IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S389 of 2011

BETWEEN

BRITISH AMERICAN TOBACCO AUSTRALASIA LIMITED & ORS

Plaintiffs

and

COMMONWEALTH OF AUSTRALIA

Defendant

PHILIP MORRIS LTD'S REPLY SUBMISSIONS

Date of document: 11 April 2012
Filed on behalf of: Philip Morris Ltd (intervening)
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Part I: Certification

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

Part II: Argument

Is the "ultimate" public health purpose of the TPP Act relevant?

2. No. The TPP Act is an Act for the acquisition of control of the BAT Property: that is its purpose.

3. There is no dispute in this case that the Commonwealth has the power under the Constitution to legislate for the acquisition of control of the BAT Property, just as it has the power to legislate for the acquisition of control of an accrued cause of action of an injured worker.[1] No wider enquiry about the purpose of the TPP Act is constitutionally mandated.

4. The Commonwealth concedes that it is obliged to pay compensation in the latter case but says the former stands in a wholly different constitutional position because the legislation is for the "ultimate purpose"[2] of reducing harm to members of the public and to public health and that purpose is so important as to make any acquisition of BAT's Property a mere incident of achieving that purpose.

5. A purpose stated at such a high level of generality[3] is without meaning and provides no criterion or test for validity. An acquisition of property is no less an acquisition of property because it also has a regulatory or other public purpose.[4] Indeed, every acquisition under s 51(xxxi) may be said to serve a public purpose. The Commonwealth's submissions ignore the basic proposition that the validity of the law must be tested by its legal operation on proprietary rights. Furthermore, the Commonwealth's submissions ignore that the course of authority in the Court is firmly against the proposition that some purposes are so important as to take acquisitions of property for those purposes outside the reach of s 51(xxxi).[5]

6. Because no wider enquiry about the purposes of the TPP Act is mandated, any inquiry into the "constitutional facts" asserted by the Commonwealth is thus irrelevant to the issues to be determined in this case. Further, that those facts are susceptible to dispute

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1 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

2 Commonwealth's Submissions at [90].

3 *Cf R&R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 631 [95] (Gummow, Hayne, Heydon and Kiefel JJ).

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

5 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

(and are disputed) means they are not truly constitutional facts, being the kind of facts upon which the validity of a statute depends.

7. To avoid any doubt, the findings sought by the Commonwealth on the basis of the notified documents are controversial and disputed and would require determination at a trial.[6] In particular, Philip Morris Limited (**PML**) disputes that "plain packaging" will contribute to the improvement of public health, as the Commonwealth asserts. Amongst other matters, PML does, and would at any remitted trial, contend that the studies referred to by the Commonwealth do not provide reliable evidence that plain packaging will have a discernible effect on smoking behaviour. These contentions include the following.

   (a) Evidence concerning known and accepted drivers of smoking behaviour is neglected, such as price (which will be critical in circumstances where commoditization and price competition are likely) and the background or social status of the studies' respondents. This ensures an underlying overemphasis of the effect of branding and pack design on smoking behaviour.

   (b) The studies relied upon by the Commonwealth are subject to numerous methodology and analysis errors, including framing effects, social response bias, small sample sizes and selection bias, and reliance on questionnaire responses about a hypothetical, which frequently produce inaccurate estimates of actual future behaviour.

Property: Does the owner or licensee of a registered trade mark have constitutional property?

8. Yes. Section 51(xxxi) is concerned with constitutional property, not with what might or might not have qualified as property at general law or what the legislature might choose to call "property" in a statute. At the core of the constitutional conception of property is power to control the benefits of exploitation. To focus only on whether BAT had, and the Commonwealth or another now has, a positive right to use the Registered Trade Marks, is not only too narrow a focus but ignores the constitutional concept of property. The exclusive rights of the owner of a registered trade mark include the right to exclude others from the rights of use conferred by the *Trade Marks Act 1995* (Cth) and to license those rights of use to others. That is incorporeal property that is readily capable of being characterised as property for the purposes of s 51(xxxi).[7] The constitutional conception of property focuses on any acquisition of control over the benefits or advantages of such rights.

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6 {PMCB} at 66-67 [6]-[9].

7 *Cf Phonographic Performance Company of Australia Ltd v Commonwealth* [2012] HCA 8 at [109], [113] (Crennan and Kiefel JJ).

Property: Are registered trade marks inherently susceptible of modification or extinguishment?

