IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S389 of 2011

BETWEEN:

British American Tobacco Australasia Limited
ACN 002 717 160
First Plaintiff

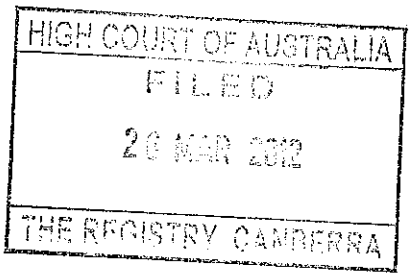
British American Tobacco (Investments) Limited
BCN 00074974
Second Plaintiff

British American Tobacco Australia Limited
ACN 000 151 100
Third Plaintiff

AND:

The Commonwealth of Australia
Defendant

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



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Part I Publication of submissions

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

Part II Basis of intervention

2. Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Limited (together, **Van Nelle**) intervene in these proceedings pursuant to the orders made by Gummow J on 9 March 2012, in support of the plaintiffs (together, **BAT**). Pursuant to leave granted by Gummow J on 27 February 2012, Van Nelle has proposed additions to the Questions Reserved.[1] If the Questions Reserved are so varied by the Full Court, Van Nelle seeks to rely upon the additional submissions set out in Annexure A.

Part III Applicable constitutional provisions, statutes and regulations

3. Van Nelle adopts Annexure A to the submissions filed by BAT on 26 March 2012 (**BAT Submissions**). If the Full Court varies the Questions Reserved in the manner proposed by Van Nelle, then the statutory provisions in Annexure B are also relevant to the determination of those questions.

Part IV Argument

A General principles

4. Like the United States takings clause, s51(xxxi) does not prohibit outright the taking of private property.[2] It places a condition upon the exercise of the Commonwealth Parliament's power of eminent domain, which it also confers. The clause exhibits a double purpose[3] - the requirement for just terms exists as a confining component of the placitum's "positive" grant of legislative power.[4]

5. Those matters informed, for example, the principle of construction identified by Dixon CJ in *Schmidt*[5]. The fact that the placitum confers a conditional power to make laws also locates it in a different universe from that occupied by, for example, the guarantees or freedoms conferred by s92 or implied from ss 7 and 24 (and related provisions). In approaching those guarantees or freedoms, this Court has held that a law which burdens protected political communications or imposes a discriminatory burden upon interstate trade and commerce may be valid if the end which it serves is constitutionally legitimate and the means chosen are "appropriate and adapted", "reasonably necessary" or (perhaps) "proportionate" to that end.[6] At least in part that may be understood as being directed to the avoidance of the stultification of legislative or executive power,[7] recognising that neither constitutional constraint is absolute.[8]

6. That analysis is not apposite in this case. The guarantee conferred by s51(xxxi) operates to prevent the expropriation of private property, without adequate compensation, even where such expropriation has as its object a legitimate "wider public interest" or "regulatory or other public purpose".[9] That is so regardless whether that interest is one that concerns even the security of the nation.[10] At the level of principle, that follows from the duality identified above – the functional issue of a crippling constraint upon power is here far less acute than in the case of other constitutional guarantees, because the Parliament remains free to exercise its acquisition power for any purpose for

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[1] Shown in mark up on the document entitled Variations to Questions Reserved, filed on 15 March 2012, which appears in the Van Nelle Court Book (**VN CB**) at 98.

[2] See, as to the US position, *US v Jones*,109 US 513, 518 (1883); *First English Evangelical Lutheran Church of Glendale v County of Los Angeles California*, 482 US 304, 314 (1987) and *Lingle v Chevron USA Inc*, 544 US 528, 536-7 (2005) (***Lingle***).

[3] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (***Banking Case***) at 349-50 per Dixon J.

[4] See eg *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 (***Mutual Pools***) at 177 per Brennan J and 185 per Deane and Gaudron JJ.

[5] *Attorney-General of the Commonwealth v Schmidt* (1961) 105 CLR 361 (***Schmidt***) at 371-2 per Dixon CJ. See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at 386-387 [185]-[186] per Gummow and Hayne JJ.

[6] Of course, that states the tests developed by this Court at a level of compendious generality. As to their more precise formulation see eg, *Wotton v Queensland* [2012] HCA 2 at [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ, [40] per Heydon J and [77]-[83] per Kiefel J and *Betfair v Western Australia* (2008) 234 CLR 418 (***Betfair***) at 476-477 [101]-[105] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

[7] See eg *S.O.S. (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529 at 574-575 per Windeyer J.

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

[9] *Smith v ANL Ltd* (2000) 204 CLR 493 (***Smith***) at 501 [9] per Gleeson CJ and *Wurridjal* at 364 [103] per French CJ.

[10] See eg *Minister for Army v Dalziel* (1944) 68 CLR 261 (***Dalziel***) *Johnston Fear & Kingham & the Offset Printing Company v Commonwealth* (1943) 67 CLR 314 (***Johston Fear***) and *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 (***Tonking***).

which it has power to make laws. The restriction is, by its very nature, not absolute. There is thus little tension between the condition of just terms and the object of conferring upon the Parliament a power of acquisition to be exercised for "public purposes" or the "purposes of the Commonwealth".[11] True it is that the condition of just terms may, as a fiscal matter, constrain use of the expropriation power to its "utmost limit"; but, as may be seen in the Convention Debates, that result was intended.[12]

7. That harmonious view of the elements of s51(xxxi) should be understood in its historical context as the resolution of competing conceptions of the role of the State as regards private property. On one side, the statements of principle by common law and continental writers like Blackstone and Grotius recognised the right of the State to compulsorily acquire private property for public purposes, but only if "full indemnification" was provided to the former owner.[13] As Professor Tribe has observed, those notions may be seen as a counterpoint to a view based on feudal notions of property and sovereignty: all property ultimately belonged to the sovereign and "is held subject to the government's limitless power to do with it what the government wishes".[14] An 18th century variant placed less emphasis upon the exercise of sovereign will, and more upon the need for the rights of the individual to give way to the "common good", even absent compensation.[15]

8. The former view, not the latter, informed the drafting of the United States and the Australian Constitutions.[16] The condition of just terms was viewed at Federation as being "consistent with the common law of England and the general law of European nations".[17] That may overstate the protections of the common law, given the power of statutory override.[18] More accurately, in *Pumpelly v Green Bay Company*[19] the United States Supreme Court said (in a passage extracted by Quick and Garran at 642) that "the just principles of the common law [had been placed] beyond the power of ordinary legislation to change or control them". The Court saw a "curious and unsatisfactory result" in the notion of a taking so narrowly construed that it was required that there be "absolute conversion of...property" (the issue in *Pumpelly* concerned a dam which raised the level of a lake so as to cause damage to private land). The Court said that the narrow construction would make the constitutional protection an:

> ...authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[20]

The Court also held that no defence was afforded by an allegation that the "damage [to the property] is inflicted for the public good, and is remote and consequential".[21]

9. Consistent with that concern for the private rights of individuals (even in the face of an asserted public good), it has been said that the condition imposed by s51(xxxi) was "plainly intended for the

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[11] *Convention Debates*, Melbourne (Vol 1), 25 January 1898, pp 151 (Mr Barton – see the wording of his proposed s31A); 151, 152 (Dr Quick) and Convention Debates, Melbourne (Vol II), 4 March 1898, p 1874 (Mr O'Connor).

[12] *Convention Debates*, Melbourne (Vol 1), 25 January 1898, p152 – the exchange between Sir George Turner and Mr Barton.

[13] See the passages extracted or referred to by Heydon J in *ICM Agriculture Limited v Commonwealth* (2009) 240 CLR 140 at 209-211 [181], [182].

[14] L Tribe *American Constitutional Law*, 2nd ed, (1988) at 607-8. See also, tracing the history of those two strands of thought and their influence on Fifth Amendment jurisprudence, W Treanor "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment" (1985) 94 *Yale Law Journal* 694-716 (**Treanor**).

