Case Note

JT International SA v Commonwealth: Tobacco Plain Packaging

Daniel Fletcher*

Abstract

This case note examines three conclusions that underpin the High Court's decision in *JT International SA v Commonwealth* that tobacco plain packaging legislation is not contrary to s 51(xxxi) of the *Constitution*. First, that intellectual property rights held under Commonwealth legislation can attract s 51(xxxi) protection. Second, that to engage s 51(xxxi), the impugned law must cause the Commonwealth or another person to acquire a right or benefit of a proprietary nature. Third, that none of the benefits allegedly acquired by the Commonwealth and others as a consequence of the tobacco plain packaging legislation were of a proprietary nature. The author contends that the High Court's interpretation of s 51(xxxi) is informed by use of the word 'property' in legislation and concepts of property at common law. This case note also examines dicta dismissive of an attempt to rationalise recognised exceptions to s 51(xxxi) in terms of a proportionality analysis.

I Introduction

In *JT International; British American Tobacco Australasia Ltd v Commonwealth*,[1] the High Court held by majority that the recently implemented regime of 'plain packaging' for tobacco products did not involve an acquisition of the intellectual property tobacco companies previously used in their packaging, and was therefore constitutionally valid.[2] The majority judges affirmed the orthodox position that for the constitutional guarantee in s 51(xxxi) to be engaged, the impugned law must do more than deprive or extinguish property rights — it must also cause the Commonwealth or another person to acquire a right or benefit of a proprietary nature.[3]

However, the legal concepts associated with the words 'property' and 'proprietary' are difficult to explain in an exhaustive manner. Common descriptions such as a 'bundle of rights'[4] and a 'legal relationship with a thing'[5] can be of little utility when analysing the nature of a sovereign state's rights in

* Final-year student, Bachelor of Laws, University of Sydney. The author thanks Professor Peter Gerangelos for guidance in preparing this case note.

1 (2012) 291 ALR 669 ('*JT International*').

2 See Part IV(D) of this case note.

3 See Part IV(B) of this case note.

4 *Yanner v Eaton* (1999) 201 CLR 351, 366 [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

5 Ibid 365–6 [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

relation to identifiable 'things' within its territory.[6] And while constitutional lawyers need not descend so far as to describe property as a 'mere illusion',[7] there is a distinct sense in which the concept of 'constitutional property'[8] can be considered a creature of, or at least informed by, the broader legal system.[9] As discussed in Part III, the Court's concept of 'constitutional property' appears to involve deference to the features and characterisation of property in a general law context. Accordingly, although the decision in *JT International* does not provide a 'test' to apply to putative property rights, it is an important addition to the case law from which the contours of the concept of 'constitutional property' can be drawn.

The decision in *JT International* has consequences in areas of law other than Australian federal constitutional law. The Australian government is currently engaged in a World Trade Organization ('WTO') dispute resolution process with several tobacco-producing countries that claim that the legislation impugned in *JT International* appears to be inconsistent with Australia's obligations under international law.[10] Philip Morris Asia has also challenged the legislation under a bilateral investment treaty between Australia and Hong Kong,[11] and arbitral proceedings are expected to continue throughout 2013 and 2014.[12] However, this case note focuses solely on the decision in *JT International* and the constitutional issues therein.

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6 The idea being that sovereign states necessarily have legal rights of some sort in relation to all things and persons within their territories. For a similar idea see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 536–7 [75].

7 In a much quoted passage, Professor Kevin Gray stated that 'the ultimate fact about property is that it does not really exist: it is a mere illusion': Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 252. See also *Yanner v Eaton* (1999) 201 CLR 351, 365–6 [17]–[18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

8 This phrase is adopted in a sense similar to those of the phrases 'constitutional trade and commerce' and 'constitutional corporations' as used in Commonwealth legislation and case law such as *Industrial Relations Act 1988* (Cth) s 127C and *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

9 J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 3.

10 WTO, *Dispute Settlement: Dispute DS434* (18 December 2012) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm>; WTO, *Dispute Settlement: Dispute DS435* (30 September 2013) <http://www.wto.org/english/tratop_e/dispu_e/ cases_e/ds435_e.htm>; WTO, *Dispute Settlement: Dispute DS441* (18 December 2012) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm>. See also 'Cuba Joins Attack on Australia's Plain-packaging Rules', *The Sydney Morning Herald* (online), 6 May 2013 <http://www.smh.com.au/world/cuba-joins-attack-on-australias-tobacco-plainpackaging-rules-20130506-2j3rg.html>.

11 Specifically, the *Agreement Between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

12 See generally Permanent Court of Arbitration, *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* (31 December 2012) <http://www.pca-cpa.org/showpage.asp?pag_id=1494>.

II The Legislation, the Parties and their Challenge

The *Tobacco Plain Packaging Act 2011* (Cth) ('*TPPA*') regulates the retail packaging and appearance of tobacco products.[13] Cigarette packs and cartons must be rectangular prisms[14] of specified dimensions,[15] made of cardboard[16] and with a prescribed finish and colour.[17] No embellishments may be made to the outer or inner surfaces.[18] Corners may not be rounded.[19] Glues and other adhesives must not be coloured.[20] Nor can the packaging produce a noise or scent that could be taken to constitute tobacco advertising.[21]

The *TPPA* also prohibits the use of trademarks on retail packaging[22] except for brand and variant names,[23] which, if used, must appear in a specified position,[24] font,[25] size[26] and colour[27] and with specified frequency.[28] The 'Quitline' logo and other regulatory trademarks are excepted,[29] and are in fact required.[30] Packs and cartons must also display the written health warnings and graphic images of smoking-related diseases required by previously enacted legislation.[31] In sum, the *TPPA* prescribes a uniform packaging regime designed to reduce the appeal of tobacco products to consumers,[32] and where each packet's only distinctive features are brand and variant names.

The plaintiffs[33] and supporting interveners[34] in *JT International* were tobacco companies whose businesses involved the production, packaging and sale of retail tobacco products. Between them, they held, and exploited in their tobacco packaging, a number of statutory intellectual property rights, such as trademarks, copyright, registered designs and patents, and common law rights in relation to

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13 Tobacco products include processed tobacco, and any product containing tobacco manufactured for smoking, sucking, chewing or snuffing (except where the product is included in the Australian Register of Therapeutic Goods): *TPPA* s 4(1) (definition of 'tobacco product').