9. No. To the extent the Commonwealth states this conclusion based on the premise that the Registered Trade Marks have no existence apart from statute, it is contrary to authority.[8] To the extent this conclusion is based on the proposition that the Registered Trade Marks are susceptible to modification or extinguishment for the purpose of reducing harm to the public or public health, it finds no support in the terms of the *Trade Marks Act* itself. In any event, the legal point that lies at the heart of this argument (despite the policy label of reducing harm) is the distinction between regulation and acquisition that is addressed below.[9]

Property: Does property that does not yet exist come within the scope of s 51(xxxi)?

10. Yes. The TPP Act has an ambulatory operation; it acquires the BAT Property as and when it comes within the jurisdiction or into existence. The TPP Act does not have a once and for all operation upon commencement. *Andrews v Howell*[10] concerned an order that, in part, provided that all apples and pears harvested after a certain date were acquired by the Commonwealth. The order was upheld on the basis that just terms were provided for the acquisition, not on the basis that no acquisition occurred in respect of that future property.

11. Section 51(xxxi) authorises ambulatory laws. Indeed, if the Commonwealth's contention is right, it places a significant fetter on the legislative power that is conferred by s 51(xxxi) and one that is not supported by the text of the provision. Why does the Commonwealth not have legislative power to acquire property that a person or class of persons might receive in the future? Why does the Commonwealth not have legislative power to acquire property that might be created in the future? Why does the Commonwealth not have legislative power to acquire property as soon as it is imported into the jurisdiction? Ambulatory operation is not denied to other heads of Commonwealth legislative power.

12. The Commonwealth's contention is not made good by reframing it as a proposition that as and when property comes into existence it is subject to the "congenital infirmity"[11] that it is subject to the TPP Act. That is to overextend the concept of "congenital infirmity" which is a proposition about only a limited class of statutory property which when granted is expressly made subject to the will of the legislature from time to time.[12]

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8 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

9 See below at [26]-[29].

10 (1941) 65 CLR 255.

11 *Cf Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 75 [203] (Gummow J).

12 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [24]-[25].

Property: Does the proposition that the BAT Goodwill is a form of property that is entirely derivative and contingent on a freedom take it outside the scope of s 51(xxxi)?

13. No. Again, the Commonwealth's submission ignores that s 51(xxxi) is concerned with the constitutional conception of property not with whether the Winfield Get-Up is in and of itself property at general law. Goodwill is property[13] and well within the scope of s 51(xxxi). It is generated and maintained by the use of the Registered Trade Marks and the Winfield Get-Up.[14] To control the use of the Registered Trade Marks and the Winfield Get-Up is to control the BAT Goodwill. The Commonwealth acquires control of the BAT Goodwill through control over the benefits of exploitation of the Registered Trade Marks and the Winfield Get-Up. The constitutional conception of property is concerned with the substance and reality of control over the maintenance of the BAT Goodwill. It is the Commonwealth who has that control. It is not to the point, and not in accordance with the constitutional conception of property, to describe the use of the Registered Trade Marks and the Winfield Get-Up as "entirely derivative and contingent on freedom".[15]

Acquisition: Is it necessary to show that the Commonwealth "exploits" or "possesses" the subject-matter of the BAT Property?

14. No.[16] Again, the Commonwealth's submissions ignore the constitutional conception of property. That conception is concerned with "benefit[s] or advantage[s] relating to the ownership or use of property."[17] There is no need for the acquisition to correspond precisely with what was taken.[18] What has been acquired may often be without any analogue in the law of property and incapable of characterisation according to any established principles of property law.[19] An acquisition may occur through a "circuitous device" which does not involve any direct or formal acquisition of property.[20] If the Commonwealth did itself exploit or possess the property that would certainly show acquisition. But it is not necessary to demonstrate such exploitation or possession in order to show acquisition. The ultimate benefit or advantage relating to the ownership and use of property is to control the benefits of exploitation.

15. The Commonwealth's submissions substantially omit to deal with the complete control it acquires over the use and exploitation of the BAT Packaging. BATA pays

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13 *Commissioner of Taxation (Cth) v Murry* (1998) 193 CLR 605; *Campomar Sociedad, Limitada v Nike International* (2000) 202 CLR 45 at 68 [48].

14 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 33 (Windeyer J).

15 Commonwealth's Submissions at [68].

16 *Contra* Commonwealth's Submissions at [77].

17 *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).

18 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ).

19 *Smith v ANL Limited* (2000) 204 CLR 493 at 542 [157] (Callinan J).