[15] See Treanor at 698-700 (attributing such views to Jefferson and Franklin).

[16] Treanor at 708-714; *Tonking* at 104 per Rich J. See also D Ostler "The Drafting of the Commonwealth Acquisition Clause" 28(2) *University of Tasmania Law Review* (2009) 211.

[17] See eg, Quick and Garran *The Annotated Constitution of the Australian Commonwealth* at 641. As to the US Constitution, see to similar effect, J Nowak and R Rotunda, *Constitutional Law*, 8th ed, (2010) at 542 (**Nowak**).

[18] *ICM* at 209 [181] per Heydon J.

[19] 80 US 166, 177 (1872) (***Pumpelly***) – the matter involved the Constitution of Wisconsin, but the Court proceeded on the basis that that provision was materially identical to the US Constitution (at 176-7).

[20] See also, drawing a connection between *Pumpelly* and the regulatory takings cases, *Stop the Beach Renourishment Inc v Florida Department of Environmental Protection* 130 SCt 2592, 2601 (2010) – both reflect the principle that, "though the classic taking is a transfer of property to the State or to another...party...the Takings Clause applies to other state actions that achieve the same thing".

[21] At 180-1 – the matter proceeded by way of demurrer. The argument to the contrary was apparently sought to be supported by decisions of State courts which the Court described as having "gone to the uttermost limits of sound judicial construction in favour of [that principle] and, in some cases beyond it...". See also *Peabody v United States* 231 US 530 (1913); *Portsmouth Harbor Land & Hotel Co v United States*, 260 US 327 (1922) (***Portsmouth***) and *United States v Causby* 328 US 256 (1946).

protection of the subject".[22] In contrast, the other constitutional constraints upon power referred to above have been understood to serve a broader systemic function,[23] being the preservation of a particular vision of political economy and national unity or the constitutionally prescribed features of representative and responsible government.

10. Those matters are important in this matter for two reasons. First, they may be seen to assist in understanding the well entrenched notion that s51(xxxi) should be construed liberally (consistently with the doctrine of this Court and reflecting the approach in *Pumpelly*)[24] and in a way that is protective of individual property holders. Secondly, they suggest that the Commonwealth's attempt to invoke, in various guises, the "public good" or matters said to constitute compelling or cogent public health concerns, is misconceived.

B Property

11. The term "property" is the "most comprehensive term that can be used"[25] and extends to every species of valuable right and interest, including those which are "innominate and anomalous".[26] It is accepted by the Commonwealth that the Registered Trade Marks (Agreed Facts para 4, **CB 10**) are property for the purposes of s51(xxxi).[27] That concession is consistent with authority.[28] It is unclear whether it is accepted that the BAT Goodwill (Agreed Facts para 11, **CB 12**) falls within the placitum. This Court has said that goodwill and reputation is a proprietary interest.[29] The BAT Packaging (Agreed Facts para 17, **CB 12**) is obviously a subject of property for the purposes of the placitum.[30] Considerably more controversy arises as to the nature of those property interests by reason of the Commonwealth's grounds of defence.

Rights vs liberties

12. The Commonwealth says that the BAT Goodwill does not relevantly enter into the field of property because those matters involve (at most) a "liberty, ability or capacity" to control the appearance of the BAT Packaging or the Winfield Get Up.[31] Property may be usefully conceptualised as a "bundle of rights",[32] but the Commonwealth would pare it back such that it is limited to those "rights" in the bundle which confer a legal entitlement to some form of benefit, enforceable as against third parties. However, as four members of this Court observed in *Yanner*,[33] there are limitations to the "bundle of rights" analysis. Moreover, an exclusive focus upon whether rights are enforceable against third parties involves what Professor Gray has described as a confusion between property status and proprietary consequence, leading to a "deadening embrace of cause and effect".[34]

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[22] *Dalziel* at 276 per Latham CJ (see also at 284-5 per Rich J). See also *Trade Practices Commission v Tooth* (1979) 142 CLR 397 (***Tooth***) at 403 per Barwick CJ; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (***Newcrest***) at 613 per Gummow J; *Smith* at 501 [9] per Gleeson CJ and *Wurridjal* at 359 [87] per French CJ.

[23] See eg *Betfair* at 459 [32]-[35]; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-1.

[24] See eg, *ICM* at 169 [43] per French CJ, Gummow and Crennan JJ; *Wurridjal* at 359-360 [87]-[89] per French CJ; *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 (***Telstra***) at 230-231 [43]-[44] per curiam; *Banking Case* at 349 per Dixon J and at 276 per Latham CJ and *Dalziel* at 290 per Starke J.

[25] *Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21 per Knox CJ and Starke J.

[26] *Banking Case* at 349 per Dixon J.

[27] Commonwealth Defence (**CD**) para 6(a)(iii), **CB 45**.

[28] See *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 (***Campomar***) at 65 [42] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ and *Health World Ltd v Shin-Sun Australia Pty Ltd* (2010) 240 CLR 590 (***Shin-Sun***) at 598-599 [29] per French CJ, Gummow, Heydon and Bell JJ. See also, apparently accepting that trade marks are property for the purposes of s51(xxxi) *Newcrest* at 602 per Gummow J and (by way of analogy, dealing with copyright) *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 (***WMC***) at 70 [184] per Gummow J and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 177 CLR 480 (***Tape Manufacturers***) at 527 per Dawson and Toohey JJ.

[29] *Bachus Marsh Concentrated Milk Co v Joseph Nathan and Co Limited* (1919) 26 CLR 410 at 438 per Isaacs 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 and the authorities there referred to. See also, in the context of the Fifth Amendment, *Kimball Laundry Co v United States* 338 US 1 (1949) and Nowak at 545, note 5.

[30] Van Nelle makes no submissions as to the other proprietary interests identified in BAT's claim.

[31] CD, para 6(c)(iii) and (d), **CB 47-48**. As to the Winfield Get Up, see Agreed Facts para 7(a), **CB 10-11**.

[32] *Dalziel* at 285 per Rich J.

[33] *Yanner v Eaton* (1999) 201 CLR 351 (***Yanner***) at 365-366 [17] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

[34] K Gray, "Property in Thin Air", *Cambridge Law Journal*, vol 50 (1991) 252-307 (**Gray**) at 293, to which reference was made in *Yanner* at 365-366 [17]-[18] per Gleeson CJ, Gaudron, Kirby and Hayne JJ and in *Telstra* at 230 [44] per curiam.

13. The more useful analysis (proposed by Professor Gray and referred to with apparent approval by four members of this Court in *Yanner* and by the entire Court in *Telstra*) is that property is a "legally endorsed concentration of power over things and resources".[35] Importantly, on that view, property consists primarily of "control over access".[36] The BAT Goodwill would support an action in passing off.[37] Necessarily, that involves a significant degree of control over the access of other persons to the various matters comprising the Winfield Get Up. That control could not prevent all uses by others of the Winfield Get Up in all circumstances and does not involve the exercise by BAT of some "positive right of use". However, those matters are not essential attributes of property, which is not "a monolithic notion of standard content and invariable intensity".[38]

Inherent susceptibility to variation

14. As regards the Registered Trade Marks, it is said by the Commonwealth that the engagement of s51(xxxi) may turn upon whether the rights conferred by *Trade Marks Act 1995* (Cth) (**TMA**) may be characterised as "inherently susceptible of variation".[39] However, it is erroneous to proceed on the basis that that slogan forms part of a taxonomy of rule and exceptions to a rule,[40] which has congealed around s51(xxxi). It is also too broad a proposition to suggest that the contingency of subsequent removal or alteration of statutory rights removes them from the scope of s51(xxxi).[41] Those contingencies have not in all cases proved an insurmountable obstacle to the engagement of s51(xxxi) by "purely statutory rights".[42]

15. That result is explicable on the basis of the principles outlined above. Leaving aside s51(xxxi), all property (be it based in statute or the general law) would be vulnerable to the contingency of legislative modification or extinguishment without compensation,[43] unless one accepts some form of natural law theory evident in some of the early American authorities.[44] That would be so even in respect of real property and indeed remains the case in so far as the legislative power of the States is concerned.[45] It is difficult, in those circumstances, to discern why s51(xxxi) should be understood to have some form of attenuated application to property owing its existence to statute, when property owing its existence to the general law is equally frail. Rather, one of the central objects underlying the constitutional requirement for just terms was to address the vulnerability to the exercise of Commonwealth legislative power "inherent" to all forms of property, whatever their provenance. Consistent with what was said in *Pumpelly*, it did so by putting the principles enunciated by common law writers like Blackstone beyond the capacity of the Commonwealth Parliament to alter.

