

Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia

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I. BACKGROUND

In November 2011, Australia became the first country in the world to legislate for “plain packaging” of tobacco products. As of December 1, 2012, the packaging of tobacco products sold in Australia must be a standard, drab dark brown color; and the printing of tobacco company logos, brand imagery, colors, or promotional text on that packaging and on individual tobacco products is prohibited.¹ While the Australian scheme is described as “plain packaging,”² tobacco packaging is required to be far from “plain” in the ordinary sense of the word. The scheme requires large health warnings composed of graphics, warning statements and explanatory messages, and information messages.

Plain packaging of tobacco products—which has also been called “generic packaging” or “standardized packaging”—is not a new idea. It was proposed as far back as June 1986, when the Canadian Medical Association agreed to a motion in favor of its adoption.³ It was only a matter of time before the first country introduced plain packaging, an inevitability accelerated by the entry into force in February 2005

[†] Director, McCabe Centre for Law and Cancer, a joint initiative of Cancer Council Victoria (CCV) and the Union for International Cancer Control. The author wishes to disclose that he is an employee of Cancer Council Victoria, which owns the Quitline trade mark and operates Quitline services. As explained in this paper, the tobacco companies argued (unsuccessfully) in their High Court challenges that Australia’s plain packaging regime confers benefits on CCV, and for this reason, among others, should have been struck down. The author is a member of the Australian Government’s Expert Advisory Group on Plain Packaging and an expert member of the Standing Tobacco Committee to the Intergovernmental Committee on Drugs. Both of these positions are unpaid. The author contributed to the application made by Cancer Council Australia for leave to make submissions in the High Court case as *amicus curiae*. The author is grateful to Kamala Rangarajan for helpful research and editorial assistance.

¹ See generally *Tobacco Plain Packaging Act 2011* (Cth) s 19 (Austl.) [hereinafter TPP Act]; *Tobacco Plain Packaging Regulations 2011* (Cth) reg 2.2.1 (Austl.) [hereinafter TPP Regulations].

² TPP Act, *supra* note 1; TPP Regulations, *supra* note 1.

³ PHYSICIANS FOR SMOKE-FREE CAN., PACKAGING PONEY INTELLECTUAL PROPERTY CLAIMS 1, 8 (2009), available at <http://www.smoke-free.ca/plain-packaging/documents/2009/packagingponeyipclaims-june2009-a4.pdf>. Further reference can be found in the plain packaging timeline included in this report.

of the WHO Framework Convention on Tobacco Control (FCTC)⁴ and the adoption in November 2008 by its Conference of the Parties of guidelines on the implementation of Articles 11 (packaging and labeling) and 13 (tobacco advertising, promotion, and sponsorship) of the Convention, both of which recommend that Parties consider the adoption of plain packaging, and significantly strengthen the policy, political, and legal bases underpinning it.

It was no surprise that Australia—long an international leader in tobacco control—became the first country to implement plain packaging,⁵ nor that its decision to do so would be met with fierce opposition by the tobacco industry. The tobacco industry has long feared plain packaging, and it is well aware of the “domino effect” history of tobacco control, with one jurisdiction’s world-first initiative inevitably being followed by many others. The tobacco industry has long asserted that plain packaging would breach a range of domestic and international laws;⁶ and claims that plain packaging would be unconstitutional and would lead to Australian taxpayers having to pay the tobacco industry billions of dollars in compensation were a central part of the tobacco industry’s vigorous campaign against its introduction.⁷

This Article aims to provide an overview of Australia’s plain packaging regime, and the decision of the High Court of Australia upholding that regime, that will be helpful to those considering legal issues relating to plain packaging in other domestic jurisdictions, and in the ongoing challenges to Australia’s legislation in the World Trade Organization (WTO)⁸ and under a bilateral investment treaty between

⁴ WHO Framework Convention on Tobacco Control, Feb. 27, 2005, 2302 U.N.T.S. 166 [hereinafter FCTC].

⁵ Jonathan Liberman et al., *Plain Tobacco Packaging in Australia: The Historical and Social Context*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES 30-47, 40-42 (Tania Voon et al. eds., 2012).

⁶ PHYSICIANS FOR SMOKE-FREE CAN., *supra* note 3, at 21; Eric Crosbie & Stanton A. Glantz, *Tobacco Industry Argues Domestic Trademark Laws and International Treaties Preclude Cigarette Health Warning Labels, Despite Consistent Legal Advice that the Argument Is Invalid*, 21 TOBACCO CONTROL 1, 6 (2012).

⁷ Evidence to Senate Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 13 September 2011, 4 (British American Tobacco Australia); British American Tobacco Australia Limited, Submission No 35 to Senate Legal and Constitutional Affairs Committee, *Inquiry into Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*, 2 September 2011, 24 [7.1]; British American Tobacco Australia, Submission to the National Preventative Health Taskforce, *BATA and the Australian Regulatory Landscape: Response to the Preventative Health Taskforce Technical Report 2 ‘Tobacco Control in Australia: Making Smoking History’*, Jan. 2009; British American Tobacco Australia, Submission to the Department of Health and Ageing Public Consultation on the Exposure Draft of the Tobacco Plain Packaging Bill 2011, *Submission on the Tobacco Plain Packaging Bill 2011*, 6 June 2011; Imperial Tobacco Australia Limited, Submission to the Department of Health and Ageing Public Consultation on the Exposure Draft of the Tobacco Plain Packaging Bill 2011, 6 June 2011, 27 [6]; Japan Tobacco International, Submission to the Department of Ageing Public Consultation on the Exposure Draft of the Tobacco Plain Packaging Bill 2011, *JTI’s Response to the Australian Government’s Consultation Paper on Tobacco Plain Packaging Bill 2011 Exposure Draft*, 2 June 2011, 2 [1.4]; Philip Morris Limited, Submission to the Department of Health and Ageing Public Consultation on the Exposure Draft of the Tobacco Plain Packaging Bill 2011, *Commoditising Tobacco Products through Plain Packaging Will Harm Public Health, Violate Treaties, and Does not Meet the Test of “Evidence-Based Policy”*, June 2011, 26; Press Release, British American Tobacco Australia, BATA Heads to High Court Over Plain Packs (Sept. 5, 2011) available at [http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/\\$FILE/medMD8LE28A.pdf](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/$FILE/medMD8LE28A.pdf); see also Philip Morris Ltd., Submission to the National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020*, 22 January 2009, 4 [1.2.1].

⁸ See *Investor-State Arbitration – Tobacco Plain Packaging*, AUSTL. GOV’T ATT’Y-GEN.’S DEP’T, <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging>

Australia and Hong Kong.⁹ There seems little doubt that Australia will not be the only country to introduce plain packaging. Both the New Zealand¹⁰ and United Kingdom governments¹¹ have launched public consultations on the introduction of plain packaging. A private member's bill has been introduced in India,¹² and the South African Health Minister has expressed support for plain packaging.¹³

Part II of this Article outlines the requirements of the Australian regulatory scheme, and its objects and rationale. Part III explains the High Court challenges brought against the scheme by the tobacco industry, and analyzes the High Court's six-to-one decision upholding the legislation. It seeks to draw out the major themes and narratives that underlie the decision of the majority, and to outline the reasoning of the dissident. Part IV offers some concluding observations.