20 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).

for the materials that are used to create the BAT Packaging but must then submit that packaging to the complete control of the Commonwealth. The TPP Act gives the Commonwealth complete control over how the packs are and are not exploited. BATA must make its property available for use by Quitline. The economic owner of the BAT Packaging has no residual rights to the surface area of the packs, other than such "permissive" grants as are made by the Commonwealth under the TPP Act.

Characterisation: Is the TPP Act outside the power abstracted by s 51(xxxi)?

16. No. The Commonwealth contends that the TPP Act regulates the principal means of promotion of a product that is gravely harmful to the public health by means that are appropriate. It then contends that the TPP Act does not come within the power that is abstracted from other heads of legislative power by s 51(xxxi). Nine points may be made about those contentions.

17. *First*, s 15(1) of the TPP Act does not ask a characterisation question. Whether it applies depends on whether the TPP Act operates to acquire property otherwise than on just terms. It does not ask the further question, assuming there to be such an acquisition, is the law outside the power abstracted by s 51(xxxi)?

18. *Secondly*, the Commonwealth's contention divorces the judgment of Brennan J in *Mutual Pools & Staff Pty Ltd* from its context. It is wrong to read the judgment of Brennan J as describing a general theory about the relationship between s 51(xxxi) and other heads of legislative power based on a concept of proportionality.[21] Properly understood, Brennan J was stating a proposition about how s 51(xxxi) did not operate at "a level which would so fetter other legislative powers as to reduce the capacity of the Parliament to exercise them effectively."[22] Brennan J was explaining how it is that the cases concerning the imposition of a tax, the seizure of the property of enemy aliens, the sequestration of the property of bankrupts, forfeiture and the exaction of fines and penalties are incongruous or inconsistent with s 51(xxxi).[23] That is how Brennan J's judgment was understood by Gleeson CJ and Kirby J in *Airservices Australia v Canadian Airlines*; it provided the "explanation of [those] decisions."[24]

19. *Thirdly*, there have been only a very few heads of power or classes of law that have been held to be incongruous or inconsistent with the guarantee of just terms in s 51(xxxi). Those instances do not provide the foundation for an overarching proportionality principle. Incongruous subject matters are taxation and bankruptcy

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21 For the avoidance of doubt, if, contrary to PML's contentions, Brennan J's reasons are to be understood as positing a general test about the limits on the powers abstracted by s 51(xxxi) based on whether the law prescribes means that are appropriate and adapted to achieve a legitimate objective, PML contends that proposition is wrong.

22 *Mututal Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 180 (Brennan J).

23 Compare *Theophanous v Commonwealth* (2006) 225 CLR 101 at 124-125 (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

24 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 180 [98] (Gleeson CJ and Kirby J).

because of "the very terms in which they are conferred."[25] The TPP Act is not a law within heads of power of that kind. Incongruous classes of law are those that seize the property of enemy aliens[26] (but not of subjects[27]), provide for forfeiture of property[28] or exact a fine or penalty.[29] The TPP Act is not a law of that character.

20. *Fourthly*, as PML pointed out in its submissions in chief, Brennan J expressly acknowledged 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)".[30] That is precisely the character of the TPP Act and the TPP Regulations. The Commonwealth seeks to avoid this proposition by the claim that the purpose of reducing harm to public health is so important that any acquisition of property must be but an incident of the operation of the law. That submission elevates a generalised and irrelevant purpose of the TPP Act over the legal operation of the provisions of the TPP Act.

21. *Fifthly*, where a conclusion of incongruity is sought to be reached, what must be incongruous is the provision of just terms for the acquisition.[31] But the Commonwealth looks for the incongruity elsewhere: "To invalidate the restriction on trading activity in the absence of legislated compensation to those whose harmful activity is restricted would be profoundly incongruous".[32] That is a policy statement devoid of any legal test. This is not a borderline case involving difficult questions of judgment;[33] there is no reason to conclude that the provision of just terms to the plaintiffs is incongruent with the acquisition of its property.

22. *Sixthly*, in none of the "incongruity" cases has a party or the Court sought to rely on "constitutional facts" in order to reach the conclusion of incongruity. In addition to the points made below about "constitutional facts", that point highlights the incontestable nature of the conclusion about what must be incongruous for a law to fall outside the power abstracted by s 51(xxxi).