14 *TPPA* s 18(2)(b).

15 See, eg, *Tobacco Plain Packaging Regulations 2011* (Cth) regs 2.1.1(1), 2.1.5 ('*TPPR*').

16 *TPPA* s 18(2)(a).

17 Ibid s 19.

18 Ibid s 18(1)(a).

19 Ibid s 18(2)(c).

20 Ibid s 18(1)(b).

21 Ibid s 24.

22 Ibid s 20(1).

23 Ibid s 20(3)(a).

24 Ibid s 21(2)(b)(i); *TPPR* regs 2.4.3(2), 2.4.4(2).

25 *TPPA* s 21(1); *TPPR* reg 2.4.1(a).

26 *TPPA* s 21(1); *TPPR* regs 2.4.1(b)–(c).

27 *TPPA* s 21(1); *TPPR* reg 2.4.1(f).

28 *TPPA* s 21(1); *TPPR* regs 2.4.3(b), 2.4.4(b)–(c).

29 *TPPA* s 20(3)(c); *TPPR* reg 2.6.1.

30 *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), made pursuant to *Competition and Consumer Act 2010* (Cth) sch 2 cl 134.

31 See, eg, *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) and its predecessor, the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth).

32 *TPPA* s 4(2)(a).

33 JT International SA, British American Tobacco Australasia Ltd, British American Tobacco (Investments) Ltd and British American Tobacco Australia Ltd.

34 Philip Morris Ltd, Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Ltd.

unregistered trademarks and goodwill in the get-up of their products.[35] But for the operation of the *TPPA*, which prohibited the use of the various trademarks, patents and other design features protected by the above rights,[36] the tobacco companies would have continued to use the intellectual property to advertise tobacco products[37] and to generate further income by licensing the rights to third parties. The rights thus had significant commercial value,[38] and, accordingly, the plaintiffs challenged the constitutional validity of the *TPPA* within two weeks of it receiving Royal Assent.[39]

It being agreed[40] that the *TPPA* was prima facie valid under heads of power such as the trade and commerce, intellectual property, corporations and external affairs powers (ss 51(i), (xviii), (xx), (xxix) respectively), the plaintiffs invoked the 'constitutional guarantee'[41] of s 51(xxxi), which provides that:

> The Parliament shall, subject to this constitution, have power to make laws for the peace, order, and good government of the Commonwealth 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.

This raised four main issues for the Court's consideration:

a) whether the plaintiffs' intellectual property rights were 'property' for the purposes of s 51(xxxi);

b) whether the *TPPA* effected an acquisition of any such property;

c) whether any acquisition was other than on just terms; and

d) whether the *TPPA* benefited from an exception to s 51(xxxi), and, in particular, one based on a 'proportionality' analysis.

The Court by majority upheld the validity of the *TPPA*, ruling that although the plaintiffs' rights were property rights capable of attracting the protection of s 51(xxxi), the *TPPA* did not effect an acquisition of property. Parts III and IV analyse the majority judges' treatment of issues (a) and (b) respectively.

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35 *JT International* (2012) 291 ALR 669, 676, 678–9 [18]–[19], [25], [28] (French CJ), 686–7 [54]–[61] (Gummow J), 709 [163] (Hayne and Bell JJ), 719 [202]–[205] (Heydon J), 728 [245] (Crennan J), 745, 755 [311]–[312], [345] (Kiefel J).

36 Ibid 704–5 [138], [140] (Gummow J), 709 [163] (Hayne and Bell JJ), 721 [213] (Heydon J).

37 Albeit subject to *Tobacco Advertising Prohibition Act 1992* (Cth) pt 3, which prohibits tobacco advertising in print, radio and television media. Legislation in the states and territories has also prohibited or restricted the promotion of tobacco products at the point of retail sale, including the display of such products: see, eg, *Public Health (Tobacco) Act 2008* (NSW) ss 12–15.

38 *JT International* (2012) 291 ALR 669, 704 [138]–[139] (Gummow J), 721 [214] (Heydon J), 732–3 [264]–[265] (Crennan J).

39 The *TPPA* received Royal Assent on 1 December 2011. The British American Tobacco companies commenced proceedings by a writ of summons issued on 1 December 2011. JT International SA commenced its proceedings on 15 December 2011: *JT International* (2012) 291 ALR 669, 676–7 [17], [24] (French CJ).

40 *JT International* (2012) 291 ALR 669, 746 [314] (Kiefel J).

41 Ibid 684 [41] (French CJ), 726 [236] (Heydon J); reflecting *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 542 (Brennan CJ), 560 (Toohey J), 561 (Gaudron J), 571 (McHugh J), 589 (Gummow J), 653 (Kirby J).

Heydon J was the only judge to consider issue (c),[42] and, because his Honour dissented, this case note does not consider that issue. Nor does it examine the plaintiffs' speculative and unsuccessful[43] challenge to the validity of the *TPPA*'s 'reading down' provision, s 15.[44]

Issue (d), however, merits examination. The High Court has previously recognised a number of seemingly disparate 'exceptions' to s 51(xxxi),[45] and several commentators have attempted to rationalise a basis for those exceptions.[46] Yet, as analysed in Part V, the dicta of Heydon and Kiefel JJ[47] suggest that a unifying approach is not likely to emerge in the near future.

III The Plaintiffs' Property

Most of the plaintiffs' interests allegedly acquired by the Commonwealth and others under the *TPPA* were interests created by Commonwealth statutes[48] rather than under state or territory legislation or at general law. This led the Commonwealth to submit that, because of their statutory nature, such interests were not 'property' for the purposes of s 51(xxxi) and could not attract that section's protection. The Court rejected this argument, ruling that the statutory origin was not necessarily a bar to the plaintiffs' claims.[49] Instead, determining the degree to which s 51(xxxi) could protect the plaintiffs' statutory interests required an analysis of the statutes and the nature of the rights they created.[50]

In undertaking that analysis, the Court focused on two matters. First, it examined the formal descriptions of the statutory interests. In separate judgments, French CJ,[51] Gummow,[52] Heydon,[53] Crennan[54] and Kiefel JJ[55] drew attention to

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42 *JT International* (2012) 291 ALR 669, 716, 725–6 [193], [235]–[236] (Heydon J).