II. THE REGULATORY SCHEME

A. THE REQUIREMENTS

Under the scheme constituted by the Tobacco Plain Packaging Act 2011 (Cth) (TPP Act) and the Tobacco Plain Packaging Regulations 2011, as amended by the Tobacco Plain Packaging Amendment Regulations 2012 (No. 1) (Cth), (TPP Regulations):

- the outer and inner surfaces of retail packaging must have a matte finish and be a drab dark brown color (known as Pantone 448C);¹⁴
- no trade marks or other marks may appear on retail packaging except brand, business, company or variant name, which must be in prescribed font, size and color (with the exception of the Quitline trade mark and certain other marks prescribed by the Regulations);¹⁵
- the outer and inner surfaces of retail packaging must not have any decorative ridges, embossing, bulges or other irregularities of shape or texture, or any other embellishments;¹⁶
- packs and cartons must be rigid and made of cardboard, and each outer surface must be rectangular when the pack or carton is closed;¹⁷
- all edges of packs and cartons must be rigid, straight and not beveled or otherwise shaped or embellished in any way;¹⁸

.aspx (last visited Mar. 2, 2013); see also Tania Voon, *Flexibilities in WTO Law to Support Tobacco Control Regulation*, 39 AM. J.L. & MED. 199 (2013).

⁹ *Investor-State Arbitration – Tobacco Plain Packaging*, *supra* note 8.

¹⁰ *Consultation Document: Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand*, MINISTRY OF HEALTH NZ (July 23, 2012), <http://www.health.govt.nz/publication/proposal-introduce-plain-packaging-tobacco-products-new-zealand>.

¹¹ *Consultation Launched on Standardised Tobacco Packaging*, DEP'T OF HEALTH (Apr. 16, 2012), <http://www.dh.gov.uk/health/2012/04/tobacco-packaging-consultation>.

¹² Abantika Ghosh, *BJD MP Moves Bill on Tobacco Packaging*, INDIAN EXPRESS (Nov. 21, 2012), <http://www.indianexpress.com/news/bjd-mp-moves-bill-on-tobacco-packaging/1033792>.

¹³ *South Africa: Gov't to Follow New Australia Tobacco Laws - Report*, ALLAFRICA (Aug. 16, 2012), <http://allafrica.com/stories/201208160174.html>.

¹⁴ TPP Act, *supra* note 1, at s 19; *Tobacco TPP Regulations*, *supra* note 1, at reg 2.2.1.

¹⁵ TPP Act, *supra* note 1, at ch 2 pt 2 div 1 s 20; TPP Regulations, *supra* note 1, at regs 2.3.1-9, 2.4.1-4 (other allowable marks include origin marks, calibration marks, measurement marks and trade descriptions, bar codes, fire risk statements, locally made product statements, name and address, and consumer contact telephone number).

¹⁶ TPP Act, *supra* note 1, at ch 2 pt 2 div 1 s 18(1).

¹⁷ *Id.* at ch 2 pt 2 div 1 s 18(2).

- cigarette packs must meet requirements for height (between 85 and 125mm), width (between 55 and 82mm) and depth (between 20 and 42mm);¹⁹
- no part of the retail packaging of tobacco products may make a noise or produce a scent that could be taken to constitute tobacco advertising and promotion;²⁰
- retail packaging of tobacco products must not include any features designed to change the packaging after sale such as heat-activated inks and inks that appear fluorescent in certain light;²¹
- retail packaging of tobacco products may not have inserts or onserts;²²
- no trade mark or other mark may appear anywhere on a tobacco product;²³ and
- the paper casing of cigarettes must be white or white with an imitation cork tip.²⁴

The TPP Act and TPP Regulations operate in conjunction with the Competition and Consumer (Tobacco) Information Standard 2011 (the “Standard”),²⁵ which also commenced operation on December 1, 2012. The Standard includes requirements for large health warnings comprising graphics, warning statements, and explanatory messages—required to cover at least seventy-five percent of the front surfaces of most tobacco product packaging, including cigarette packaging (an increase from thirty percent), and ninety percent of the back surface for cigarette packaging and seventy-five percent for most other tobacco products—and information messages on the health effects of chemicals in tobacco smoke on the side of cigarette packs and cartons and on most loose tobacco packs.²⁶

B. OBJECTS AND RATIONALE OF THE TPP ACT

The objects of the TPP Act are:

- (a) to improve public health by
 - (i) discouraging people from taking up smoking, or using tobacco products; and
 - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
 - (iv) reducing people’s exposure to smoke from tobacco products; and

¹⁸ *Id.*

¹⁹ *Id.* at ch 2 pt 2 div 1 s 18(3); TPP Regulations, *supra* note 1, at reg 2.1.1.

²⁰ TPP Act, *supra* note 1, at ch 2 pt 2 div 1 s 24.

²¹ *Id.* at ch 2 pt 2 div 1 s 25.

²² *Id.* at ch 2 pt 2 div 1 s 23 (other than those permitted in TPP Regulations, regs 2.6.1–.3).

²³ *Id.* at ch 2 pt 2 div 1 s 26 (other than alphanumeric codes that comply with TPP Regulations 3.1.2, including requirements that they not constitute tobacco advertising and promotion or provide access to tobacco advertising and promotion).

²⁴ TPP Regulations *supra* note 1, at reg 3.1.1.

²⁵ See Parliamentary Secretary to the Treasury, *Competition and Consumer (Tobacco) Information Standard 2011*, 22 December 2011.

²⁶ *Id.*

- (b) to give effect to certain obligations that Australia has as a party to the FCTC.²⁷

The Act states that:

- (2) It is the intention of the Parliament to contribute to achieving the objects . . . by regulating the retail packaging and appearance of tobacco products in order to:
- (a) reduce the appeal of tobacco products to consumers[;]
 - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products[;] and
 - (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.²⁸

The introduction of plain packaging was announced by the Australian Government in April 2010 as part of a “comprehensive suite of reforms to reduce smoking and its harmful effects,” which also included a twenty-five percent excise increase, further investment in anti-smoking social marketing campaigns, and legislation to restrict the advertising of tobacco products on the internet.²⁹ The Explanatory Memorandum to the Bill notes that tobacco smoking remains one of the leading causes of preventable death and disease among Australians, killing over 15,000 Australians every year and imposing annual social costs of around \$31.5 billion, and that approximately 3 million Australians smoke.³⁰ It affirms the Australian Government’s commitment to reaching performance benchmarks set under the 2012 Council of Australian Governments National Healthcare Agreement of reducing the national smoking rate to ten percent of the population by 2018 and halving the Aboriginal and Torres Strait Islander smoking rate.³¹

The plain packaging scheme is based on a number of findings from a large volume of social science research:³²

- “[m]essages and images promoting the use of tobacco products can normalize tobacco use, increase uptake of smoking by youth, and act as disincentives to quit”,³³
- “packaging of tobacco products is an important element of advertising and promotion, and its value has increased as traditional forms of advertising and promotion have become restricted in countries such as Australia”,³⁴
- the primary role of tobacco packaging is to “promote brand appeal, particularly to youth and young adults”,³⁵
- “plain packaging has been shown to be less appealing for youth who might be thinking of trying smoking”,³⁶

²⁷ TPP Act, *supra* note 1, at ch 1 pt 1 s 3(1).

²⁸ TPP Act, *supra* note 1, at ch 1 pt 1 s 3(2).

²⁹ Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 1 (Austl.).

³⁰ *Id.*

³¹ *Id.*

³² The Explanatory Memorandum, *supra* note 29, cites a number of relevant research publications.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

- “[m]any smokers are misled by pack design into thinking that certain cigarettes may be safer”;³⁷
- “[p]ack design can also distract from the prominence of graphic health warnings”;³⁸
- “the inclusion of brand names and other design embellishments on cigarettes are strongly associated with the level of appeal and perceived traits associated with branding, such as sophistication”;³⁹ and
- “innovative packaging shape, size, and opening . . . created strong associations with level of appeal and perceived traits associated with branding.”⁴⁰

The prescribed drab dark brown color was selected on the basis of market research which showed that it “was optimal in terms of decreasing the appeal and attractiveness of tobacco packaging, decreasing the potential of the pack to mislead consumers about the harms of tobacco use, and increasing the impact of graphic health warnings.”⁴¹

C. TWO SIGNIFICANT FEATURES OF THE ACT

Two other features of the Act bear mention, as they are essential to understanding the way in which the High Court challenges were argued and decided.