23. *Seventhly*, the proposition derived from *Nintendo Co Ltd* concerning a "genuine adjustment of the competing rights, claims or obligations of persons in a particular

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25 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 (Dixon J).
26 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361.
27 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.
28 *Re Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 CLR 270.
29 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 (Gibbs J).
30 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 181 (Brennan J).
31 *Re Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 CLR 270 at 275 (Mason CJ), 285 (Deane and Gaudron JJ); *Theophanous v Commonwealth* (2006) 225 CLR 101 at 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). *Cf Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 181 (Brennan J).
32 Commonwealth's Submissions at [84].
33 *Theophanous v Commonwealth* (2006) 225 CLR 101 at 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

relationship"[34] is not able to be invoked where one of those parties suffers deprivation of its property rights, to the benefit of another, of such a degree as to leave it with no control over its property of any substance. That proposition must also give way where the acquisition is not incidental, but the sole or dominant character of the law.

24. *Eighthly*, that s 51(xxxi) does not provide absolute protection for property does not mean that legitimate acquisitions can only be identified through a proportionality test.[35] Such an approach to limitations on legislative power may be apposite where the limitation itself directs attention to identifying circumstances in which a law discriminates[36] or gives preference[37] or where the law must be assessed for compatibility with the constitutionally prescribed system of government.[38] In those cases, the very terms and nature of the limitation leads to an analysis of that kind. Section 51(xxxi) contains no such comparable limitations.

25. *Ninthly*, the Commonwealth's principle, stated broadly,[39] cannot explain the result in *Minister of State for the Army v Dalziel*[40] or any case in which an acquisition occurs pursuant to a law supported by the defence power. And, stated narrowly,[41] the principle cannot explain the result in *Newcrest Mining (WA) Ltd v Commonwealth.*[42] The legislation in *Newcrest Mining* was enacted to give effect to Australia's international obligations by regulating mining operations harmful to the environment. (The harmful effects of mining was the very "noxious use" spoken of by the United States Supreme Court in *Pennsylvania Coal v Mahon* which is addressed below). On the Commonwealth's principle, the importance of the purpose of reducing that harm would have justified regulation of mining activity in Kakadu.

Characterisation: Is there a general principle that the regulation of "noxious uses" of property falls outside the power abstracted by s 51(xxxi)?

26. No. The Commonwealth seeks to support its principle about regulation of harmful uses of property falling outside the power abstracted by s 51(xxxi) by reference to decisions from the United States Supreme Court about regulating the "noxious use" of property. Those decisions provide no such support, nor does the decision in *Tooth & Co Ltd.* Those cases are concerned with laws that are merely regulatory (and so involve no acquisition of property) and the related proposition that even regulatory laws may impose restraints of such a degree as in substance to acquire property.

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34 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160-161. In distinguishing this case from the doctrine stated in *Nintendo*, PML does not concede the correctness of that doctrine and will, if necessary, contend that the doctrine is wrong.

35 *Cf Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 136 [444] (Kiefel J).

36 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

37 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388.

38 *Wotton v Queensland* [2012] HCA 2.

39 Commonwealth's Submissions at [83].

40 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

41 Commonwealth's Submissions at [84].

42 (1997) 190 CLR 513.

27. In *Trade Practices Commission v Tooth & Co Ltd*, Barwick CJ said that *Pennsylvania Coal Co* was "concerned with the question whether restraints imposed upon the exercise of proprietary rights are, *because of the extent of the restraint*, confiscatory in nature."[43] The passage from Mason J's reasons is of particular relevance:[44]

> *We were invited by the Solicitor-General to hold that a law whose effect is to provide for the acquisition of property is not a law with respect to the acquisition of property when it also happens to be a regulatory law which prohibits and penalizes obnoxious or undesirable trade practices by corporations. The argument accompanying this invitation was rather elusive. It derives no support from the speech of Viscount Simonds in* Belfast Corporation v OD Cars Ltd, *where his Lordship cited the observations of Holmes J and Brandeis J in* Pennsylvania Coal Co v Mahon *and went on to draw attention to the distinction between "regulating" and "taking" and between "regulatory" and "confiscatory". ...*
>
> *It is one thing to say that a law which is merely regulatory and does not provide for the acquisition of title to property is not a law with respect to property. It is quite another thing to say that a law which does provide for the compulsory acquisition of property and which also happens to be regulatory is not a law with respect to the acquisition of property.*

That is the context in which Stephen J's reasons must be understood. Justice Stephen's reasons similarly sought to distinguish "between mere regulation of property rights and the 'taking' of property".[45]

28. Two additional points may be made. *First*, there is no doubt that s 51(xxxi) is concerned with laws made for a purpose in respect of which the Parliament has power to make laws. But, except to the extent there may be a challenge to the sufficiency of that other head of power to make the law (which there is not in this case) and where that other power is purposive, it is sterile to enquire into the purpose of the law. It provides no criterion for validity.