16. The terms of a statute conferring a proprietary interest may dictate that its content depends upon the will from time to time of the legislature which created that right.[46] That narrower principle is not engaged here. The TMA creates a statutory species of "personal property" (protected by an action for infringement) which accommodates the interests of traders in their goodwill and in turning it to account through assignment or licensing.[47] The interests of proprietors, assignees and licensees are also

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See also K Gray and S Gray "The Idea of Property in Land" in S Bright and J Dewar (eds) *Land Law: themes and perspectives* (1998) 15-51 at 17.

[35] The language "things and resources" was not intended to refer to some narrow universe of the tangible, as is apparent from Professor Gray's discussion of confidential information at 300-1.

[36] See *Yanner* at 366 [18] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

[37] *Campomar* at 88-89 [108]-[109] per curiam.

[38] *Yanner* at 366-376 [19] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

[39] CD, para 6(a)(vii), **CB 46**.

[40] *Telstra* at 232 [49] per curiam.

[41] *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 (***Chaffey***) at 664 [24] per Gleeson CJ, Gummow, Hayne and Crennan JJ and *Telstra* at 232 [49] per curiam.

[42] See eg, *Newcrest*.

[43] *WMC* at 58 [149] per McHugh J and *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 67 per Griffith CJ, 77-8 per Barton J, 98 per Isaacs J and 105 per Gavan Duffy J.

[44] See W Stoebuck, "A General Theory of Eminent Domain", *Washington Law Review*, vol 47 (1972) 553 at 572-3. Such a possibility was rejected as a limitation on the legislative power of the States in *Durham Holdings v New South Wales* (2001) 205 CLR 399 (***Durham***) at 410 [13]-[14] per Gaudron, McHugh, Gummow and Hayne JJ.

[45] See *Durham* at 408 [7] (and the authorities referred to in footnote 68) and at 410 [13]-[14] per Gaudron, McHugh, Gummow and Hayne JJ.

[46] *Wurridjal* at 382-383 [172] per Gummow and Hayne JJ; *Chaffey* at 662 [18] and 665-666 [30] per Gleeson CJ, Gummow, Hayne and Crennan JJ and *WMC* at 73-4 [198] per Gummow J.

[47] See *Shin-Sun* at 598-599 [29] per French CJ, Gummow, Heydon and Bell JJ and, in the context of the former Act, *Campomar* at 65 [42] per curiam.

addressed by making provision for a system of registration upon which those persons may rely[48] and by specifying the rights and powers of registered owners and authorised users (ss20 and 26). An enactment which creates tradeable property of that nature is not to be regarded as contemplating frequent amendment.[49]

17. It takes matters no further that the Commonwealth, State and Territory legislatures have applied, from time to time, requirements or restrictions to the packaging and marketing of tobacco products.[50] All property, even a fee simple, is subject to such requirements – restrictions on use in zoning laws providing the obvious example.[51] Only by some form of syllogistic fallacy does one deduce that all such property is inherently susceptible to all forms of legislative restriction on use (no matter how extensive), such that s51(xxxi) cannot be engaged by such a measure. At no time have any of the measures upon which the Commonwealth seeks to rely prevented BAT from applying the Registered Trade Marks or the Winfield Get Up to the BAT Packaging in a manner akin to the restrictions imposed by the *Tobacco Plain Packaging Act 2011* (Cth) (**TPP Act**) and the *Tobacco Plain Packaging Regulations 2011* (Cth) (**TPP Regulations**).[52] But the TPP Act and TPP Regulations do directly affect the definitional character of the property. That is, trade marks and get up are not merely incidentally for display; that is their raison d'être.[53] The legislation thus distinguishes itself from unexceptionable statutory affectation of trade - for example, taxation, quotas and restrictions on eligible buyers and places of sale, all of which may consequentially affect the value of a brand.

C Acquisition

18. Acquisition also has been construed liberally. Once property is construed broadly to include "innominate and anomalous" interests, acquisition cannot be confined to traditional conveyancing principles and procedures.[54] Nevertheless, given s51(xxxi) uses the term "acquisition" rather than "taking" or "deprivation", there must be an "obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property".[55]

19. Doubts[56] have been expressed as to whether that approach sits comfortably with the notion that the Commonwealth or another party must acquire "an interest in property, however slight or insubstantial it may be".[57] Those matters are readily reconciled when one has regard to this Court's clarification of the meaning of the term "property" in *Telstra* and in *Yanner* (see above). The expression "benefit" embraces advantages extending beyond those of a proprietary kind in any conventional sense as understood by property lawyers, perhaps because that "conventional understanding" might not embrace the concept of the defining characteristic of "property" as some person's form of legally endorsed control over access to the relevant resources. It follows that the question of acquisition depends upon whether the Commonwealth or another person has gained that control.

20. Justice Dixon expressed himself in similar terms in the *Banking Case*, holding that s51(xxxi) was engaged because there had been an "assumption and indefinite continuance of exclusive possession and control of" the undertaking (which he identified as an innominate and anomalous interest in the property).[58] The centrality of control to the acquisition question may also be seen in *ICM* and in *Newcrest*. In *ICM*, French CJ, Gummow and Crennan JJ concluded that there had been no acquisition by reason of fact that the State had always had "power to limit the volume of water to be taken from

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[48] See s22(1) and Parts 10 and 11 of the TMA and *Shin-Sun*, ibid.

[49] Cf *Chaffey* at 674-675 [66] per Heydon J and note the matters to which his Honour had regard at 673-674 [63]-[65].

[50] See CD, para 6(a)(vi), **CB 45**; 6(c)(iv), **CB 47**.

[51] See *Commonwealth v Tasmania* (1983) 158 CLR 1 (***Tasmanian Dam***) at 283 per Deane J; *Wurridjal* at 382 [171] per Gummow and Hayne JJ.

[52] See, by way of analogy, *Newcrest* per Gummow J at 618-9.

[53] See eg s17 and Part 9 of the TMA and *E&J Gallo Winery v Lion Nathan* (2010) 241 CLR 144 at 162-163 [41]-[43].

[54] *Mutual Pools* at 185 per Deane and Gaudron JJ.

[55] *Mutual Pools* at 185 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunication Corporation* (1994) 179 CLR 297 (***Georgiadis***) at 304-305 per Mason CJ, Deane and Gaudron JJ; *Newcrest* at 634 per Gummow J, with whom Toohey and Gaudron JJ relevantly agreed at 560 and 561; *ICM* at 179-180 [81]-[82] per French CJ, Gummow and Crennan JJ and at 201-201 [147] per Hayne, Kiefel and Bell JJ.

[56] See *Smith* at 545-546 [164]-[166] and 548-549 [173] per Callinan J.

[57] *Tasmanian Dam* at 145 per Mason J- that passage has since been cited with apparent approval in *Tape Manufacturers* at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ; *Wurridjal* at 360 [90] per French CJ and *ICM* at 201-202 [147] per Hayne, Kiefel and Bell JJ (equating that concept with that of receipt of an identifiable and measurable advantage).