43 Ibid 674–5 [9] (French CJ), 694 [97]–[99] (Gummow J), 709 [161] (Hayne and Bell JJ), 731 [261] (Crennan J); Heydon and Kiefel JJ not deciding: 726 [237] (Heydon J), 761 [373] (Kiefel J).

44 Section 15(1): 'This Act 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.' Section 15(2) outlines the operation of s 15(1) in relation to trademarks and signs.

45 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook, 2nd ed, 2006) 353.

46 See, eg, Simon Evans, 'When Is an Acquisition of Property Not an Acquisition of Property?' (2000) 11 *Public Law Review* 183; Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution' (2005) 27 *Sydney Law Review* 639; Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351, 362–9.

47 *JT International* (2012) 291 ALR 669, 724–5 [229]–[234] (Heydon J), 752–5 [332]–[344] (Kiefel J).

48 In particular, the *Trade Marks Act 1995* (Cth), the *Designs Act 2003* (Cth), the *Patents Act 1990* (Cth) and the *Copyright Act 1968* (Cth).

49 *JT International* (2012) 291 ALR 669, 679 [29] (French CJ), 695 [102] (Gummow J), 715 [192] (Heydon J), 735 [276] (Crennan J). This is a further rejection of the position adopted only by McHugh J that all rights created by Commonwealth statutes are inherently susceptible to variation without just terms: see, eg, *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 260–5; Joseph and Castan, above n 45, 360.

50 *JT International* (2012) 291 ALR 669, 679 [29] (French CJ), 695 [102] (Gummow J) citing *Wurridjal v Commonwealth* (2009) 237 CLR 309, 439–40 [363]–[364] (Crennan J), 733 [267] (Crennan J).

51 *JT International* (2012) 291 ALR 669, 680–2 [31]–[34].

52 Ibid 690–2 [78]–[86].

sections in the *Trade Marks Act*, the *Designs Act*, the *Patents Act* and the *Copyright Act* that stated that the interests created by those statutes were 'personal property'.[56] Their Honours also noted that each interest was capable of transmission by assignment and by operation of law.[57] However, there was little examination of the relationship that, by virtue of their Honours' reasoning, appears to exist between these characteristics of the statutory interests and the meaning of 'property' in s 51(xxxi). There are compelling reasons to consider it unlikely that a statute can deem an interest to be proprietary for the purposes of s 51(xxxi); the stream cannot rise above the source.[58] Yet their Honours' reasoning appears to allow room for a weaker form of interpretative assistance, perhaps because broader interpretations of 'property' generally restrict the scope of Commonwealth legislative power (assuming acquisitions are other than on just terms).

The second feature of the plaintiffs' statutory interests was the public policy purposes for which the statutes were enacted. French CJ recognised that, to varying degrees, the statutes and their predecessors were created, amended and, in some instances, repealed, to accommodate the competing interests of intellectual property owners and consumers. However, for French CJ, this purpose did not detract from the conclusion that the statutes created property rights.[59] His Honour's reasoning appears to identify the specific statutes as instances of a broader conception of intellectual property laws that create property rights despite being 'instrumental in character'[60] and sometimes allowing use by third parties.

The Court's reasoning in relation to both the above matters is an example of a broader trend in the interpretation of s 51(xxxi): that the current interpretation of 'property' is strongly influenced by the accepted use of that term in the general law. A variety of rights of exclusion has been described, since at least the 1960s,[61] as 'intellectual property', and, although the historical prevalence of the term might not be determinative of this issue, the brevity of the Court's reasoning suggests that

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53 Ibid 719 [202]–[205].

54 Ibid 729, 735 [249], [275].

55 Ibid 755 [346]–[347].

56 *Trade Marks Act 1995* (Cth) s 21(1); *Designs Act 2003* (Cth) s 10(2); *Patents Act 1990* (Cth) s 13(2); *Copyright Act 1968* (Cth) s 196.

57 *Trade Marks Act 1995* (Cth) s 106; *Designs Act 2003* (Cth) ss 10–11; *Patents Act 1990* (Cth) s 13(2), *Copyright Act 1968* (Cth) s 196(1).

58 In accordance with the so-called 'doctrine in the Communist Party Case': *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263 (Fullagar J).

59 Heydon J agreed on this point: *JT International* (2012) 291 ALR 669, 720 [209].

60 It is less than clear what French CJ meant in describing intellectual property laws as 'instrumental in character' and the rights under those laws as having 'instrumental character'. If his Honour was describing the laws and rights as tools or means to achieving certain ends, then the same can be said of most laws. Similarly, if by 'instrumental' his Honour was describing the laws and rights as 'of, or relating to, an instrument', then the same can be said of all legislative instruments and rights thereunder. Finally, if by 'instrumental' his Honour meant 'important', 'useful' or 'effective', then the term implies a conclusion rather than stating a reason.

61 Use of the term can be traced to the foundation of the World Intellectual Property Organisation ('WIPO') in accordance with the *Convention Establishing the World Intellectual Property Organisation*, opened for signature 14 July 1967, 828 UNTS 3 (entered into force 26 April 1970). The term can also be traced to the civil law systems of the 19th century: Mark A Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 *Texas Law Review* 1031, 1033 fn 4.

the Court saw no need to explain from first principles the 'inclusion' of intellectual property.

The above criticisms are not made to suggest that the Court's decision to include statutory intellectual property rights in the genus of rights protected by s 51(xxxi) was unexpected or unpredictable. Previous decisions have stressed the importance of giving s 51(xxxi) 'a liberal construction appropriate to' its 'status [as] a constitutional guarantee'.[62] The Court had also recognised that 'the term 'property' in s 51(xxxi) was 'the most comprehensive term that [could have been] used'.[63] Further, there were dicta suggesting, albeit indirectly, that statutory intellectual property rights would be seen to fall within s 51(xxxi) property.[64] The criticisms are instead made to highlight the degree to which the limits of the 'liberal construction' advanced by the High Court have been explained as they have arisen, rather than up-front and with a particular conception of 'property' in mind.