1. Inter-Relationships with the Trade Marks Act and the Designs Act

The TPP Act deals specifically with its inter-relationships with the Trade Marks Act 1995 (Cth) and the Designs Act 2003 (Cth).⁴² The TPP Act provides that its prohibitions on the use of trade marks cannot be grounds (under the Trade Marks Act) for refusing to register a trade mark, revoking the acceptance of an application for registration of the trade mark, registering the trade mark subject to conditions or limitations, or revoking the registration of the trade mark.⁴³ This section “preserves a trade mark owner’s ability to protect a trade mark, and to register and maintain registration of a trade mark.”⁴⁴ Similarly, the TPP Act provides that failure to make a product that embodies a registered design merely as a result of complying with the TPP Act does not provide a basis for an order (under the Designs Act) requiring the grant of a license in relation to the design or revoking the registration of the design.⁴⁵

2. Provision that in the Event that the Scheme Would Otherwise Be Constitutionally Invalid, Act Not to Apply to the Extent of That Unconstitutionality

The TPP Act provides that it “does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms.”⁴⁶ It states that:

³⁷ *Id.* at 1-2.

³⁸ *Id.* at 2.

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 12.

⁴¹ *Id.* at 12.

⁴² TPP Act, *supra* note 1, at ch 2 pt 2 div 1 ss 28-29.

⁴³ *Id.* at ch 2 pt 2 div 1 s 28(3).

⁴⁴ Explanatory Memorandum, *supra* note 29, at 15.

⁴⁵ TPP Act, *supra* note 1, at ch 2 pt 2 div 1 s 29.

⁴⁶ *Id.* at ch 1 pt 3 s 15(1).

In particular, if, apart from this section, this Act would result in such an acquisition of property because it would prevent the use of a trade mark or other sign on or in relation to the retail packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark or sign may be used on or in relation to the retail packaging of tobacco products, or on tobacco products, subject to any requirements that may be prescribed in the regulations for the purposes of this subsection.⁴⁷

The effect of this section is that, in the event that the operation of plain packaging were to be found unconstitutional, the Act would not apply to the extent of that unconstitutionality, and regulations made under the Act could prescribe restrictions on the use of trade marks or signs. This would allow an alternate scheme to be enacted through regulations, presumably in accordance with any guidance given by a court decision finding that plain packaging was unconstitutional, without the need to amend the Act. The Explanatory Memorandum notes that this section was included “out of an abundance of caution,” though the Government believed that the Act had been drafted “so as to avoid the potential for any acquisition of property other than on just terms” that would be contrary to the Constitution.⁴⁸

III. THE HIGH COURT CHALLENGES

A. THE CASES PRESENTED TO THE HIGH COURT FOR RESOLUTION

Four major tobacco companies (or groups of companies)—British American Tobacco (BAT), Imperial Tobacco, Japan Tobacco, and Philip Morris—challenged the TPP Act in the High Court of Australia, Australia’s highest court. Proceedings were instituted directly in the High Court, rather than a lower court, as the High Court has “original jurisdiction” in all matters “[i]n which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party,”⁴⁹ and “in any matter . . . arising under this Constitution, or involving its interpretation.”⁵⁰

The tobacco companies’ challenges were based on section 51(xxxi) of the Constitution, under which the Australian Parliament has power to make laws with respect to “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”⁵¹ Though expressed in terms of the conferral of power on the Parliament (the power to acquire property on just terms), the provision operates as a constraint on legislative power,⁵² and as a protection of property, both tangible and intangible. Legislation that violates the constraint is invalid, rather than enlivening a right to compensation.

Section 51(xxxi) was the only basis on which the tobacco companies could conceivably mount the semblance of a plausible constitutional challenge. Unlike

⁴⁷ *Id.* at ch 1 pt 3 s 15(2).

⁴⁸ Explanatory Memorandum, *supra* note 29, at 11.

⁴⁹ AUSTRALIAN CONSTITUTION S 75(iii).

⁵⁰ *Id.* at s 76(i); *Judiciary Act 1903* (Cth) s 30 (Austl.).

⁵¹ AUSTRALIAN CONSTITUTION S 51(xxxi).

⁵² *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43, ¶ 167 (Austl.) (Justices Hayne and Bell, describe section 51(xxxi) as a “legislative power with respect to the acquisition of property which is abstracted from other heads of legislative power”).

other jurisdictions,⁵³ the Australian Constitution provides no protection for expression or speech (let alone commercial expression or speech), with the exception of an implied right to freedom of political communication (communication about governmental or political matters), such communication being an essential aspect of the operation of Australia's system of representative government.⁵⁴ The State of Victoria and the Australian Capital Territory have both enacted statutory charters of rights which provide protection to freedom of expression (which may be restricted in order to protect other public interests).⁵⁵ Both specify that only "individuals" (i.e., natural persons) have "human rights."⁵⁶

Once the constitutional challenges had been filed, a process of determining the appropriate form in which they should be heard commenced.⁵⁷ Ultimately, the challenges proceeded by way of questions reserved for the Court on the basis of facts agreed between the Commonwealth and BAT, in which Imperial and Philip Morris participated as interveners with exposure as to costs,⁵⁸ and a demurrer (a procedure under which one party argues that even if everything alleged by the other were true, the case ought still to be determined in its favor) by Japan Tobacco.⁵⁹ The cases were heard together and a single decision (constituting of six separate judgments) was issued.

In the BAT (with Imperial Tobacco and Philip Morris intervening) matter, five questions were reserved for the consideration of the Court, to be determined on the basis of a set of "agreed facts." The primary questions were:

⁵³ See U.S. CONST. amend. I; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.); S. AFR. CONST., 1996 § 16; Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

⁵⁴ *Coleman v Power* (2004) 220 CLR 1 ¶¶ 208-209 (Austl.); *Lange v Austl. Broad. Corp.* (1997) 18 CLR 520, 572 (Austl.).

⁵⁵ *Charter of Human Rights and Responsibilities* (2006) (Vic) s 15 (Austl.); *Human Rights Act 2004* (ACT) s 16 (Austl.).

⁵⁶ *Charter of Human Rights and Responsibilities* (2006) (Vic) s 6 (Austl.); *Human Rights Act 2004* (ACT) s 6 (Austl.).

⁵⁷ This involved discussion between the parties under the guidance of a single judge of the Court, Justice Gummow, which included four Directions Hearings. See Transcript of Proceedings, *Van Nelle Tabak Nederland BV & Anor v Commonwealth* (High Court of Australia, Gummow J, 22 December 2011); Transcript of Proceedings, *Philip Morris Ltd. v Commonwealth* (High Court of Australia, Gummow J, 24 January 2012); Transcript of Proceedings, *Philip Morris Ltd. v Commonwealth* (High Court of Australia, Gummow J, 23 February 2012); Transcript of Proceedings, *Philip Morris Ltd. v Commonwealth* (High Court of Australia, Gummow J, 27 February 2012).

⁵⁸ Transcript of Proceedings, 27 February 2012, *supra* note, 57. The Australian Government and BAT agreed to questions reserved and agreed facts which were presented to Justice Gummow at the February 27 Directors Hearing. No agreement was reached with either Imperial Tobacco or Philip Morris.

⁵⁹ *Id.* The Attorneys-General of Queensland, the Australian Capital Territory and the Northern Territory intervened in both matters and made submissions supporting the validity of the scheme. See Attorney-General (Qld), Submissions on Behalf of the Attorney-General for the State of Queensland (Intervening), Submission in *JT Int'l SA v Commonwealth*, No. S409/2011, 12 April 2012; Attorney-General (ACT), Submissions for the Attorney-General of the Australian Capital Territory Intervener, Submission in *JT Int'l SA v Commonwealth*, No. S409/2011, 5 April 2011; Attorney-General (NT), Submissions of the Attorney-General for the Northern Territory (Intervening), Submission in *JT Int'l SA v Commonwealth*, No. S409/2011, 5 April 2011. Cancer Council Australia (CCA) sought leave to make submissions as *amicus curiae*. See Cancer Council Australia, 'Submissions of Cancer Council Australia', Submission in *JT Int'l SA v Commonwealth*, No S389/2011, 26 March 2012. Leave was not granted, the Court having "take[n] account of the fact" that "the matters [CCA sought] to canvass are adequately canvassed in the Commonwealth submissions." Transcript of Proceedings, *JT Int'l SA v Commonwealth* (High Court of Australia, French CJ, 17 April 2012).