[58] At 349.

[the] resource" (emphasis added).[59] In his dissenting reasons, Heydon J also emphasised the issue of control by the State over water resources to reach the opposite conclusion (relying on the passage from Dixon J's reasons in the *Banking Case*).[60] *Newcrest* may similarly be seen to have turned upon whether the Commonwealth had gained a sufficient degree of control in respect of the resource (minerals), so as to allow it to exclude Newcrest from it.[61]

21. So understood, *ICM* and *Newcrest* illustrate the point made by this Court in *Yanner* regarding the need to differentiate between the "thing" or subject of property and the set of legal relationships with that thing.[62] If the Commonwealth acquires a sufficient degree of control over the relevant thing or resource, it will then be in a position to secure for itself or others the benefits of that subject of property. In that sense, the "identifiable benefit" analysis provides a useful analytical tool for determining whether property has been acquired, which will involve matters of substance and degree.[63] However, the fundamental determinant of that issue remains that of control over access to those benefits.

22. That also explains the established proposition that there need not be precise correspondence between the benefit received and what was taken.[64] The benefits or advantages that may be derived from control over most subjects of property will be legion. Further, the benefit or advantage that might be derived by a polity from that control will naturally tend to differ from that of an individual property holder[65] – indeed, that was the expectation of the framers, as may be seen in the references to acquisition being for "public purposes" collected above.[66] The example given by Deane J in *Tasmanian Dam* concerning the prohibition on any presence upon land in a buffer zone around a Commonwealth defence facility illustrates those points.[67] Prior to the commencement of those prohibitions, that land might have been applied by its legal owner to the fulfilment of a variety of private objects. The fact that the Commonwealth derives a distinctly different benefit (characterised by Deane J as the use of the land in its unoccupied state) is simply the product of the fact that it desires to exercise its newly acquired control of the land to a different (public) end. But that situation is no less properly characterised as the "acquisition of property" than if the Commonwealth had used the land to derive a "benefit" more closely resembling that originally pursued by the legal owner (for example building an expanded facility upon that land). The point may be further illustrated by the facts of *Pumpelly* – the benefit derived from the building of the dam and inundation of the plaintiff's land was the quintessentially public object of "improvement of navigation"; whereas it appears that the plaintiff had previously applied the land for farming purposes, which would give rise to a different range of benefits.

23. This analysis readily accommodates the acquisition of choses in action.[68] It also casts light upon

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[59] See also their Honours' reasoning regarding the position of other licensees – they had at most "the prospect of increasing or obtaining allocations..." (at 180 [84] emphasis added). Such a "prospect" could not equate to control over the resource. The reasoning of Hayne, Kiefel and Bell JJ (at 202 [150]) is not dissimilar, particularly when one takes into account the sense in which their Honours understood the nature of the "rights" vested in the State (see at 201 [146]).

[60] At 234 [232]-[233]. The analysis of Deane J in *Tasmanian Dam* at 286-7 may be seen to proceed on a similar basis.

[61] In a like manner, the Director of National Parks and Wildlife obtained control over access to the land, such that Newcrest could be excluded from occupying it and conducting mining operations on it (see Gummow J at 634). See also *WMC* at 17 [17] per Brennan J, *Smith* at 504-505 [22] per Gaudron and Gummow JJ and *ICM* at 180 [85] per French CJ, Gummow and Crennan JJ.

[62] Gleeson CJ, Gaudron, Kirby and Hayne JJ at 365-366 [17] and Gummow J at 389 [86]. See also W Hohfeld "Some fundamental legal conceptions as applied in judicial reasoning" 23 *Yale Law Journal* 16 (1913) 21-23.

[63] *Tooth* at 414-415 per Stephen J; *Tasmanian Dam* at 283 per Deane J; *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 at 184-185 per Black CJ and Gummow J; *Smith* at 505-506 [23] per Gaudron and Gummow JJ. See also the US regulatory takings cases (to which reference was made in *Tooth* and in *Tasmanian Dam*), summarised in *Lingle* at 537-540. As such, a mere requirement to display a warning message will not (at least in most cases) involve an acquisition of property.

[64] *ICM* at 215-216 [190] per Heydon J; *Newcrest* at 634 per Gummow J and *Georgiadis* at 305 per Mason CJ, Deane and Gaudron JJ, observing that that is so particularly in respect of innominate and anomalous interests (see also *Banking Case* at 349 per Dixon J, to which their Honours referred).

[65] See *Smith* at 546-547 [168] per Callinan J.

[66] See note 11 above.

[67] See also *Portsmouth* and *Commonwealth v Western Australia* (1999) 196 CLR 392 (***WA Mining Case***), although in the latter case the pleadings did not indicate that any relevant prohibition yet had been engaged (see Gleeson CJ and Gaudron J at 420 [71]-[72] and Gummow J at 443-4 [156]-[158]), the matter having proceeded by way of demurrer.

[68] The notion that a chose in action constitutes property may be explained on the basis that it "performs the exclusory and regulatory functions which comprise the primary hallmark of 'property'" (see, discussing contractual choses in action, Gray at

unresolved questions, such as whether receipt of a benefit in the nature of assisting Australia to implement its international obligations can engage s51(xxxi).[69] Such matters are as readily regarded as a "benefit" to the Commonwealth as those related to the achievement of defence purposes in the example given by Deane J. The real issue may be seen to be whether (as in *ICM*) the Commonwealth already possesses the power to implement those obligations and so gains no more control than it already has from the putative acquisition, that being a matter which will depend upon the particular facts. So understood, *WMC* may be seen to be a case akin to *ICM*;[70] whereas *Tasmanian Dam* (like *Newcrest* and the current matter) may be seen to have involved the acquiring of new or enlarged powers to control access to the benefits of the land (the hallmark of property) and to exclude Tasmania from them.[71]

24. As to the current matter, Van Nelle adopts the submissions made by BAT regarding the manner in which BAT's property interests will be affected by the operation of the legislative scheme.[72] It matters not whether that involves the destruction or reduction of "positive rights", enforceable against third parties. The significant feature is that BAT has lost a material degree of legally endorsed control over access to the resources or things which are the subject of those interests. Exercising that power, BAT formerly caused the packaging for Winfield cigarettes to have the appearance depicted in annexure B to the statement of claim (**CB 30-1**). The effect of the scheme is that it may not, from the commencement of the relevant provisions, do so. That is the result of the fact that the Commonwealth is now in a position to regulate access to the benefits of the Winfield Trade Marks, the BAT Goodwill and the Packaging.

25. Those benefits may be variously expressed and Van Nelle adopts the submissions of BAT in that regard.[73] Given that it is necessary to consider the practical operation of the legislation,[74] those matters should be seen in the context of a broader scheme, including the system of "graphic health warnings" provided for by the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations* 2004 and the *Competition and Consumer (Tobacco) Information Standard 2011* (the **Standards**). So understood, the Commonwealth has secured for itself a benefit or advantage in that it may now determine all aspects of the appearance of the BAT Packaging and cause it to convey its messages (provided for in the Standards) in the form it chooses – in essence, the pack has been reconstituted as a "bonsai billboard" for those messages. The allegation that that does not "correspond" to or "correlate" with what was taken (CD 19(b), **CB 53**) overlooks the fact that the benefits derived by a polity will generally differ from those of a private individual from whom the property was acquired (see the examples given above). There is sufficient "correspondence" in the current case, particularly given that the Agreed Facts refer to BAT having formerly used the pack to "promote" its product.[75] However, even if it were otherwise, the other benefits or advantages sought to be derived by the Commonwealth (for example, the purpose identified in s3(1)(b), being to implement certain obligations under the *WHO Framework Convention on Tobacco Control*) "correspond" in the requisite sense to what was taken: the necessary correspondence flows from the fact that the Commonwealth has sought to achieve those benefits by obtaining for itself a degree of control of similar intensity and amplitude to that formerly possessed by BAT.