IV Acquisition of Property

A *The Distinction between 'Taking' and 'Acquiring' Property*

In interpreting s 51(xxxi), the Court held by majority that 'taking' property and 'acquiring' property are different standards against which an impugned law can be characterised.[65] Whereas 'taking' involves a deprivation of property seen from the perspective of the owner, 'acquiring' involves the receipt of something from the perspective of the acquirer.[66] Section 51(xxxi) uses the term 'acquisition' and, as such, a law is not a law with respect to the acquisition of property if it merely deprives a state or person of property rights.[67] Accordingly, a law can validly restrict or even extinguish a proprietary right, so long as the law does not effect an acquisition and is supported by another s 51 head of power.[68]

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62 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193, 201–2 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ), cited with approval in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

63 *JT International* (2012) 291 ALR 669, 729, 760 [366] (Kiefel J) quoting *Commonwealth v New South Wales* (1923) 33 CLR 1, 20–1 (Knox CJ and Starke J) as approved in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

64 See, eg, *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 34 (Windeyer J), cited with approval in *JT International* (2012) 291 ALR 669, 696 [105] (Gummow), 733 [267] (Crennan J).

65 *JT International* (2012) 291 ALR 669, 684 [41–2] (French CJ), 694–5 [100]–[101] (Gummow J), 709 [164] (Hayne and Bell JJ), 735–6 [278]–[279] (Crennan J), 758 [357] (Kiefel J). Heydon J did not expressly affirm the distinction between 'taking' and 'acquiring', and described as 'not implausible' Callinan J's view in *Smith v ANL Ltd* (2000) 204 CLR 493, 546 [166]–[167] that any distinction between 'taking' and 'acquiring' was not of significance.

66 *JT International* (2012) 291 ALR 669, 684 [42] (French CJ).

67 *Commonwealth v Tasmania* (1983) 158 CLR 1, 145 (Mason J) ('*Tasmanian Dam Case*'), adopted in *JT International* (2012) 291 ALR 669, 684 [42] (French CJ), 700 [118] (Gummow J), 710–11 [169] (Hayne and Bell JJ), 735–6 [278]–[279] (Crennan J), 760 [365] (Kiefel J).

68 *JT International* (2012) 291 ALR 669, 684 [42] (French CJ), 694–5 [100] (Gummow J), 710 [167] (Hayne and Bell JJ); *R v Ludeke; Ex parte Australian Building Construction Employees' and*

Gummow and Kiefel JJ interpreted s 51(xxxi) with reference to the 'takings clause'[69] of the Fifth Amendment to the *United States Constitution*.[70] Whether it is considered the 'source' of s 51(xxxi) or not,[71] the 'takings clause' has, in some ways, been interpreted similarly to s 51(xxxi). Gummow J observed that both provisions use the term 'property' with respect to 'the group of rights inhering in ownership'[72] and not in any 'vulgar and untechnical sense'.[73] Yet there are also important differences between the two provisions.[74] For example, the Fifth Amendment is expressed in negative form and operates as a prohibition only.[75] In contrast, s 51(xxxi) is expressed in positive form and operates both as a source of power and as a prohibition.[76] Further, the distinctions between 'taking' and 'acquiring' adopted by the United States Supreme Court and the High Court of Australia have the effect of engaging the 'takings clause' in a broader range of circumstances than those in which s 51(xxxi) would be engaged.[77]

As if to temper the scope of the 'takings clause', the United States Supreme Court has developed a doctrine that permits the regulation of proprietary interests so long as the regulatory actions are not 'functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain'.[78] The Commonwealth argued for a similar exception to s 51(xxxi), characterising the *TPPA* as a law that merely regulates the appearance of dangerous products.[79] However, both Gummow and Kiefel JJ rejected this submission. Gummow J described the suggested characterisation as '[providing] a false frame of reference',[80] and adopted dicta of Mason and Brennan JJ in cautioning against establishing a 'regulation' test in the application of s 51(xxxi).[81]

Builders Labourers' Federation (1985) 159 CLR 636, 653. See also Australian Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) vol 1, 600.

69 The clause provides: 'nor shall private property be taken for public use, without just compensation'.

70 *JT International* (2012) 291 ALR 669, 697–700 [109]–[118] (Gummow J), 757 [355] (Kiefel J).

71 For the affirmative, see *Andrews v Howell* (1941) 65 CLR 255, 282 (Dixon J), and for its rejection, see *JT International* (2012) 291 ALR 669, 757 [355] (Kiefel J). Gummow J did not express an opinion as to the correctness of the position in *Andrews v Howell*: *JT International* (2012) 291 ALR 669, 697–8 [110]–[112].

72 *JT International* (2012) 291 ALR 669, 697 [110].

73 *United States v General Motors Corporation* (1945) 323 US 373, 377–8, cited in *JT International* (2012) 291 ALR 669, 697 [110].

74 Some of these were recognised as early as 1944: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 295 (McTiernan J) ('*Dalziel*').

75 *JT International* (2012) 291 ALR 669, 698 [113] (Gummow J).

76 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349–50 (Dixon J) ('*Bank Nationalisation Case*'); see generally G Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials* (Lawbook, 2nd ed, 2007) 610–11.

77 *JT International* (2012) 291 ALR 669, 699 [115] (Gummow J).

78 *Lingle v Chevron USA Inc* (2005) 544 US 528, 539, quoted in *JT International* (2012) 291 ALR 669, 699 [115] (Gummow J).

79 Commonwealth, 'Submissions of the Commonwealth of Australia', Submission in *British American Tobacco Australasia Ltd v Commonwealth*, NSD S389/2011, 5 April 2012, 38–41 [84]–[92].

80 *JT International* (2012) 291 ALR 669, 699 [116].

81 Ibid 699 [116]–[117], citing *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 428 (Mason J) and the *Tasmanian Dam Case* (1983) 158 CLR 1, 247–8 (Brennan J).