- (1) Apart from [section] 15 of the TPP Act, would all or some of the provisions of the TPP Act result in an acquisition of any, and if so what, property of the plaintiffs or any of them otherwise than on just terms, of a kind to which [section] 51(xxxi) of the *Constitution* applies?
- (2) Does the resolution of question (1) require the judicial determination of any and if so what disputed facts following a trial?
- (3) If the answer to question (1) is “yes” are all or some, and if so which, provisions of the TPP Act in whole or in part beyond the legislative competence of the Parliament by reason of [section] 51(xxxi) of the *Constitution*?⁶⁰

The fourth question concerned a challenge to the constitutional validity of section 15 on the basis that it was said to infringe the constitutional separation of powers by “requir[ing] the court to perform a feat which is in essence ‘legislative and not judicial’”⁶¹—an issue which did not arise given the Court’s answers to the first three questions. The fifth was a standard question concerning the costs of the proceedings.⁶²

The agreed facts concerned:

- (a) the existence and operation of the three BAT companies that brought the challenge; ownership of registered trade marks; ownership of a registered patent; ownership of a registered design; ownership of copyright; many members of the public having been exposed to and become familiar with BAT’s branded cigarettes; BAT having established goodwill and reputation in connection with its branded cigarettes; Commonwealth, State, and Territory tobacco control legislation; the existence of the WHO and the fact of Australia’s WHO membership; the existence of the FCTC, and the fact of Australia being a Party; the adoption by the Conference of the Parties to the FCTC of guidelines on Articles 11 and 13; the existence and operation of Quitline telephone services; the fact of the Quitline logo consisting of one or more registered trade marks, the registered owner of which is the Anti-Cancer Council of Victoria;⁶³
- (b) the packaging and appearance of cigarettes having, by the time of the enactment of the Act, become the principal means used and available to be used by BAT in Australia for the purposes of distinguishing its cigarettes in the course of trade from other brands of cigarettes; and promoting its cigarettes in compliance with the said legislation⁶⁴—by

⁶⁰ *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43, ¶ 27 (Austl.).

⁶¹ See *British American Tobacco Australasia Ltd*, Submissions of the Plaintiffs, Submission in *JT Int’l SA v Commonwealth*, No. S389/2011, 26 March 2012, ¶ 71. In its writ of summons, BAT argued that section 15 “is, in substance and effect, no different from a law that provides that ‘This law only applies in the circumstances in which it is valid,’ which is not a valid exercise of legislative power.” *British American Tobacco Australasia Ltd.*, Writ of Summons, Submission in *British Tobacco Australasia Ltd. v Commonwealth*, No. S389/2011, 1 Dec. 2011, ¶ 11(b) (Austl.).

⁶² *Tobacco Plain Packaging Case*, ¶ 27.

⁶³ Australian Gov’t Solicitor, Submission of Defendants, Submission in *British American Tobacco Australasia Ltd. v Commonwealth*, No. S389/2011, 27 Feb. 2012, at 1-8. The Anti-Cancer Council of Victoria operates as “Cancer Council Victoria.” *Beyond 2000*, CANCER COUNCIL VICTORIA, <http://www.cancervic.org.au/about/70-years/history-2000s> (last visited Mar. 27, 2013).

⁶⁴ It is significant that BAT agreed that packaging and appearance perform this promotional role, i.e., that their functions go beyond distinguishing between tobacco products and providing

reason of Commonwealth, State, and Territory regulation of the marketing and advertising of tobacco products;⁶⁵

- (c) the fact that smoking tobacco is a cause of serious and fatal diseases, such as lung cancer, respiratory disease and heart disease;⁶⁶ and
- (d) the fact that risk of such diseases reduces in groups of people who quit smoking, and the reduction of risk increases from quitting earlier.⁶⁷

B. THE SUBSTANTIVE RESOLUTION OF THE CHALLENGES

The tobacco companies argued that they had a range of intellectual property and related rights (trade marks, get-up, copyright, design, patents, packaging rights, licensing rights, and goodwill), which were acquired by the TPP Act without just terms being provided to them.⁶⁸ Accordingly, they argued the Act should either be read down in accordance with section 15 so as not to apply to their property, or be held invalid.⁶⁹ There was no dispute that the tobacco companies did have property (though there was dispute about the “nature and amplitude”⁷⁰ of those rights, and therefore the nature and extent of the impact of the scheme upon those rights).

The case was decided in the Australian Government’s favor on the basis of the majority’s affirmation (six-to-one)⁷¹ of what Justices Hayne and Bell described as the “bedrock principle” that “[t]here can be no acquisition of property without ‘the Commonwealth or another acquir[ing] an interest in property, however slight or insubstantial it may be.’”⁷² “[T]he relevant constitutional question is whether there has been an *acquisition* of property, not whether there has been a *taking*.”⁷³ The tobacco companies were unable to show any such acquisition.⁷⁴ Arguments by the

“information” to consumers. See Mark Davison, *Plain Packaging and the TRIPS Agreement: A Response to Professor Gervais*, AUSTL. INTELL. PROP. J. (forthcoming 2013).

⁶⁵ Australian Gov’t Solicitor, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ *Id.* It should be noted that the Commonwealth sought to put a large volume of material before the Court on the basis of which it sought to argue that the Court should make a number of findings of “constitutional fact” about the grave harm caused by smoking tobacco products, the promotion of tobacco products by retail packaging, and the impact of health warnings. See Commonwealth of Australia, Submissions of the Commonwealth of Australia, Submission in *Tobacco Plain Packaging Case*, No. S389/2011, 5 April 2012, ¶¶ 13-42 [hereinafter *Commonwealth Submission*]. These facts were said not to “form issues between parties to be tried like [other] questions [of fact],” but “simply involve information which the Court should have in order to judge properly of the validity of this or that statute.” *Id.* ¶ 13. The tobacco companies opposed the introduction and consideration of this material, and the Court declined to accept it. It proved unnecessary for the resolution of the challenges.

⁶⁸ *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43, ¶ 25 (Austl.).

⁶⁹ *Id.* ¶ 26.

⁷⁰ *Commonwealth Submission, supra* note 67, ¶ 5.

⁷¹ *Tobacco Plain Packaging Case*, ¶ 27.

⁷² *Id.* at ¶ 169; see also *id.* ¶ 42 (French, CJ); *id.* ¶¶ 131-132, 149-154 (Gummow, J); *id.* ¶¶ 278-79; *id.* ¶¶ 302-305 (Crennan, J); *id.* ¶¶ 364-65 (Kiefel, J).

⁷³ *Id.* ¶ 164; see also *id.* ¶ 42 (French, CJ). Justice Gummow commented on the differences between section 51(xxxi) and the “taking” clause in the U.S. Constitution. *Id.* ¶¶ 109-118. His Honor wrote that the effect of U.S. jurisprudence is to accept that the “taking” clause may be engaged without what the decisions of the High Court would classify as an “acquisition.” *Id.* ¶ 115. He noted that “the greater scope this gives to the Fifth Amendment has been tempered by a doctrine permitting ‘regulation’ which does not amount to a ‘taking.’” See also *id.* ¶ 355 (Kiefel, J).