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274). As between the parties, those legal relationships regulate access to either money (which this Court has held to be within the purview of s51(xxxi) – *Tape Manufacturers* at 509 per Mason CJ, Brennan, Deane and Gaudron JJ) or the assets of the obligor, which might be the subject of enforcement proceedings to satisfy a judgment obtained by the obligee or their assignee. The extinguishment of the chose in action (or the impeachment of its substance – as in *Smith*) alters that set of legal relationships and confers upon the obligor a comparatively larger set of powers to exclude the obligee from those subjects of property. The "benefit", in such a case, may be seen to be the financial gain resulting from liability being brought to an end without payment (see eg *Georgiadis* at 305-6 per Mason CJ, Deane and Gaudrom JJ and *ICM* at 180 [83] per French CJ, Gummow and Crennan JJ). But that result is merely the product of the alterations to those underlying legal relationships.

[69] See, expressing a diversity of views on that issue: *Tasmanian Dam* at 286-7 per Deane J; *WMC* at 30-31 [57]-[59] per Toohey J, 38 [85] per Gaudron J and at 96 [246] per Kirby J and *Smith* at 548-549 [173] per Callinan J.

[70] See particularly Gaudron J at 38 [85].

[71] See Deane J at 286-7. The status of Deane J's reasoning on that issue requires clarification. It led his Honour to hold with a majority of the Court (Gibbs CJ, Wilson and Dawson JJ deciding on a different basis) that the *World Heritage (Western Tasmania Wilderness) Regulations* were wholly invalid (see the answers to the questions reserved at 59). While Mason J at 145-6, Brennan J at 248 and Murphy J at 182-3 expressed a contrary view as regards s51(xxxi), their Honours are properly regarded as being in dissent on that aspect of the matter.

[72] BAT Submissions paras 18-34.

[73] BAT Submissions paras 46-50.

[74] *ICM* at 198-199 [138] per Hayne, Kiefel and Bell JJ.

[75] See para 9, **CB 11**.

D The Commonwealth's novel "legitimate regulation" approach

26. Seemingly drawing upon disparate dicta extracted from *Tooth*, *Tasmanian Dam*, *Mutual Pools* and *Airservices*[76] the Commonwealth seeks to develop a doctrine which would deeply erode the guarantee of just terms: CD, paras [20]-[21], **CB 53-54**. There are a number of difficulties with that suggested approach.

27. First, central to the engagement of that novel principle is that the impugned legislation seeks to fulfil "legitimate regulatory objects" within the scope of other heads of power; and that the means selected to achieve those objects bears some form of relationship to those objects (that relationship is expressed in a number of different formulations and might loosely be described as involving some form of "proportionality" inquiry): see CD 20(a) and (b) and 21 **CB 53-54**. However, as submitted above, the achievement of "legitimate" public objects is at the heart of s51(xxxi), reflecting its historical origins and the terms and non-absolute nature of the constitutional constraint. The legislature is not inhibited in the achievement of those public purposes, save that it is required to ensure that the benefit for the many is paid from the public purse and not only by the expropriated few.[77] As such, the functional imperative which may be seen to have animated the deployment of similar inquiries in the context of other constitutional guarantees is absent or at least not as pressing in the context of s51(xxxi).

28. Secondly, it appears to be an important step in the Commonwealth's argument that any acquisition is "subservient to, incidental to and consequent upon" the achievement of objects within another head of power and that the "sole, dominant or principal purpose" of the legislative scheme was to achieve those objects: CD 20(c) and (d) **CB 53-54**. Those criteria appear to reflect an assumption that there is a "most correct" characterisation of that law, possibly as an exception to the general principle that a law may bear more than one character.[78] That seems to involve the attempted resurrection of the single characterisation heresy or perhaps some form of "essential attributes" doctrine from older s92 authority.[79] The difficulties inherent to that ambitious proposal are at once apparent: first, Commonwealth laws may, and commonly will, find support in several heads of power – indeed, by reason of its terms, every law falling within by s51(xxxi) will do so. Secondly, if in addition to whatever other characters it may have, the law is one with respect to the acquisition of property, the law must satisfy the requirement of just terms.[80] Thirdly, the question of whether a law bears another character only properly arises if it is first determined that the law does not fall within s51(xxxi) – the question then arises as to whether the law is otherwise within the legislative power of the Commonwealth as a law with respect to another head of power. But it is incorrect to treat that second inquiry as somehow relevant to the first. That point was made by McHugh J in *Airservices*[81] and is reflected in the approach of all members of this Court in *Theophanous*.[82] A somewhat similar corrective was administered by the United States Supreme Court, in *Lingle v Chevron USA Inc.*[83]

29. The United States authorities are also of utility in assessing the seemingly related proposition that something turns upon the likely efficacy of the legislative scheme: see, the Commonwealth's allegation that there is a "rational and cogent basis" for concluding that the plain packaging of tobacco products will achieve certain ends at CD [17], **CB 52**. Indeed, it is seemingly the United States authorities from which the Commonwealth has appropriated that concept. However, that test is

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

[77] *WA Mining Case* at 461-462 [194] per Kirby J; *Smith* at 501 [9] per Gleeson CJ and *ICM* at 229-230 [222] per Heydon J. See also *Armstrong v United States*, 364 US 40, 49 (1960) and *Lingle* at 537.

[78] See *Airservices* at 247-248 [333], 250 [339] per McHugh J, *ICM* at 229-230 [222] per Heydon J.

[79] Cf *Actors and Announcers Equity Association v Fontana Films* (1982) 15 CLR 169 at 193-4 per Stephen J; *Cole v Whitfield* (1988) 165 CLR 360 at 400-1 per curiam.

[80] *Wurridjal* at 387 [187] per Gummow and Hayne JJ.

[81] At 250 [339].

[82] *Theophanous v Commonwealth* (2006) 225 CLR 101 (***Theophanous***). The engagement of s51(xxxi) was considered by Gummow, Kirby, Hayne, Heydon and Crennan JJ at 124-127 [55]-[67]; the question of whether the legislation was reasonably incidental to the exercise of another head of power was only considered after it had been determined s51(xxxi) was not so engaged (at 127-128 [68]-[71]).

[83] 544 US 528, 542-543 (2005), where it was said that the inquiry as to the "underlying validity" of an impugned law (eg whether the "public use" requirement had been met or the legislation was so arbitrary as to violate due process) was "logically prior to and distinct from the question of whether a [law] effects a taking".

applied as regards the Due Process Clause and the "public use" question.[84] Neither area is a source of fruitful analogies for the purposes of s51(xxxi).[85] Moreover, in observations which are equally applicable to the issue of whether a law may be characterised as one with respect to the acquisition of property, the Supreme Court said in *Lingle*: "The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not".[86]

30. Thirdly, the Commonwealth's proposed principle may be seen to be founded on the notion that those cases in which this Court has said it would be "incongruous and inconsistent" to provide just terms may be explained by a single unified theory (one which has at its core the sole characterisation fallacy just referred to). However, rather than the formulaic inquiry which the Commonwealth proposes, that issue is to be determined as a question of judgment, recognising that the Constitution authorises the Commonwealth Parliament to make certain laws divesting property in circumstances where the provision of just terms would be an absurdity.[87] This Court has, at least in part, approached the identification of laws of that kind by reference to historical antecedents, from which analogies have been developed using ordinary processes of legal reasoning.[88] In that regard, forfeiture, taxation, penalties and charges for services were all well understood to be excluded from s51(xxxi) at the time of federation.[89] In contrast, as *Pumpelly* illustrates, the same cannot be said of the seemingly unbounded category of laws pursuing the public interest or "legitimate regulatory objects".