Kiefel J gave a briefer analysis, stressing that the jurisprudence concerning the 'takings clause' had 'not been applied as relevant' to the operation of s 51(xxxi).[82]

B *What Must Be Acquired?*

In the *Tasmanian Dam Case*,[83] Mason J stated that '[t]o bring [s 51(xxxi)] into play … there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be'.[84] The majority in *JT International* strongly approved of this statement.[85] For Hayne and Bell JJ, it was a 'bed-rock principle' from which no amount of 'liberal construction' of the terms 'acquisition' or 'property' could justify departure.[86] The other judges were similarly forceful, describing it as an 'established doctrine'[87] of 'enduring authority'.[88]

In affirming this interpretation of s 51(xxxi), the majority also considered two judgments on which the plaintiffs had relied. The first was that of Deane J in the *Tasmanian Dam Case*,[89] in which his Honour expressed, with some hesitation, a view that at least where property rights were entirely sterilised (as in that case) there could be an acquisition of property within the meaning of s 51(xxxi) without the Commonwealth or another obtaining a material benefit of a proprietary nature.[90] The majority in *JT International* rejected this view. Hayne, Bell and Crennan JJ described it as a dissenting view that had not since been adopted or applied.[91] Gummow J went further, criticising the two arguments Deane J gave in support of his view.[92]

The second judgment on which the plaintiffs relied was that of Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v Commonwealth*,[93] where their Honours stated that 'for there to be an "acquisition of property", there must be an obtaining of at least some identifiable benefit or advantage *relating to* the ownership or use of property'.[94] The plaintiffs submitted that the words 'relating to' correctly established a threshold lower than that connoted by 'a benefit of a proprietary nature'. However, the majority judges rejected that submission because, in their opinion, it neglected other passages of the judgment in which Deane and Gaudron JJ emphasised that there must be an acquisition of property.

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82 *JT International* (2012) 291 ALR 669, 757 [355].
83 (1983) 158 CLR 1.
84 Ibid 145.
85 (2012) 291 ALR 669, 684 [42] (French CJ), 705 [144] (Gummow J), 710–1 [169] (Hayne and Bell JJ), 735–6 [278]–[279] (Crennan J), 759–60 [365] (Kiefel J), *contra* 717–719 [196]–[200] (Heydon J).
86 Ibid 710–11 [169]–[170].
87 Ibid 706 [144] (Gummow J).
88 Ibid 736 [279] (Crennan J).
89 (1983) 158 CLR 1.
90 *Tasmanian Dam Case* (1983) 158 CLR 1, 286.
91 See also *Esposito v Commonwealth* [2013] FCA 546 (31 May 2013), in which Griffiths J applied *JT International* in dismissing a sterilisation-type argument: at [18], [32].
92 These criticisms are not examined here as they were narrowly addressed to the specific examples Deane J provided: see *JT International* (2012) 291 ALR 669, 702–3 [128]–[132] (Gummow J).
93 (1994) 179 CLR 155.
94 Ibid 185 (emphasis added).

As Kiefel J stated, 'not too much should be read into Deane and Gaudron JJ's use of the words "relating to"'.[95]

C *Was There a Taking?*

Despite drawing the distinction discussed in Part IV(A), French CJ, Gummow and Crennan JJ considered the issue of whether the *TPPA* effected a taking of the plaintiffs' proprietary interests as anterior to the issue of whether the *TPPA* effected an acquisition of property.[96]

French CJ and Gummow J were willing to accept the Commonwealth's submissions: first, that the relevant intellectual property legislation[97] did not formally confer on the holders of protected trademarks, designs, patents, etc, a positive right to use those creations; and second, that any positive right at common law to use the same was not proprietary in nature.[98] However, their Honours rejected the Commonwealth's further submission that because no positive right of use existed there was nothing for the *TPPA* to take.[99] Previous cases such as *Dalziel*[100] and the *Bank Nationalisation Case*[101] established that s 51(xxxi) requires attention to substance over form, and, as French CJ noted, a right to exclude others from using property has no substance if all use of the property is prohibited.[102] Gummow J also focused on the substance of the plaintiffs' property rights, observing that the regime imposed by the *TPPA* 'denuded' the rights of their value and thus their utility.

Crennan J disagreed with French CJ and Gummow J with respect to those trademarks that included written expressions of the plaintiffs' brand or variant names.[103] The brand and variant names in those marks could still be used[104] and could be protected from the use of others under the *Trade Marks Act*.[105] Crennan J also emphasised that the brand and variant names remained capable of sustaining an action for passing off,[106] and that the plaintiffs could still use brand and variant names to distinguish their products and thereby create custom and goodwill.[107] While there was the possibility of a 'consequential diminution' in the value of the

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95 *JT International* (2012) 291 ALR 669, 759 [365].

96 Hayne and Bell JJ stated that it was 'hard to deny' that the *TPPA* would take the plaintiffs' property. However, along with Kiefel J, they preferred not to examine the issue closely: *JT International* (2012) 212 ALR 669, 709 [164] (Hayne and Bell JJ), 757 [355] (Kiefel J).

97 *Trade Marks Act 1995* (Cth); *Designs Act 2003* (Cth); *Patents Act 1990* (Cth); *Copyright Act 1968* (Cth).

98 *JT International* (2012) 291 ALR 669, 682–3 [36]–[37] (French CJ), 691–2 [76]–[78] (Gummow J).

99 Ibid 683 [37] (French CJ), 704–5 [137]–[141] (Gummow J).

100 (1944) 68 CLR 261.

101 (1948) 76 CLR 1.

102 *JT International* (2012) 291 ALR 669, 683 [37]. French CJ resisted the plaintiffs' submission that rights of exclusion are of the essence of all proprietary rights: at 683 [37].

103 This included composite trademarks that included the written expressions and other visual features such as colours, chevrons, crests, shields and similar insignia: *JT International* (2012) 291 ALR 669, 738 [288].

104 *TPPA* s 20(3)(a).

105 *Trade Marks Act 1995* (Cth) pt 12.

106 *JT International* (2012) 291 ALR 669, 739–40 [291]–[292].