⁷⁴ Chief Justice French held that the imposition of controls by the TPP Act “may be said to constitute a taking in the sense that the plaintiffs’ enjoyment of their intellectual property rights and related rights is restricted,” but that there was no acquisition. *Id.* ¶ 44. Justice Gummow held that there was “sufficient impairment, at least of the statutory intellectual property of the plaintiffs, to amount to a ‘taking,’ but there is no acquisition of any property.” *Id.* ¶ 101; see also *id.* ¶¶ 138-141.

tobacco companies that there need be no acquisition of “property” or of a benefit or advantage of a proprietary nature⁷⁵ “sought to depart from [the] bedrock principle.”⁷⁶ Accordingly, the three questions identified above were answered “No,” “No” and “Does not arise,” respectively, and the demurrer was overruled.⁷⁷ Orders for costs were made against the tobacco companies.⁷⁸

- The tobacco companies advanced a range of “creative” arguments in attempting both to expand the Australian constitutional notion of “acquisition,” and to articulate relevant “benefits” and “advantages” conferred on the Commonwealth and/or others by the TPP Act. Purported benefits or advantages included: the Commonwealth being able to impose its own design, labeling, and get-up on packaging and cigarettes;⁷⁹
- the increased prominence of advertising of Quitline services by reason of the prohibition on use of the plaintiffs’ property, with benefit conferred on both the Commonwealth and Quitline service providers;⁸⁰
- the Commonwealth obtaining the right to require the printing of its and others’ messages without any obligation to pay for the design, printing or publicity benefit thereby obtained, conferring a direct financial benefit on Quitline service providers and others;⁸¹
- the pursuit of the legislative purposes expressed in the objects of the Act;⁸²
- the intended reduction in expenditure by the Commonwealth on illnesses alleged to be “tobacco related”;⁸³
- the improved effectiveness of health warnings through the creation of a “blank background,” without trade marks and get-up that are said to draw attention away from the warnings;⁸⁴

Justices Hayne and Bell wrote that the proposition that the TPP Act would take the tobacco companies’ property “seems hard to deny” “[o]n the face of it,” but that its accuracy “need not be examined because the relevant constitutional question is whether there has been an *acquisition* of property, not whether there has been a *taking*.” *Id.* ¶ 164. Justice Crennan appeared to conflate the concepts of taking and acquisition. Her Honor wrote that restricting or extinguishing the tobacco companies’ rights to use their property for advertising or promotional purposes “with a possible consequential diminution in the value of property or the associated businesses, did not constitute a taking amounting to an indirect acquisition.” *Id.* ¶ 296.

⁷⁵ *Id.* ¶¶ 169-171. The companies’ arguments drew on a dissenting view expressed by Justice Deane in *Commonwealth v Tasmania*, “that the absence of a material benefit of a proprietary nature did not conclude whether there had been an acquisition of property in that case.” *Id.* ¶ 172; see *Commonwealth v Tasmania* (“*Tasmanian Dam Case*”) [1983] HCA 21 (Austl.). The arguments also drew on the observation by Justices Deane and Gaudron in *Mutual Pools & Staff Pty Ltd v Commonwealth* that a person must obtain “at least some identifiable benefit or advantage *relating to the ownership or use of property*.” *Id.* ¶¶ 173 (citing *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9 (Austl.)) (emphasis added).

⁷⁶ *Tobacco Plain Packaging Case*, ¶ 170.

⁷⁷ *Id.* at 1-2.

⁷⁸ *Id.* at 1.

⁷⁹ British American Tobacco, Submissions of the Plaintiffs, Submission in *British American Tobacco Australasia Ltd. v Commonwealth*, No. S389/2011, 26 March 2012, ¶ 46(b), available at http://www.hcourt.gov.au/assets/cases/s389-2012/BAT_Plf.pdf.

⁸⁰ *Id.* ¶ 46(d).

⁸¹ *Id.* ¶ 46(e).

⁸² JT Int’l SA, Plaintiff’s Submissions, Submission in *JT Int’l SA v Commonwealth*, No. S409/2011, 26 March 2012, ¶ 34, available at http://www.hcourt.gov.au/assets/cases/s409-2011/JT_Plf.pdf.

⁸³ *Id.* ¶ 35.

- the furthering of the Commonwealth’s foreign policy objectives through giving effect to obligations under the FCTC;⁸⁵
- the obtaining of comprehensive control of the exploitation of packaging, cigarettes, registered trade marks and goodwill;⁸⁶
- the obtaining of the right to control access to the benefits of use of registered trade marks and get-up;⁸⁷ and
- the obtaining of exclusive possession of the surface areas of packs and cigarettes.⁸⁸

Not surprisingly, in light of the “bedrock principle” affirmed by the majority, none of these arguments succeeded. On analysis, a number of these arguments strike as somewhere on the spectrum between tortuous and absurd, particularly those that assert that it is the very pursuit or achievement of the objects of the legislation that should entitle the tobacco companies to “just terms” and thus render the legislation invalid.

This Article does not examine the Court’s disposition of each of these arguments in detail. Rather, it seeks to identify six of the major themes and narratives that can be found running through the reasoning of the majority. It is these themes and narratives that are likely to feature in other legal challenges to plain packaging (or to large health warnings)—both domestic and international—though to be argued and resolved in the context of different laws, doctrines, and legal principles. This Article also outlines the major elements of the judgment of the dissentient, Justice Heydon.

1. The Relevant Rights of the Tobacco Companies Were “Negative Rights”

The rights at issue in the challenges were essentially negative in character, i.e., rights to exclude others, rather than positive rights to use. For example, Justice Crennan wrote that the “exclusive right” to use a trade mark granted to a registered owner by the Trade Marks Act “is a negative right to exclude others from using it.”⁸⁹ Similarly, Justice Kiefel observed that “the right subsisting in the owner of a trade mark is a negative and not a positive right. It is to be understood as a right to exclude others from using the mark.”⁹⁰

2. The Tobacco Companies May Have Lost Something of Commercial Value, but Commercial Value Is Not the Object of Constitutional Protection

Justice Gummow noted that the rights of registered trade mark owners to assign their marks with or without goodwill, to license others to use them, and to bring proceedings against other parties for infringement, and the generation of goodwill flowing from the use of registered trade marks “may be of great commercial

⁸⁴ *Id.* ¶ 36.

⁸⁵ *Id.* ¶ 37.

⁸⁶ Philip Morris Ltd., Philip Morris Ltd.’s Submissions (Intervening), Submission in *British American Tobacco Australasia Ltd. v Commonwealth*, No. S389/2011, 26 March 2012, ¶ 5, available at http://www.hcourt.gov.au/assets/cases/s389-2012/BAT_Phillip.pdf. Philip Morris went so far as to argue that the Act “is an Act for the acquisition of control of the [tobacco companies’] Property: that is its purpose.” Philip Morris Ltd, Philip Morris Ltd’s Reply Submissions, Submission in *British American Tobacco Australasia Ltd. v Commonwealth*, No S389/2011, 11 April 2011, ¶ 2.

⁸⁷ Philip Morris Ltd., Philip Morris Ltd’s Submissions (Intervening), *supra* note 86, ¶ 32.

⁸⁸ *Id.*

⁸⁹ *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43, ¶ 248 (Austl.).