31. Fourthly, although a matter to be developed further in reply, that aspect of the Commonwealth's case seemingly depends upon this Court making findings on the basis of a vast array of material, the truth and relevance of which is not agreed to by the parties.[90] Nor, as with any issue of public importance, is that material free from controversy, as may be seen in the report of the Parliamentary Committee on the bill which became the TPP Act.[91] Van Nelle relies upon that document only to submit that the choices to be made regarding those controversies are (emphatically) the province of the legislative branch of government.[92] The reasons in *Lingle* make that point, with the Court observing that the proposed adoption of "means ends review" would require Courts to scrutinise the "efficacy of a vast array of state and federal regulations – a task for which courts are not well suited" and moreover would require "courts to substitute their predictive judgments for those of elected legislatures and expert agencies". While that inquiry might be made less onerous by the application of some form of doctrine of "margin of appreciation",[93] that is not an approach which has found favour with this Court.[94]

E Just terms

32. The Commonwealth's contentions concerning just terms appear to put some of the same arguments which underpin its novel characterisation approach – primarily by reference to the

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[84] See *Lingle* at 543 and *Kelo v City of New London* 545 US 469, 487-490 (2005) – see also Justice O'Connor (in dissent) at 503 and *Airservices* at 278 [433] per Gummow J.

[85] See, as regards the Due Process Clause, *Mutual Pools* at 202 per Dawson and Toohey JJ and *Health Insurance Commission v Peverill* (1994) 170 CLR 226 at 248 per Dawson J.

[86] *Lingle* at 543 (original emphasis). The magnitude of burden upon property rights is one of the factors identified by the Court in *Penn Central Transport Co v New York City* 438 US 104 (1978) for evaluating regulatory takings claims.

[87] *Theophanous* at 126 [60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ; *Tooth* at 408 per Gibbs J and see *R v Smithers; Ex Parte McMillan* (1982) 152 CLR 477 (***Smithers***) at 488 per curiam. As such, the principle of construction identified by Dixon J in *Schmidt* at 371-2 (frequently referred to as "abstraction" – see *Wurridjal* at 386-387 [185]-[186] per Gummow and Hayne JJ) does not apply in that class of case.

[88] See eg, *Smithers* at 487 per curiam; and *Theophanous* at 126-127 [60]-[64] per Gummow, Kirby, Hayne, Heydon and Crennan JJ. See also, in a different context, *Lumbers v W Cook Pty Limited* (2008) 232 CLR 635 at 665 [85] per Gummow, Hayne, Crennan and Kiefel JJ. That familiar approach resembles that which has been adopted in respect of "tax like exactions" which are not in fact taxes for the purposes of ss55 or 90: see eg *Air Caledonie v Commonwealth* (1988) 165 CLR 462 at 467 per curiam.

[89] See Sir H Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) 506-7.

[90] Agreed Facts para 31, **CB 14**.

[91] **VNCB 102**.

[92] See eg *Rowe* at 22 [29] per French CJ; *Leask v The Commonwealth* (1996) 187 CLR 579 at 602 per Dawson J and *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 437 per Kitto J.

[93] See, in the area of the regulation of tobacco vending machines, *R (Sinclair Collis Ltd) v Health Secretary* (2012) 2 WLR 304.

[94] See eg *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 [17] per Gleeson CJ; see also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 262-263 [236]-[239] per Kirby J.

distinction drawn by Dixon J in *Nelungaloo No 1* between the "full money equivalence" inherent in the notion of compensation and what is "fair and just between the community and the owner of the thing taken".[95]

33. That ground of the Commonwealth's defence does not assist it for the following reasons. First, as BAT submits,[96] nowhere was it suggested by his Honour (nor has it been suggested in any other authority of this Court) that the requirement for just terms may be satisfied without providing compensation for what was lost,[97] as is the case here. Properly understood his Honour's comments (and his somewhat similarly worded reasons in *Grace Brothers*[98]) go no further than the proposition that the legislature (or, in *Nelungaloo No 1*, the administrative decision maker) has some degree of latitude in determining what is just. Any such latitude is far exceeded in the current matter. Secondly, his Honour's comments (which formed part of his "personal views"[99] in *Nelungaloo No 1* and not part of his dispositive reasoning) are contradicted by more recent statements by members of this Court, which reject the proposition that the interests of the community are to be balanced against the interests of individual property holders.[100] Thirdly, insofar as they suggest that just terms may be provided without furnishing the "pecuniary equivalent" or "full compensation" for what was lost, his Honour's comments are at odds with contrary statements made by other members of this Court on many occasions.[101] Fourthly, and more fundamentally, for the reasons given above, there is in fact little tension between the interests of the Australian community in pursuing "public objects" or a regulatory scheme and the provision of full compensation to those whose property is acquired by reason of such a scheme. Indeed, as submitted above, any practical fiscal constraint which results from that position is a matter which the framers intended.[102]

F Validity of section 15 of the TPP Act

34. As to the validity of s15 of the TPP Act, Van Nelle adopts the submissions of BAT. If s 15 is valid, then that provision is engaged, with the result that the TPP Act does not apply to the property of BAT referred to in paragraph 11 above.

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[95] *Nelungaloo v Commonwealth* (1948) 75 CLR 495 (***Nelungaloo No 1***) at 569 per Dixon J and see CD para 22(b), **CB 55.**

[96] BAT Submissions para 59.

[97] Indeed, Dixon J expressly said that if, on their proper construction, the relevant regulations permitted the Board to dispose of the wheat on terms that were "unfair or unjust to the growers without any indemnification to the pool and leaving the growers without remedy", then they would have been invalid by reason of s51(xxxi): see at 567.

[98] *Grace Brothers v Commonwealth* (1946) 72 CLR 269 at 290-1 per Dixon J. See also *WA Mining Case* at 460-461 [192] per Kirby J.

[99] See 569-71.

[100] *Smith* at 500-501 [8]-[9] per Gleeson CJ, referring with approval to Brennan J in *Georgiadis* at 310-311.

[101] *Tonking* at 85 per Williams J; *Johnston Fear* at 323 per Latham CJ, 324 per Rich J and 333 per Williams J; *Commonwealth v Huon Transport Pty Limited* (1945) 70 CLR 293 at 306-7 per Rich J; *Banking Case* at 300 per Starke J; *Smith* at 501 [10] per Gleeson CJ, 531 [111] per Kirby J and 557 [198] per Callinan J.

[102] See, in addition to the Convention Debate references at footnotes 12 above, the *WA Mining Case* at 461-462 [194] per Kirby J.

Annexure A – Submissions Van Nelle would make were the Full Court to amend the questions reserved in the manner proposed in the document dated 15 March 2012

Proposed questions 5-7

1. These proposed questions seek to raise a discrete point concerning the *Competition and Consumer (Tobacco) Information Standard 2011* (the **2011 Standard**). The questions as to whether property has been acquired by operation of that instrument (and whether the determination of that matter requires the resolution of disputed facts) depend upon essentially identical issues to those which arise under questions 1 and 2 of the existing Questions Reserved. For the reasons given above, they should be answered in a similar fashion to that identified by BAT at para 73 of the BAT Submissions.[103] If property of BAT has been acquired by operation of the 2011 Standard, questions 5-7 seek to raise a further question as to whether just terms are afforded to BAT for that acquisition by s139F of the *Competition and Consumer Act 2010* (Cth) (**CC Act**).

1. It may be accepted that the term "reasonable amount of compensation" (which appears in that provision) is a flexible one and will, in most cases, satisfy the requirement for just terms. But the peculiar circumstances of this matter give rise to particular difficulties, which strain even that flexible measure to its breaking point. In that regard, Van Nelle submits that the warnings and messages required to be displayed by the 2011 Standard, by reason of their nature and content, may be characterised as being aimed to be aversive to the business of BAT referred to in para 7 of the Agreed Facts (**CB 10-11**) and to the commercial interests of BAT in carrying on that business. That is, the proprietary interest acquired by the Commonwealth (the control over the content of the messages which appear on the pack) is to be turned against the business of its former owner as a weapon.