107 Ibid 740 [294].

relevant trademarks and the plaintiffs' businesses,[108] Crennan J noted that s 51(xxxi) is not directed at preserving the value of a commercial business or the value of an item of property.[109] Accordingly, the substance and 'reality of proprietorship' in the trademarks that included written expressions of brand or variant names remained with the plaintiffs and were not taken from them under the *TPPA*.[110]

D *Was There an Acquisition?*

The plaintiffs made a number of related submissions as to how the *TPPA* allegedly resulted in the Commonwealth and others obtaining benefits of a proprietary nature. These submissions, and the majority judges' analyses of them, can be grouped into three main categories.

1 *Use or Control of Tobacco Retail Packaging*

In the *Bank Nationalisation Case*,[111] Dixon J stated that s 51(xxxi) 'extends to … and includes the assumption and indefinite continuance of *exclusive possession and control* … of any subject of property'. The plaintiffs therefore advanced a submission that the *TPPA* gave the Commonwealth the use of, or control over, tobacco packaging because the *TPPA* prescribed a particular packaging regime.[112]

The majority judges rejected the plaintiffs' submission.[113] For Hayne and Bell JJ, with whom French CJ and Gummow J agreed, the *TPPA* requirements were 'no different in kind' from other legislation that validly required labels warning against use or misuse of particular products.[114] Further, the plaintiffs retained use and control of the packaging; they owned and produced it, and were the only entities capable of using it to sell their products. Thus, while the appearance of the packaging was determined by law, decisions to manufacture and use the packaging remained with the plaintiffs.[115] Crennan J similarly observed that the plaintiffs continued to possess residual capacity to choose whether or not to produce and use the packaging.[116]

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108 Ibid 741 [296].

109 *JT International* (2012) 291 ALR 669, 740 [295] citing *British Medical Association v Commonwealth* (1949) 79 CLR 201, 270 (Dixon J) and *Commonwealth v WMC Resources Limited* (1998) 194 CLR 1, 72–3 [193]–[194] (Gummow J).

110 *JT International* (2012) 291 ALR 669, 740–1 [294]–[296]. The 'reality of proprietorship' is a term Dixon J used in the *Bank Nationalisation Case* (1948) 76 CLR 1, 349 and has been adopted in other cases such as *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 663 (Gummow J).

111 (1948) 76 CLR 1, 349 (emphasis added).

112 *JT International* (2012) 291 ALR 669, 713 [181] (Hayne and Bell JJ).

113 Ibid 685 [42] (French CJ), 707 [150] (Gummow J), 713 [180]–[183] (Hayne and Bell JJ), 741–2 [297]–[301] (Crennan J), 759 [362] (Kiefel J).

114 Ibid 713 [181].

115 Ibid 713 [182].

116 Ibid 742 [301].

Although their reasons on this issue largely coincided with those of Hayne and Bell JJ,[117] Gummow and Kiefel JJ gave two further reasons for rejecting the plaintiffs' submission. The first was that when Dixon J used the phrase 'exclusive possession and control' to identify the substance of the property acquired by the Commonwealth in the *Bank Nationalisation Case*, his Honour did not use that phrase to indicate that s 51(xxxi) was engaged when the Commonwealth obtained no more than some measure of control over the use of property.[118] The second reason was that the *Bank Nationalisation Case* could be distinguished from the present case on the ground that *TPPA* did not create control 'with the clear purpose of, and only one step removed from, completing an acquisition of all the incidents of ownership'.[119]

A further way the Commonwealth allegedly used or controlled the packaging was in mandating that the plaintiffs convey the Commonwealth's health messages on their packaging. However, according to Hayne and Bell JJ (with whom French CJ and Gummow J agreed),[120] the plaintiffs' argument wrongly assumed that the author or sponsor of the message could be personified as 'the Commonwealth'.[121] Their Honours noted that, like 'the Crown',[122] 'the Commonwealth' is a term that could be used in different senses.[123] One sense refers to the body politic.[124] Another sense, and that on which the plaintiffs relied, refers to the executive government.[125] However, Hayne and Bell JJ did not accept that the executive government had a message which was conveyed by the plaintiffs' packaging. Any 'message' was conveyed as a result of tobacco companies complying with the *TPPA* and not as the result of the executive government using the packaging as advertising space.[126] Their Honours' reasoning therefore appears to rely on the notion that property inheres in persons and entities and not, for example, in statutes. Accordingly, 'the Commonwealth' did not obtain a right to use the plaintiffs' packaging to display 'its' messages. Further, and as discussed in Part IV(D)(3), any benefit accruing to the Commonwealth because of compliance with the *TPPA* was not proprietary in nature.[127]

2 *Acquisition of the Plaintiffs' Rights Not to Use Their Property*

The *TPPA* did not confer on the Commonwealth a right to use the plaintiffs' trademarks, implement their registered designs, exploit their patents or otherwise

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117 Ibid 707 [150] (Gummow J), 758–9 [358]–[363] (Kiefel J).
118 Ibid 702 [127] (Gummow J).
119 Ibid 759 [362] (Kiefel J).
120 Ibid 684–5 [42] (French CJ), 707 [150] (Gummow J).
121 Ibid 713–4 [184].
122 See, eg, *Sue v Hill* (1999) 199 CLR 462, 497–503 [82]–[94] (Gleeson CJ, Gummow and Hayne JJ).
123 *JT International* (2012) 291 ALR 669, 714 [185].
124 See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, in which the High Court held that a law extinguishing without compensation the plaintiff's right to mine minerals from land enhanced the property of the body politic and was therefore invalid.
125 *JT International* (2012) 291 ALR 669, 714 [186] (Hayne and Bell JJ).
126 Ibid 714 [188] (Hayne and Bell JJ).
127 Ibid.

put the plaintiffs' intellectual property to its use.[128] The plaintiffs therefore advanced the concept of a right *not to use* their property, that is, a right to extinguish their own legal interests, and submitted that such a right was taken from them and exercised by the Commonwealth under the *TPPA*.[129] However, this submission was rejected by the only judge whose judgment considered it, Crennan J.[130] While acknowledging that the concept of a right not to use property can be useful in some contexts,[131] her Honour described it as an 'awkward and incongruous notion' to apply in relation to registered trademarks and product get-up.[132] Trademarks can be removed from the register for non-use,[133] and an action at common law in respect of product get-up is contingent upon the existence of goodwill generated as a result of using the get-up. Crennan J therefore considered 'use' an integral and defining element of an owner's rights in registered trademarks and product get-up,[134] and rejected the plaintiffs' arguments as synthetic and unreal.[135]

3 *Other Benefits and Advantages*

The plaintiffs and supporting interveners identified three other benefits and advantages that allegedly accrued to the Commonwealth and others under the *TPPA* and were said to enliven s 51(xxxi): first, fulfilment of the *TPPA*'s legislative objects;[136] second, increased prominence of the Quitline logo; and third, a reduction in public healthcare expenditure.

