated: 26 March 2012



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53 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-311 (Brennan J); *Smith v ANL Limited* (2000) 204 CLR 493 at 501 [9] (Gleeson CJ).

54 *Smith v ANL Limited* (2000) 204 CLR 493 at 512 [48] (Gaudron and Gummow JJ).

55 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290.

56 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-311 (Brennan J); *Smith v ANL Limited* (2000) 204 CLR 493 at 501 [9]-[10], 531-532 [111]-[112], 556 [195].