2. There appear to be significant difficulties attending the valuation of such an interest which (to adapt what was said by Callinan J in *Smith* at 546-547 [168]) has in the hands of the Commonwealth assumed an "entirely different, even elusive shape or character" (see the submissions at paras 22 and 25 above). It is self evident that there is no market for that interest, nor is one readily hypothesised. Of course, the law can (and does) provide monetary compensation for proprietary interests even absent a market. However, as Gleeson CJ observed in *Boland*, the notion of "value" in all such cases means "exchange value", which presupposes, inter alia, a "person willing to give what is being valued in exchange for money...".[104] There are perplexities involved in the application of that assumption when one is dealing with the unusual interest acquired here. It may not be necessary to contend that just terms can never be afforded in such circumstances by the payment of money.[105] It is sufficient that no test or standard governing how that is to be done emerges from s139F or from the other provisions of the CC Act. It is not for the Court to re-write the legislation so as to supply the missing integer, which is not readily derived from the term "reasonable amount of compensation".[106] The consequence is that s139F does not provide for the requisite fair dealing as between the Commonwealth and BAT, with the result that s51(xxxi) is infringed. As such, either the provisions of the 2011 Standard referred to in proposed question 7(c) are ultra vires the CC Act and void or (in so far as they authorised the making of those provisions of that instrument) the provisions of the CC Act referred to in proposed question 7(b) are invalid. Proposed question 7 should be answered accordingly.

3. **Proposed question 8**

This question deals with the validity of s231A of the TMA,[107] which provides that the regulations made under s231(1)(a) of the TMA may make provision for the "effect of the operation" of the TPP Act on a provision of the TMA.[108] It is further provided that those regulations may be inconsistent with the TMA (231A(3)(a)) and prevail over the TMA to the extent of that inconsistency (s231A(3)(b)).

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[103] However, as noted above, Van Nelle does not make submissions as to BAT's design or patent.

[104] *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 225 [79] per Gleeson CJ. See also *Airservices* at 282 [444] per Gummow J, *Nelungaloo No 1* at 507 and *Commissioner of Succession Duties (South Australia) v Executor Trustee and Agency Company of South Australia Limited* (1947) 74 CLR 358 at 361-2 per Latham CJ, Rich and Williams J.

[105] Although, to the extent it is necessary, Van Nelle puts that submission. That was a question left open in *Wurridjal* – see Gummow and Hayne JJ at 390 [198]; Kirby J at 426 [309] and Heydon J at 426-427 [314]-[317], [339]-[341]. Note also that Heydon J suggested that that category of rights and interests (if it exists) may extend to matters that are not strictly spiritual: at 426 [314].

[106] *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ; *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 94 [251] per Gummow, Crennan and Bell JJ; cf *Minister for Primary Industry v Davey* (1993) 47 FCR 151 at 167 per Black CJ and Gummow J.

[107] Added by the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth).

[108] Section 231A also deals with regulations made under each of those legislative schemes.

4. That provision gives rise to two difficulties in terms of validity. First, although its precise field of operation is obscure, it is tolerably clear that s231A sets the Governor-General free to choose whether to apply provisions of the TMA in any case or class of case where that enactment actually or potentially intersects with the TPP Act. The extent of that power is at least as broad as that postulated by Kitto J in *Giris* at 379[109] – the Governor-General is liberated to do as she or he will in determining whether provisions of the TMA are to apply (at all or in modified form), subject only to the limits of the legislative powers of the Parliament. The possibility that his Honour envisaged in that case is therefore realised and the provision is invalid as an attempt to invest an officer of the executive government with part of the legislative power of the Commonwealth.[110] Clearly, as with any enactment, Parliament remains able to repeal or amend the law conferring power[111] and could also disallow any regulation made pursuant to it. However, the principle as articulated by his Honour does not appear to turn upon such matters.[112] On the other hand, it may be of significance that (like the legislation in issue in *Giris*) the power in issue here is able to be exercised by the executive with retrospective effect – see the terms of subsection 2.[113]

5. Secondly, in what is perhaps no more than a different way of putting the same point (or perhaps the true doctrinal foundation of the principle identified by Kitto J), the open ended power conferred by s231A is akin to the hypothetical laws to which reference was made in *S157/2002*.[114] Such laws, as the plurality there observed, lack the essential hallmarks of legislative power identified by Latham CJ in *Grunseit*, namely the determination of the content of a law as a rule of conduct or a declaration as to power, right or duty.[115] The legislation considered in *Work Choices*[116] provides a useful contrast. Unlike the regulation making power in issue in that case, s231A plainly contemplates the making of regulations which are neither "necessary" nor "convenient" for carrying out or giving effect to the TMA.[117] Indeed, it extends to the making of regulations which are entirely antithetical to that statutory scheme – those which "vary or depart from the positive provisions" of the TMA and which "go outside the field of operation which [the TMA] marks out for itself".[118] As such, within its field of operation, s231A has no defined ambit (cf *Work Choices* at [415]-[417]), but rather operates unconstrained, right up to the limits of legislative power.

6. For those reasons, proposed question 8 should be answered "yes".

Further applicable statutes and regulations

7. If the Full Court were to amend the Questions Reserved in the manner proposed by Van Nelle, the following statutory provisions (in addition to those identified by BAT) would be relevant to the determination of those questions:

(a) *Competition and Consumer Act 2010* (Cth), s139F, and Schedule 2 (*The Australian Consumer Law*) ss 134, 136, 203; and

(b) *Trade Marks Act 1995* (Cth), s231A;

which are attached as Annexure B and are still in force as at the date of these submissions.

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

[110] Note also the observations of Menzies J at 381 and of Windeyer J at 384-385.

[111] A point made by Evatt J in *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan* (1931) 47 CLR 73 at 120 (***Dignan***).

[112] Of course, that issue has been seen as determinative in the context of matters in which it has been contended there has been an impermissible abdication of Commonwealth legislative power: *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at 265 per Mason CJ, Dawson and McHugh JJ and *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 at 420-422 [75]-[77] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. See also Dixon J in *Dignan* at 102 and cf Evatt J at 120.

[113] That is how Professor Zines has explained *Giris* - see *The High Court and the Constitution*, 5th edition (2008) 206.

[114] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 [100]-[101] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

[115] Compare the laws in issue in *M61/2010E v Commonwealth* (2010) 243 CLR 319 at 346-347 [56] per curiam and in *New South Wales v Commonwealth* (2006) 229 CLR 1 (***Work Choices***) at 176-181 [401]-[417] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

[116] *Work Choices* at 176-181 [401]-[417] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

[117] Compare the terms of s231(1)(b) of the TMA.

[118] See the passage from *Morton v Union Steamship* (1951) 83 CLR 402 at 410, which immediately precedes that extracted in *Work Choices* at 180 [415] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

Competition and Consumer Act 2010

Act No. 51 of 1974 as amended

This compilation was prepared on 21 March 2012
taking into account amendments up to Act No. 185 of 2011

Volume 1 includes: Table of Contents
Sections 1 – 119

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes: Table of Contents
Sections 10.01 – 179

Volume 3 includes: Table of Contents
Schedules 1 and 2
Note 1
Table of Acts
Act Notes
Table of Amendments
Notes 2 – 7
Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

(a) a person would, but for this subsection, be required under one or more enforcement orders that relate to 3 or more fines to serve periods of imprisonment that in aggregate are longer than 3 years; and

(b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions:

(i) that occurred within a period of 2 years; and

(ii) that appear to a court to have been of the same nature or of a substantially similar nature;

the court must, by order, declare that the enforcement order or orders cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment.

