Chapter 7

Law, Economics and Interdisciplinary Indeterminancy

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Introduction

No federal government really likes s 51(xxxi) of the Commonwealth Constitution. Unless, to achieve its purpose, it cannot escape using unequivocally implicitory language, a government almost invariably will seek to characterise its acquisitive action as different from, or less than, a taking. For example, it may be described as mere regulation, or fulfilment of an international obligation (albeit that the obligation has been voluntarily assumed), or as a measure of some other non-compensable kind. A broad, at least superficially enlightened, public interest to justify the action is routinely invoked. To question it, or even the means adopted to achieve it, is to risk a charge of denialism, selfishness, or worse.

The particular concern of this chapter is Part IV of the *Trade Practices Act 1974* (Cth) (TPA),[1] and its State siblings, and their operation in the real world of commerce, a topic not unrelated to acquisition as I will demonstrate. Before explaining this concern; and to put it in context, it is necessary to look briefly at three examples from some relatively recent legal history.

Some recent legal history

First, 1971, *Strickland v Rocla Concrete Pipes Ltd* (*Concrete Pipes* case)[2] is important, not only for overruling *Huddart, Parker & Co Pty Ltd v Moorehead*,[3] but also as providing a foundation for the majority decision in the *Work Choices* case.[4] It is equally important for its judicial empowerment of the Commonwealth executive, and the Parliament that it usually controls, to enable the enactment by it

1 Now renamed the *Competition and Consumer Act 2010* (Cth). References in this chapter remain to the *Trade Practices Act*.

2 (1971) 124 CLR 468.

3 (1909) 8 CLR 330.

4 *New South Wales v Commonwealth* (2006) 229 CLR 1.