The majority judges held that the pursuit and fulfilment of the *TPPA*'s legislative objects, which included giving effect to Australia's obligations under the *World Health Organisation Framework Convention on Tobacco Control*,[137] did not yield the Commonwealth a benefit that was proprietary in nature.[138] However, their Honours' reasoning on this point did little more than state that conclusion.[139] Only Gummow J, with whom French CJ agreed,[140] provided more than a cursory analysis of the plaintiffs' submission. Specifically, his Honour relied on the

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128 Cf the law impugned in *Dalziel* (1944) 68 CLR 261: *JT International* (2012) 291 ALR 669, 757–8 [354], [358] (Kiefel J).

129 *JT International* (2012) 291 ALR 669, 741 [297] (Crennan J).

130 Ibid 741–2 [297]–[301].

131 See, eg, *Yanner v Eaton* (1999) 201 CLR 351; *JT International* (2012) 291 ALR 669, 741 [300].

132 *JT International* (2012) 291 ALR 669, 741 [300].

133 *Trade Marks Act 1995* (Cth) pt 9. But note *TPPA* s 28(3), which provides that non-use resulting from compliance with the *TPPA* is not a sufficient reason to revoke a trademark's registration.

134 *JT International* (2012) 291 ALR 669, 741–2 [300].

135 'Synthetic' is the sense in which Dixon J used 'unreal' in *British Medical Association v Commonwealth* (1949) 79 CLR 201, 270, to which Crennan J referred: *JT International* (2012) 291 ALR 669, 742 [300].

136 *TPPA* s 3.

137 Opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005); *TPPA* s 3(b).

138 *JT International* (2012) 291 ALR 669, 684–5 [42] (French CJ), 706 [147]–[148] (Gummow J), 712 [177] (Hayne and Bell JJ), 742–4 [302], [306] (Crennan J), 761 [371]–[372] (Kiefel J). Heydon J did not address this point.

139 See especially *JT International* (2012) 291 ALR 669, 712 [177] (Hayne and Bell JJ), 742–4 [302], [306] (Crennan J), 761 [371]–[372] (Kiefel J).

140 *JT International* (2012) 291 ALR 669, 684–5 [42].

judgment of Mason J in the *Tasmanian Dam Case*[141] as authority for the proposition that the mere discharge by the Commonwealth of a treaty obligation does not in and of itself constitute a s 51(xxxi) acquisition.[142]

The Quitline logo is a registered trademark, in respect of healthcare services, of the Anti-Cancer Council of Victoria, which also operates the Quitline telephone service and website.[143] While Crennan and Kiefel JJ accepted that compliance with the *TPPA* would increase the prominence of the Quitline logo on tobacco product packaging[144] and might thereby promote use of the Quitline telephone service,[145] their Honours held that any such benefit was not of a proprietary nature.[146] Gummow J also rejected the plaintiffs' submissions[147] regarding any enhancement of goodwill attached to the Quitline logo as conjectural.[148] Further, his Honour held that because of a complex interaction of (unstated) regulatory, social and market forces, any benefit obtained by Quitline's operator was not sufficiently related to the property taken from the plaintiffs.[149] His Honour gave similar reasons in holding that any expected reduction in public expenditure on healthcare (due to people ceasing smoking) was not a benefit of a proprietary nature.[150]

E *Critique*

Much of the commentary in the second half of Part III of this case note applies with equal force to the majority judges' reasons outlined in this part. Their Honours provided no exhaustive definition of a 'benefit of a proprietary nature'. Indeed, Hayne and Bell JJ opined that even attempting to chart the boundaries of such a concept might not be possible and would certainly not be appropriate.[151]

There is force in that argument. Having a concept of 'constitutional property' that evolves through specific decisions of the High Court reflects the stable traditions of the common law. It can also encourage reasoning that remains grounded in constitutional text and principle[152] and can prevent a stagnation of the law that might otherwise result from an exhaustive definition.

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141 (1983) 158 CLR 1, 145–6.

142 *JT International* (2012) 291 ALR 669, 706 [148].

143 The Quitline telephone service offers free telephone counselling to people who wish to cease using tobacco products: *JT International* (2012) 291 ALR 669, 675 [13] (French CJ), 686 [51] (Gummow J), 729 [252] (Crennan J), 749 [322] (Kiefel J).

144 *JT International* (2012) 291 ALR 669, 742 [302] (Crennan J).

145 Ibid 761 [370] (Kiefel J).

146 Ibid 742–4 [302], [306] (Crennan J), 761 [370] (Kiefel J).

147 French CJ agreed with Gummow on this point: *JT International* (2012) 291 ALR 669, 684–5 [42].

148 *JT International* (2012) 291 ALR 669, 706 [148].

149 Ibid, drawing comparisons with the reasoning in *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567, 587 affirming the decision of Gummow J at first instance: *Bienke v Minister for Primary Industries and Energy* (1994) 125 ALR 151.

150 French CJ and Gummow J were the only judges to consider this benefit: *JT International* (2012) 291 ALR 669, 684–5 [42] (French CJ), 706 [148] (Gummow J).

151 *JT International* (2012) 291 ALR 669, 712 [175].