(4) If subsection (3) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the court must make an order under that subsection in relation to only one of those periods.

(5) The order under subsection (4) must relate to the period which would give the person the maximum benefit under subsection (3).

(6) For the purposes of subsection (4), the court may vary or revoke an order made under subsection (3).

139F Compensation for acquisition of property

(1) If the operation of this Part (including Schedule 2 as applied by this Part) would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

(3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

Part 3-4—Information standards

134 Making information standards for goods and services

(1) The Commonwealth Minister may, by written notice published on the internet, make an ***information standard*** for one or both of the following:

(a) goods of a particular kind;

(b) services of a particular kind.

(2) Without limiting subsection (1), an information standard for goods or services of a particular kind may:

(a) make provision in relation to the content of information about goods or services of that kind; or

(b) require the provision of specified information about goods or services of that kind; or

(c) provide for the manner or form in which such information is to be provided; or

(d) provide that such information is not to be provided in a specified manner or form; or

(e) provide that information of a specified kind is not to be provided about goods or services of that kind; or

(f) assign a meaning to specified information about goods or services.

135 Declaring information standards for goods and services

(1) The Commonwealth Minister may, by written notice published on the internet, declare that the following is an ***information standard*** for goods or services of a kind specified in the instrument:

(a) a particular standard, or a particular part of a standard, prepared or approved by Standards Australia or by an association prescribed by the regulations;

(b) such a standard, or such a part of a standard, with additions or variations specified in the notice.

(2) The Commonwealth Minister must not declare under subsection (1) that a standard, or a part of a standard, referred to in that subsection is an information standard for:

(a) goods of a particular kind; or

(b) services of a particular kind;

if that standard or part is inconsistent with an information standard for those goods or services that is in force and was made under section 134(1).

136 Supplying etc. goods that do not comply with information standards

(1) A person must not, in trade or commerce, supply goods of a particular kind if:

(a) an information standard for goods of that kind is in force; and

(b) the person has not complied with that standard.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) A person must not, in trade or commerce, offer for supply goods the supply of which is prohibited by subsection (1).

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(3) A person must not, in or for the purposes of trade or commerce, manufacture, possess or have control of goods the supply of which is prohibited by subsection (1).

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(4) In a proceeding under Part 5-2 in relation to a contravention of subsection (3), it is a defence if the defendant proves that the defendant's manufacture, possession or control of the goods was not for the purpose of supplying the goods.

(5) Subsections (1), (2) and (3) do not apply to goods that are intended to be used outside Australia.

(6) Unless the contrary is established, it is presumed, for the purposes of this section, that goods are intended to be used outside Australia if either of the following is applied to the goods:

(a) a statement that the goods are for export only;

(b) a statement indicating, by the use of words authorised by the regulations to be used for the purposes of this subsection, that the goods are intended to be used outside Australia.

(7) Without limiting subsection (6), a statement may, for the purposes of that subsection, be applied to goods by being:

(a) woven in, impressed on, worked into or annexed or affixed to the goods; or

(b) applied to a covering, label, reel or thing in or with which the goods are supplied.

(8) If:

(a) a person (the ***supplier***) supplies goods in contravention of subsection (1), (2) or (3); and

(b) another person suffers loss or damage because, contrary to the information standard, he or she was not provided with particular information in relation to the goods; and

(c) the other person would not have suffered the loss or damage if the supplier had complied with the information standard;

the other person is taken, for the purposes of this Schedule, to have suffered the loss or damage because of that supply.

137 Supplying etc. services that do not comply with information standards

(1) A person must not, in trade or commerce, supply services of a particular kind if:

(a) an information standard for services of that kind is in force; and

(b) the person has not complied with that standard.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) A person must not, in trade or commerce, offer for supply services the supply of which is prohibited by subsection (1).

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(3) If:

(a) a person (the ***supplier***) supplies services in contravention of subsection (1) or (2); and

Part 4-4—Offences relating to information standards

203 Supplying etc. goods that do not comply with information standards

(1) A person commits an offence if:

(a) the person, in trade or commerce, supplies goods of a particular kind; and

(b) an information standard for goods of that kind is in force; and

(c) the person has not complied with the standard in relation to the goods.

Penalty:

(a) if the person is a body corporate—$1,100,000; or

(b) if the person is not a body corporate—$220,000.

(2) A person commits an offence if:

(a) the person, in trade or commerce, offers for supply goods of a particular kind; and

(b) an information standard for goods of that kind is in force; and

(c) the person has not complied with the standard in relation to the goods.

Penalty:

(a) if the person is a body corporate—$1,100,000; or

(b) if the person is not a body corporate—$220,000.

(3) A person commits an offence if:

(a) the person, in or for the purposes of trade or commerce, manufactures, possesses or has control of goods of a particular kind; and

(b) an information standard for goods of that kind is in force; and

(c) the person has not complied with the standard in relation to the goods.

Penalty:

(a) if the person is a body corporate—$1,100,000; or

(b) if the person is not a body corporate—$220,000.

(4) Subsection (3) does not apply if the person does not manufacture, possess or control the goods for the purpose of supplying the goods.

(5) Subsection (1), (2) or (3) does not apply to goods that are intended to be used outside Australia.

(6) Unless the contrary is established, it is presumed, for the purposes of this section, that goods are intended to be used outside Australia if either of the following is applied to the goods:

(a) a statement that the goods are for export only;

(b) a statement indicating, by the use of words authorised by regulations made for the purposes of section 136(6)(b) to be used for the purposes of section 136(6), that the goods are intended to be used outside Australia.

(7) Without limiting subsection (6), a statement may, for the purposes of that subsection, be applied to goods by being:

(a) woven in, impressed on, worked into or annexed or affixed to the goods; or

(b) applied to a covering, label, reel or thing in or with which the goods are supplied.

(8) Subsections (1), (2) and (3) are offences of strict liability.

204 Supplying etc. services that do not comply with information standards

(1) A person commits an offence if:

(a) the person, in trade or commerce, supplies services of a particular kind; and

(b) an information standard for services of that kind is in force; and

(c) the person has not complied with the standard in relation to the services.

Penalty:

(a) if the person is a body corporate—$1,100,000; or

(b) if the person is not a body corporate—$220,000.

(2) A person commits an offence if:

Trade Marks Act 1995

Act No. 119 of 1995 as amended

This compilation was prepared on 30 January 2012
taking into account amendments up to Act No. 174 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

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(k) provide for regulations made under the repealed Act to continue to have effect (with any prescribed alterations) for specified purposes of this Act.

Note: Regulations can also be made in relation to the *Tobacco Plain Packaging Act 2011* under section 231A.

231A Regulations may make provision in relation to the *Tobacco Plain Packaging Act 2011*

(1) The regulations may make provision in relation to the effect of the operation of the *Tobacco Plain Packaging Act 2011*, and any regulations made under that Act, on:

(a) a provision of this Act; or

(b) a regulation made under this Act, including:

(i) a regulation that applies a provision of this Act; or

(ii) a regulation that applies a provision of this Act in modified form.

Note: Section 28 of the *Tobacco Plain Packaging Act 2011* also sets out the effect of the operation of that Act on certain provisions of, and regulations made under, this Act.

(2) Without limiting subsection (1), regulations made for the purposes of that subsection may clarify or state the effect of the operation of the *Tobacco Plain Packaging Act 2011*, and any regulations made under that Act, on a provision of this Act or a regulation made under this Act, including by taking or deeming:

(a) something to have (or not to have) happened; or

(b) something to be (or not to be) the case; or

(c) something to have (or not to have) a particular effect.

(3) Regulations made for the purposes of subsection (1):

(a) may be inconsistent with this Act; and

(b) prevail over this Act (including any other regulations or other instruments made under this Act), to the extent of any inconsistency.