⁹⁰ *Id.* ¶ 348 (Kiefel, J); *see also id.* ¶¶ 36, 40, 43 (French, CJ); ¶105 (Gummow, J).

value.”⁹¹ The rights in respect of registered trade marks “are in substance, if not in form, denuded of their value and thus of their utility by the imposition of the regime.”⁹² Justice Crennan noted that distinctive marks may have a capacity to advertise and promote sales of products⁹³ and that this function of a trade mark “may be of great commercial value;”⁹⁴ that the Act may reduce the volume of the tobacco companies’ sale of products, the value of associated goodwill in trade marks and associated businesses, and the value of rights to assign or license such marks;⁹⁵ and that the Act’s operation may be “severe from a commercial viewpoint.”⁹⁶ Justice Kiefel wrote that it may be accepted that some or much of the value of the tobacco companies’ intellectual property is lost,⁹⁷ trade marks that cannot be lawfully used in connection with the goods to which they relate are unlikely to be readily assignable, and the restrictions on use of the marks introduced by the Act were likely to have effects upon the custom drawn to the tobacco companies’ businesses and upon their profits.⁹⁸ Justice Kiefel also noted that if the central statutory object of the TPP Act — to dissuade persons from using tobacco products—were to be effective, the tobacco companies’ businesses may be harmed.⁹⁹

But none of this was the object of constitutional protection. Justice Gummow cited the observation of Justice Dixon in *British Medical Association v Commonwealth* that section 51(xxxi) does not give protection to “the general commercial and economic position occupied by traders.”¹⁰⁰ Justice Crennan wrote that section 51(xxxi) “is not directed to preserving the value of a commercial business or the value of an item of property.”¹⁰¹ Similarly, Justice Kiefel observed that section 51(xxxi) is “directed to proprietary interests and not to the commercial position of traders.”¹⁰²

3. The Regulatory Scheme Is No Different in Kind from Other Legislation Requiring Health or Safety Warnings

Justices Hayne and Bell wrote that the requirements of the Act “are no different in kind from any legislation that requires labels that warn against the use or misuse of a product, or tell the reader who to call or what to do if there has been a dangerous use of a product.”¹⁰³ The packaging “will convey messages to those who see it warning against using, or continuing to use, the product contained within the packaging.”¹⁰⁴ This is not akin to the Commonwealth “us[ing] the packaging as advertising space.”¹⁰⁵ The Commonwealth makes no public announcement

⁹¹ *Id.* ¶ 81.

⁹² *Id.* ¶ 138.

⁹³ Indeed, counsel for Japan Tobacco described a tobacco pack as “our billboard,” comparing it to a “billboard as you drive from the airport.” Transcript of Proceedings, 17 April 2012, *supra* note 59.

⁹⁴ *Tobacco Plain Packaging Case*, ¶ 286.

⁹⁵ *Id.* ¶ 295.

⁹⁶ *Id.* ¶ 306.

⁹⁷ *Id.* ¶ 356.

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 372.

¹⁰⁰ *Id.* ¶ 47 (citing *British Medical Association v Commonwealth* (1949) 78 CLR 201, 270 (Austl.)); see also *id.* ¶ 167 (Hayne & Bell, JJ).

¹⁰¹ *Id.* ¶ 295.

¹⁰² *Id.* ¶ 357.

¹⁰³ *Id.* ¶ 181.

¹⁰⁴ *Id.* ¶ 188.

¹⁰⁵ *Id.*

promoting or advertising anything.¹⁰⁶ Justice Crennan observed that “[l]egislative provisions requiring manufacturers or retailers to place on product packaging warnings to consumers of the dangers of incorrectly using or positively misusing a product are commonplace.”¹⁰⁷ Justice Kiefel wrote that “[m]any kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm” and to protect and promote health, including labeling requirements for medicines, poisonous substances, and certain foods.¹⁰⁸

The tobacco companies’ difficulties in showing that the plain packaging scheme effected an acquisition of their property, in some way differing from “ordinary” non-acquisitive regulation of product packaging, were apparent during the hearing. Counsel for Imperial Tobacco sought to distinguish between the skull and crossbones, or the “Keep away from children” warning, on a pack of Ratsak (a brand of rat poison)¹⁰⁹ and the plain packaging scheme on the basis that the former “is not intended to be aversive to sale but to be a guidance as to use and care.”¹¹⁰ The equivalent of the former on tobacco products, counsel argued, might be “Don’t inhale” or “Don’t have more than two a day” or “Don’t give it to your children.”¹¹¹ In contrast, the message at the heart of the plain packaging scheme is “Here are the reasons why you should not buy this at all.”¹¹² Counsel referred to the “crossing of the line”¹¹³ and to the “zone of the difference between a message which fairly accompanies goods in order to enable them to be used with appropriate care and a message which is designed to destroy the commerce which in fact remains lawful.”¹¹⁴

The obvious fallacy in this line of argument was pointed out by Justice Bell, who responded to counsel:

With the Ratsak and the chainsaw, there are uses of the product which do not involve the risk, hence the nature of the warning respecting the use of those. It is asserted here that there is no use that does not carry the risk and . . . that is not in issue. That is just on your argument of degree . . . It just seems that one is not necessarily comparing apples with apples in drawing a distinction between the warning on the Ratsak pack and having regard to the objects of this legislation and the nature of the product.¹¹⁵

Counsel for Imperial Tobacco also sought to portray the mandated health warnings as a form of government “advertising.” He argued that “there is nothing wrong with advertising as a method of government getting their messages over, whether it be to eat more fresh food, to be involved in physical exercise or any other health message,”¹¹⁶ but when private property is acquired for the purpose of that

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 301.

¹⁰⁸ *Id.* ¶ 316.

¹⁰⁹ The comparison with Ratsak was made on the first morning of the hearing by Justice Crennan and became somewhat of a running theme through the hearing. See Transcript of Proceedings, 17 April 2012, *supra* note 59, at 61.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 56.

¹¹⁴ *Id.* at 61.

¹¹⁵ *Id.* at 63.

¹¹⁶ *Id.* at 62.

advertising, there should be just terms compensation.¹¹⁷ “The payment for advertising, for the use of somebody’s space, be it on the back of a taxi, on a billboard, wherever, is, of course, de rigueur by government and by all sorts of traders.”¹¹⁸ The “payment of people to use their space for the publication of your message is a very large industry.”¹¹⁹ Counsel sought to compare the requirements to a law requiring every bottle of Coca Cola to carry a message, “Pay your taxes on time,”¹²⁰ and to advertising on the back of a pack of cornflakes “that there is a movie coming up that will appeal to the same kind of children who eat that kind of confection.”¹²¹

4. The Requirements of the Scheme Are Conditions on the Sale of Tobacco Products—The Commonwealth Does Not Use Tobacco Packaging or Products

Justices Hayne and Bell wrote:

[N]o-one other than the tobacco company that is making or selling the product obtains any use of or control over the packaging. The tobacco companies use the packaging to sell the product; they own the packaging; they decide what the packaging will look like. Of course their choice about appearance is determined by the need to obey the law. But no-one other than the tobacco company makes the decision to sell and to sell in accordance with law.¹²²

Similarly, Justice Crennan referred to the “*decision of the plaintiffs* to continue to sell tobacco products in retail packaging which complies with more stringent product and information standards, directed to providing more prominent information about tobacco goods.”¹²³ Chief Justice French described the TPP Act as “part of a legislative scheme which places controls on the way in which tobacco products can be marketed.”¹²⁴

The point was also made clearly in a question put to counsel for Imperial Tobacco by Justice Hayne during the hearing:

[W]ho is using the box? Not the Commonwealth, the vendor of the box is using it. The vendor of the box is using it and using it in that fashion because that is what the law requires of the vendor of a box containing this particular product. How is the Commonwealth using it?¹²⁵

5. The Scheme Allows the Continued Use of Brand Names (Including Trade Marked Brand Names)—The Ability to Use Such Names Is Valuable

Justice Crennan noted that, after implementation of the plain packaging scheme, “the visual, verbal, aural and allusive distinctiveness, and any inherent or acquired distinctiveness, of a brand name can continue to affect retail consumers.”¹²⁶ She

¹¹⁷ *Id.* at 57.

¹¹⁸ *Id.* at 62.

¹¹⁹ *Id.* at 63.

¹²⁰ *Id.*

¹²¹ Transcript of Proceedings, *JT Int’l SA v Commonwealth* (High Court of Australia, 18 April 2012) 5.

¹²² *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43, ¶ 182 (Austl.).

¹²³ *Id.* ¶ 301 (emphasis added).

¹²⁴ *Id.* ¶ 44.

¹²⁵ Transcript of Proceedings, *supra* note 121, at 99.