152 Ibid 715 [190]–[191].

V Proportionality

A Preliminary

As noted in Part IV(A), s 51(xxxi) is both a source of legislative power and a prohibition.[153] It can limit the scope of other s 51 heads of power.[154] Yet, at least since *Attorney-General (Cth) v Schmidt*,[155] the High Court has recognised that the prohibitive aspect of s 51(xxxi) should not be applied in a 'too sweeping and indiscriminating way'.[156] The Court has recognised that some laws, such as laws with respect to taxation,[157] penalties,[158] forfeitures[159] and bankruptcy,[160] can validly effect an acquisition of property other than on just terms.[161]

B *The Commonwealth's Submission*

The Commonwealth accepted that '[n]o set test or formula'[162] has emerged for determining whether an acquisition of property can stand outside of s 51(xxxi).[163] The High Court has applied overlapping approaches, such as:[164] whether the impugned laws were necessary or characteristic means of achieving an objective within power, not being solely or chiefly the acquisition of property;[165] whether the impugned laws were a genuine adjustment of competing property rights;[166] and whether just terms were an 'irrelevant or incongruous notion' in relation to the impugned laws.[167] From these approaches, the Commonwealth drew the following principle, which was said to resemble a proportionality test[168] and to be applicable

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153 See also *Bank Nationalisation Case* (1948) 76 CLR 1, 349–50 (Dixon J).

154 Indeed, that was the basis of the plaintiffs' challenge in *JT International* (2012) 291 ALR 669.

155 (1961) 105 CLR 361.

156 Ibid 372 (Dixon CJ).

157 *MacCormick v Federal Commission of Taxation* (1984) 158 CLR 622, 638, 649.

158 *Theophanous v Commonwealth* (2006) 225 CLR 101, 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

159 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

160 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 372 (Dixon CJ).

161 See generally *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133; Evans, above n 46.

162 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 189 (Deane and Gaudron JJ).

163 Commonwealth, 'Submissions of the Commonwealth of Australia', Submission in *British American Tobacco Australasia Ltd v Commonwealth*, NSD S389/2011, 5 April 2012, 35 [81].

164 Evans, above n 46, 186; Commonwealth, 'Submissions of the Commonwealth of Australia', above n 163, 35–6 [81].

165 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 179–80 (Brennan J); *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 180 [98] (Gleeson CJ and Kirby J).

166 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 189, 191 (Deane and Gaudron JJ); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160–1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 298–300 [497]–[501] (Gummow J).

167 *Theophanous v Commonwealth* (2006) 225 CLR 101, 126–7 [63] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 298 [494] (Gummow J).

168 That is, a test of the sort applied with regard to ss 92, 99 of the *Constitution* and the implied freedom of political communication: Commonwealth, 'Submissions of the Commonwealth of

in *JT International*: that a law may stand outside s 51(xxxi) if the acquisition of property is 'no more than a consequence or incident of a restriction on a commercial trading activity, where that restriction is reasonably necessary to prevent or reduce the harm that activity causes to public health'.[169]

C *Dicta*

French CJ, Gummow, Hayne, Crennan and Bell JJ refrained from considering the Commonwealth's submission.[170] For them, the case could be determined on the basis that the *TPPA* did not effect an acquisition of property.[171]

While her Honour considered it unnecessary to come to a firm conclusion about the applicability of a proportionality analysis,[172] Kiefel J made three criticisms of the Commonwealth's submission. First, her Honour doubted whether the cases relied upon by the Commonwealth could properly be explained upon the basis of a proportionality test;[173] the cases were better explained in terms of the approaches described in Part V(B).[174] Second, her Honour questioned whether the principle the Commonwealth submitted involved a test of proportionality.[175] On her view, the Commonwealth's principle wrongly equated a decision on whether the acquisition was incidental to the law's purpose of preventing public health risks with an answer to the characteristic test of a proportionality analysis; that is, whether the law 'goes too far in achieving its objects'.[176] Finally, Kiefel J suggested that s 51(xxxi) might not even be amenable to a proportionality analysis because: (a) a proportionality analysis requires the identification of a freedom protected by a constitutional guarantee and to identify as that freedom a 'freedom from acquisition other than on just terms' would distort the notion of a constitutional freedom;[177] and (b) unlike s 92 and the implied freedom of political communication, s 51(xxxi) already contains its own limits and conditions.[178]

Heydon J's dicta largely coincided with those of Kiefel J, but his Honour also observed that even if the Court accepted the Commonwealth's statement of principle, it did not operate in its favour; the acquisition of property that his

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Australia', above n 163, 37 [82]. See generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1; B Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212.

169 *JT International* (2012) 291 ALR 669, 753 [354] (Kiefel J). Gummow J noted that there were similarities between the Commonwealth's submissions and the remarks of Brandeis J in *Pennsylvania Coal Co v Mahon* (1922) 260 US 393, 417: *JT International* (2012) 21 ALR 669, 708 [157].

170 *JT International* (2012) 291 ALR 669, 708 [158] (Gummow J), 710–11 [189] (Hayne and Bell JJ), 744 [307] (Crennan J).

171 Hayne and Bell JJ stated that the submission was 'answered by the logically anterior conclusion that the [*TPPA*] effects no acquisition of property': *JT International* (2012) 291 ALR 669, 715 [189].

172 *JT International* (2012) 291 ALR 669, 755 [344].

173 Ibid 753 [335].

174 Ibid.

175 Ibid 753 [336].

176 Ibid 753–4 [338].

177 Ibid 754 [340].

178 Namely, the requirements of just terms and a sufficient purpose: *JT International* (2012) 291 ALR 665, 754 [340].

Honour saw as a consequence of the *TPPA* was not incidental to the operation of the *TPPA*.[179] Rather, the acquisition was the 'fundamental means by which the [*TPPA*] operate[d] and [sought] to achieve its goals'.[180]

VI Conclusion

While some might regard the *TPPA* as a significant public health initiative, the decision affirming its validity is far less remarkable. The reasoning of the majority judges in *JT International* is a consolidation of the orthodox principle established by Mason J in the *Tasmanian Dam Case*.[181] The Court also affirmed the importance of giving the phrase 'acquisition of property' a broad and liberal construction. But the limits of such a construction were not succinctly stated. The majority judges declined to provide a full and exhaustive definition of constitutional property. The boundaries of that concept are instead located in the body of s 51(xxxi) case law that *JT International* now joins.

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179 *JT International* (2012) 291 ALR 669, 725 [234].
180 Ibid 725 [234].
181 (1983) 158 CLR 1, 145.