29. *Secondly*, properly understood, propositions about "noxious uses" of property do not state an exception to the just terms guarantee but provide a colourful statement of the point made in the previous paragraph: regulation of use of property is permissible until the point is reached at which "regulation goes too far".[46] Holmes J accurately stated the point thus:

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43 (1979) 142 CLR 397 at 405 (emphasis added).

44 (1979) 142 CLR 397 at 427-428.

45 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 414.

46 *Pennsylvania Coal Co v Mahon*, 260 US 393 (1922) at 416; *Belfast Corporation v OD Cars Ltd* [1960] AC 490 at 519-520.

> *The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. ... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said this is a question of degree ...*

Characterisation: Is there any basis on which this Court should consider the "constitutional facts" asserted by the Commonwealth?

30. No. The findings sought by the Commonwealth based on the documents notified to the parties are not relevant to any constitutional issue between the parties. Moreover, the documents provide an insufficient foundation on which to make any findings. That is so for four reasons.

31. *First*, the validity of a law is not dependent on whether the Commonwealth Parliament says (or demonstrates) that there is a rational or cogent basis for a law.[47] Nor does the Court review the stated purposes of a measure that acquires property to determine its validity.[48] Further, no challenge is made to the TPP Act on basis of an absence of legislative power. That being so, there are no necessary preconditions for the exercise of legislative power in respect of which "constitutional facts" might have to be found. It is not necessary to find "constitutional facts" in order to determine whether it would be inconsistent or incongruous to provide just terms. Nor is it necessary in order to determine whether acquisition is the sole or dominant character of the law.

32. *Secondly*, the findings sought by the Commonwealth are not of "constitutional facts", properly understood. The findings sought are not identified with clarity, the underlying facts are susceptible of dispute (and are disputed). Those matters take them outside the class of constitutional facts. "Constitutional facts" are those upon which a determination about the validity of a law might be based. Facts susceptible of dispute (and here disputed) provide no secure foundation for validity. The Commonwealth's references to it being "necessary" to find "constitutional facts" should not mask the reality that there are few types of cases in which constitutional fact finding might be necessary and dispositive. The cases cover the purposive powers, and particularly the defence power, implied limitations on Commonwealth legislative power[49] and s 92 of the Constitution. Except perhaps where a "circuitous device" is alleged, "constitutional facts" are simply not relevant to s 51(xxxi) cases.[50]

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47 *Contra Re Anti-Inflation Act* [1976] 2 SCR 337 at 423. *Cf Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 133 [434] (Kiefel J).

48 *Cf Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 404 (Barwick CJ).

49 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Levy v Victoria* (1997) 189 CLR 579.

50 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 163 (Black CJ and Gummow J).

33. Of that group, the cases about s 92 of the Constitution often require some understanding of the industry involved and the likely effect of a law. Such findings as have been made in those cases by this Court in its original jurisdiction are of uncontroversial or undisputed facts.[51] No case has been resolved on the basis of a finding of a disputed constitutional fact.[52]

34. *Thirdly*, giving notice of the "constitutional facts" relied upon does not remove the controversy about the truth of those facts nor does it make those facts any more susceptible of being found. As Binnie J said in *Public School Bds Assn of Alta v Alta*, "the concept of 'legislative fact' does not, however, provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested".[53] That opportunity is not provided by a process which provides for nothing more than a "battle of reports". Disputes over facts – constitutional or otherwise – should be resolved through trial.[54]

Just terms: Does the provision of just terms require compensation?

35. Yes. The Commonwealth seeks to disinter the contention it put in *Georgiadis*: "just terms extends to what is fair, taking into account the interests of the community."[55] Mason CJ, Deane and Gaudron JJ held that "the Act provides no compensation whatsoever."[56] Brennan J held that "in determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. ... Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just." Compensation must be provided. There is no element of compensation provided by the terms of a law that are said to take away only so much of the plaintiffs' property as is reasonably necessary to reduce harm to public health.

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51 For example, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Harper v Victoria* (1966) 114 CLR 361 at 369 (the existence of a substantial trade in eggs between Victoria and adjacent States).

52 *Cf Uebergang v Australian Wheat Board* (1980) 145 CLR 266; *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120.

53 [2000] 1 SCR 44 at [5].

54 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 416 [279] (Kirby J).

55 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 301 (Griffith QC).

56 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 308.