¹²⁶ *Tobacco Plain Packaging Case*, ¶ 290.

noted that it had not been suggested by the tobacco companies that their products were ordered by retail consumers without reference to their brand names or that relevant goodwill was not significantly attached to brand names,¹²⁷ and that “an exclusive right to generate a volume of sales of goods by reference to a distinctive brand name is a valuable right.”¹²⁸ The tobacco companies’ characterization of the effect of the TPP Act on their rights was thus “overstated.”¹²⁹

6. Intellectual Property Rights Are Created to Serve Public Purposes, But They Are Not Sacrosanct and They Do Not Operate Above or in Isolation from Other Laws Created to Serve Other Public Purposes

Chief Justice French observed that the various statutory rights relied upon by the tobacco companies “are created by statute in order to serve public purposes.”¹³⁰ He described the TPP Act as “reflect[ing] a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs.”¹³¹ Justice Gummow noted that trade mark registration schemes (including that embodied in the Trade Marks Act) “ordinarily do not confer a liberty to use the trade mark, free from what may be restraints found in other statutes or in the general law.”¹³²

C. THE DISSENTING JUDGMENT

In contrast to the other six members of the Court, Justice Heydon was of the view that the authorities supported the proposition that it is not necessary for the Commonwealth or another person to acquire an interest in property for section 51(xxxi) to apply.¹³³ “It is only necessary to show that the Commonwealth or some other person has obtained some identifiable benefit or advantage *relating to* the ownership or use of property.”¹³⁴

Justice Heydon wrote that the TPP Act deprived the tobacco companies of everything that made the property at issue worth having.¹³⁵ The Act “deprived them of control of their property and of the benefits of control” and “gave that control and the benefits of that control to the Commonwealth.”¹³⁶ “The Commonwealth’s new rights of control are closely connected with the proprietors’ now-defunct property rights.”¹³⁷ The Commonwealth achieved its legislative purposes “by nullifying many of the proprietary rights of the proprietors and passing to the Commonwealth the corresponding benefits and advantages relating to the ownership or use of property—particularly control over the appearance of the cigarettes and their packaging.”¹³⁸

¹²⁷ *Id.* ¶ 291.

¹²⁸ *Id.* ¶ 293.

¹²⁹ *Id.* ¶ 284.

¹³⁰ *Id.* ¶ 35.

¹³¹ *Id.* ¶ 43.

¹³² *Id.* ¶ 78; *see also id.* ¶¶ 88, 107, 137 (Gummow, J).

¹³³ *Id.* ¶ 200.

¹³⁴ *Id.* (emphasis added).

¹³⁵ *Id.* ¶ 216.

¹³⁶ *Id.* ¶ 212.

¹³⁷ *Id.* ¶ 218.

¹³⁸ *Id.* ¶ 227.

Justice Heydon wrote that the structure of the legislation is “very strongly motivated by an altruistic desire to improve . . . the health of Australian residents,” but that improving public health is not its “fundamental concern.”¹³⁹ Rather, “[i]ts fundamental concern is to avoid paying money to those who will be damaged if that desire to improve (local) public health is gratified in the manner which the legislation envisages.”¹⁴⁰ He concluded his judgment thus:

After a “great” constitutional case, the tumult and the shouting dies. The captains and the kings depart. Or at least the captains do; the Queen in Parliament remains forever. Solicitors-General go. New Solicitors-General come. This world is transitory. But some things never change. The flame of the Commonwealth’s hatred for that beneficial constitutional guarantee, [section] 51(xxxi), may flicker, but it will not die. That is why it is eternally important to ensure that that flame does not start a destructive blaze.¹⁴¹

D. NOT A JUDGMENT ON THE MERITS OF PLAIN PACKAGING

It will have been observed from the above analysis that resolution of the constitutional challenges did not involve consideration of the merits of plain packaging as a policy intervention or of the evidence supporting it, nor any balancing of competing rights and interests such as the proprietary rights of tobacco companies against the interests of public health or of other rights such as rights to health or to life.

The Commonwealth made two major arguments in the alternative to its primary submission. First, that any acquisition of property from tobacco companies would not constitute an acquisition of property of a kind requiring the provision of “just terms” under section 51(xxxi). The restrictions imposed by the TPP Act “constitute regulation of trading activity in a manner appropriate and adapted to reducing harm to members of the public and public health, and any acquisition of property by the Commonwealth or the providers of Quitline services would be incidental to or consequential upon those restrictions.”¹⁴² Requiring “the provision of compensation to those who would gain a commercial benefit from continuing to engage in the harmful trading activity that would be permitted to continue but for the TPP Act would be profoundly incongruous,”¹⁴³ taking into account, in particular:

the gravity of the harm to members of the public and public health caused by tobacco products; the promotional purpose and effect of retail packaging; the effect of health warnings in informing of that harm and discouraging smoking; and the strength of the evidentiary foundation for the statutory judgment that retail packaging will reduce the appeal of tobacco products, increase the effectiveness of health warnings, reduce the potential for retail packaging to mislead and thereby serve the public interest by contributing to the reduction of that harm.¹⁴⁴

¹³⁹ *Id.* ¶ 193.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ¶ 241.

¹⁴² *Commonwealth Submission, supra* note 67, ¶ 7.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

The second major argument in the alternative was that any acquisition would not be on terms that are “unjust.” Specifically,

The TPP Act restricts the use of property no more than is appropriate and adapted to reduce harm to members of the public and public health. The TPP Act . . . allows . . . companies to continue to use their brand names and variant names on retail packaging to indicate trade origins of their products and not to lose trade marks and registered designs through non-use. Measured against the constitutional standard of what is fair and just between tobacco companies as owners of property and the Australian nation representing the Australian community, and having regard to the identified incongruity, the rehabilitation provided to tobacco companies by those terms is just.¹⁴⁵

The disposition of the challenges on the ground that no acquisition of property had been effected, because no benefit or advantage of a proprietary nature had been acquired by the Commonwealth or any other person, obviated the need for the Court to engage with these arguments, or to consider the evidence in support of plain packaging. At least some consideration of evidence would likely have been necessary had resolution of the challenges turned on whether the scheme was “appropriate and adapted to reducing harm to members of the public and public health.”¹⁴⁶ This would likely have entailed remitting the challenges to the Federal Court. As noted, one of the questions before the High Court was whether resolution of the matter would “require the judicial determination of any and if so what disputed facts following a trial.”¹⁴⁷

E. THE SIGNIFICANCE OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

It will also have been noted that the FCTC did not feature in the determination of the challenges. This is not surprising given that the decision turned on the affirmation and application of the “bedrock principle.” The resolution of this central question did not require consideration of the FCTC, or the significance of Australia’s obligations under it. Yet its significance to the development and implementation of the plain packaging scheme should be recognized.

As noted, one of the objects of the TPP Act is “to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.”¹⁴⁸ The Act is “supported by the external affairs power in § 51(xxix) of the Commonwealth Constitution, as it gives effect to obligations under the WHO FCTC.”¹⁴⁹ The Act gives the expression “tobacco advertising and promotion . . . the meaning given by the Convention on Tobacco Control.”¹⁵⁰

The Explanatory Memorandum notes the FCTC’s importance:

¹⁴⁵ *Id.* ¶ 8.

¹⁴⁶ *Id.*

¹⁴⁷ *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43, 2 (Austl.).

¹⁴⁸ *Tobacco Plain Packaging Act 2011* (Cth) ch 1 s 3 (Austl.).

¹⁴⁹ Explanatory Memorandum, *supra* note 29, at 10. Section 14 of the Act provides for the operation of the Act on alternative or supplementary heads of legislative power (corporations (§ 51(xx)); international and interstate trade and commerce (§ 51(i)); and Territories (§ 122)) “[i]n case there is any doubt that all of the provisions are fully supported by the external affairs power.” *Id.* at 11.

¹⁵⁰ TPP Act, *supra* note 1, at ch 1 s 4.

International framework

The introduction of plain packaging for tobacco products is one of the means by which the Australia Government will give effect to Australia's obligations under the World Health Organization *Framework Convention on Tobacco Control* [2005] ATS 7 (WHO FCTC).

Article 5 of the WHO FCTC requires each Party to develop and implement comprehensive national tobacco control strategies, plans and programs, and to take effective legislative and other measures for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.

Article 11 of the WHO FCTC requires Parties to implement effective measures to ensure that tobacco packaging does not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards, or emissions.

Article 13 of the WHO FCTC requires Parties to implement comprehensive bans on tobacco advertising, promotion and sponsorship.

Guidelines adopted by the Conference of the Parties to the FCTC for Article 11 and Article 13 recommend that Parties consider introducing plain packaging.¹⁵¹

In its explanation of the provisions regulating the appearance of cigarettes, the Explanatory Memorandum notes that the guidelines on Article 13 “identify product design features as a form of tobacco advertising and promotion that should be regulated.”¹⁵²

The identified means by which regulation of the retail packaging and appearance of tobacco products are to contribute to achieving the Act's stated objects¹⁵³ correspond with the Article 11 and 13 guidelines. The Article 11 guidelines note that plain packaging “may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.”¹⁵⁴ The Article 13 guidelines state:

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes, or other tobacco products should carry no advertising or promotion, including design features that make products attractive.¹⁵⁵

¹⁵¹ Explanatory Memorandum, *supra* note 29, at 2.

¹⁵² Explanatory Memorandum, *supra* note 29, at 14.

¹⁵³ TPP Act, *supra* note 1 at ch 1 s 3(2).

¹⁵⁴ WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, *Guidelines for Implementation of Article 11: Packaging and Labelling of Tobacco Products*, in GUIDELINES FOR IMPLEMENTATION 49, 59 (2011), available at http://whqlibdoc.who.int/publications/2011/9789241501316_eng.pdf.

¹⁵⁵ WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, *Guidelines for Implementation of Article 13: Tobacco Advertising, Promotion and Sponsorship*, in GUIDELINES FOR IMPLEMENTATION 89, 95-96 (2011), available at http://whqlibdoc.who.int/publications/2011/9789241501316_eng.pdf.

In defending the legislation, the Commonwealth argued that the statutory judgment about the ways in which plain packaging would improve public health “is consistent with the consensus of the 174 Parties to the FCTC,”¹⁵⁶ noting Articles 11 and 13 of the FCTC and their guidelines.¹⁵⁷ Had it been necessary for the Court to consider the Commonwealth’s alternate arguments, consideration would likely have been given to the significance of the FCTC, at least to the question of whether plain packaging is “appropriate and adapted to reducing harm to members of the public and public health.”¹⁵⁸

IV. CONCLUSION

The High Court’s decision upholding Australia’s plain packaging regime came as no surprise. The informed consensus had always been that the Australian Government was on solid legal ground.¹⁵⁹ It would have taken a radical change of course from decades of constitutional jurisprudence for the tobacco companies’ challenges to have succeeded. The outcome of the litigation vindicated the Australian Government’s decision to stare down the tobacco industry’s legal threats, bluff and bluster.¹⁶⁰ In many respects, it would have been easier for the Australian Government not to take the fight on. But it chose to do so, and its success will embolden other countries, and remind them of the rewards of acting on both their convictions and their legal advice in the face of tobacco industry scare campaigns and saber-rattling.

Of course, each legal challenge is framed, argued and resolved in its own particular context, under its own laws, principles and doctrines, and in accordance with its own legal and evidentiary procedures. The challenges to Australia’s plain packaging legislation were decided on the basis that no benefit or advantage of a proprietary nature had been acquired by the Commonwealth or any other person.¹⁶¹ No consideration of the merits of plain packaging or evidence in its support was necessary.

In these respects, the High Court’s consideration of the tobacco companies’ challenges differs from what might be expected if plain packaging were implemented and challenged in domestic jurisdictions in which different rights and interests are protected or promoted—both those weighing in favor of plain packaging, such as public health generally, and rights to health and to life, and in favor of those that tobacco companies would seek to invoke, such as commercial speech rights and different kinds of property rights from those protected by the Australian Constitution. Of course, it also differs from what might be expected in the

¹⁵⁶ *Commonwealth Submission*, *supra* note 67, ¶ 37.

¹⁵⁷ *Id.* It stated: “That Australia is as yet the first Party to the FCTC to act on these recommendations does not detract from the global significance of the adoption of them.” *Id.*

¹⁵⁸ *Commonwealth Submission*, *supra* note 67, at ¶ 7.

¹⁵⁹ *See, e.g.*, Simon Evans & Jason Bosland, *Plain Packaging of Cigarettes and Constitutional Property Rights*, in *PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES* 48, 48-80 (Tania Voon et al. eds., 2012).

¹⁶⁰ In welcoming the High Court’s decision, the Australian Attorney-General, Nicola Roxon, who had been the Health Minister responsible for the development and introduction of the legislation before becoming Attorney-General, said that that it showed that Big Tobacco can be “taken on and beaten.” Nicola Berkovic, *High Court Clears Way for Plain Packaged Cigarettes to Be Sold in Australia*, *THE AUSTRALIAN* (Aug. 15, 2012), <http://www.theaustralian.com.au/national-affairs/high-court-clears-way-for-plain-packaged-cigarettes-to-be-sold-in-australia/story-fn59niix-1226450705366>.

¹⁶¹ *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43, ¶¶ 42-44 (Austl.)

resolution of the current WTO and investment treaty challenges to Australia's legislation, these being claims brought before international tribunals pursuant to international laws and processes. This is not to suggest that the ultimate outcome of such challenges would be different, but to acknowledge that similar issues will play out in different ways, perhaps offering a richer jurisprudence that goes to the heart of what is at stake in plain packaging in particular, and in the battles between public health and the tobacco industry in general.

It can be expected that the FCTC will play a role in the resolution of similar challenges in jurisdictions in which the merits of plain packaging and the evidence in its support do fall for consideration. This will be true of both other domestic challenges and of the ongoing international challenges to Australia's legislation, in which the relationship between the FCTC, as both international law and international norm, and trade and investment obligations will inevitably be considered.¹⁶²

While each legal challenge is pursued and decided in its own context and its own way, no challenge to tobacco control measures takes place in isolation, not least because of the FCTC, a global treaty with 176 Parties, each having committed, under international law, to implement obligations both in their domestic jurisdictions and cooperatively at the international level. The accumulation of litigation experience and development of jurisprudence build an invaluable collective resource of ideas, themes and narratives that can be drawn upon in different ways in different places to strengthen ongoing efforts to reduce the global burden caused by tobacco and the tobacco industry.

¹⁶² WHO Framework Convention on Tobacco Control, *Decision: Punta Del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control*, COP-4(5) (Nov. 19, 2010); Benn McGrady, *Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: Philip Morris v Uruguay*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES 173, 192 (Tania Voon et al. eds., 2012); Tania Voon & Andrew D. Mitchell, *Implications of International Investment Law for Plain Tobacco Packaging: Lessons from the Hong Kong-Australia BIT*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES 137, 158 (Tania Voon et al. eds., 2012); Tania Voon & Andrew D. Mitchell, *Implications of WTO Law for Plain Packaging of Tobacco Products*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES 109, 127 (Tania Voon et al. eds., 2012); Benn McGrady, *Revisiting TRIPS and Trademarks: The Case of Tobacco*, 9 TRANSNAT'L DISP. MGMT., no. 5, 2012, at 6. See generally WORLD HEALTH ORG., CONFRONTING THE TOBACCO EPIDEMIC IN A NEW ERA OF TRADE AND INVESTMENT LIBERALIZATION (2012), available at http://whqlibdoc.who.int/publications/2012/9789241503723_eng.pdf.