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High Court delivers its reasons in the challenges to the Tobacco Plain Packaging Act

On 5 October 2012, the High Court published its reasons for its decision (announced on 15 August 2012) in *British American Tobacco Australasia Limited v Commonwealth; JT International SA v Commonwealth* [2012] HCA 43 as to why the *Tobacco Plain Packaging Act 2011* (the Act) did not contravene s 51(xxxi) of the Constitution and was therefore valid.

The decision rests on an application of relatively settled constitutional principle, albeit in a way that emphasises the requirement that, for s 51(xxxi) to be engaged, someone must obtain a benefit of a proprietary kind.

The Act

The general effect of the Act is that, from later this year, all tobacco products must be sold in generic packaging. The packaging must be of standardised shape and dimensions and without any company branding, logos, symbols, other images etc. The name of each brand will be permitted to appear, but only in a prescribed font, size and colour. Under regulations made under the *Competition and Consumer Act 2010* tobacco packaging will also have to carry graphic health warnings covering 75% of the front of the packaging and 90% of the back.

The litigation

The tobacco companies' arguments

Several tobacco companies challenged the validity of the Act on the basis that it acquires property otherwise than on just terms and therefore is contrary to s 51(xxxi) of the Constitution. They relied on various kinds of intellectual property, such as trademarks and designs, which they said they own and which they use in the packaging, promotion and sale of their tobacco products. The tobacco companies said that these rights are rights of 'property' as the word is used in s 51(xxxi) of the Constitution and that the Act deprives them of the only meaningful way they can exploit these property rights and obtain an economic benefit from them.

The Commonwealth's arguments

In reply, the Commonwealth defended the validity of the Act on 3 broad grounds:

1 the Act does not take property

2 even if the Act does take property, none is acquired

3 any acquisition is not on unjust terms.

The reasons

In 6 separate judgments the Court, by a majority of 6 to 1 (Heydon J dissenting), rejected the challenge to the validity of the Act. All of the 6 judges in the majority held that there was no 'acquisition' under s 51(xxxi) of the Constitution because no-one had acquired a benefit of a proprietary kind from the Act; that is, they accepted the Commonwealth's argument (2).

In regard to the Commonwealth's argument (1), at least 3 justices (French CJ at [37], Gummow J at [141] and Heydon J in dissent) found that there is a taking or deprivation of the tobacco companies' property. Nevertheless, French CJ (at [42]) and Gummow J (at [155]) concluded that there is no 'acquisition' because the Commonwealth does not acquire any benefit of a proprietary character.

One justice (Crennan J) appears to have taken the contrary view that there is not a 'taking'. Her Honour concluded that the Act does not deprive the tobacco companies of the 'substance' and 'reality' of their proprietorship in their property since, even under the Act, the brand names which form part of the trademarks are capable of discharging the core function of a trademark: distinguishing the registered owner's goods from those of another (at [293]–[295]). She rejected the tobacco companies' arguments that the Commonwealth takes their property by taking away their 'control' of what is placed on their goods. Her Honour also held (at [306]) that restrictions in the Act do not operate so as to involve the acquisition of any proprietary right by the Commonwealth.

The other 3 justices (Hayne, Bell and Kiefel JJ) do not appear to have reached, or considered they needed to reach, a definitive conclusion on whether there had been a 'taking'. Hayne and Bell JJ concluded (at [181]) that the requirements of the Act are not different in kind from any legislation that requires warning labels on the product. Their Honours held that such legislation effects no 'acquisition' of 'property' contrary to s 51(xxxi) (at [181]). Kiefel J also held that there had been no acquisition, but on the grounds that 'the mere restriction on a right of property or even its extinction does not necessarily mean that a proprietary right has been acquired by another' (at [357]).

In dissent, Heydon J held (at [212]) that the Act deprives the tobacco companies of 'control of their property, and of the benefits of control' and '[gives] that control and the benefits of that control to the Commonwealth'. His Honour found that the Commonwealth acquires the tobacco companies' property because the Act confers on the Commonwealth 'an "identifiable and measurable advantage" relating to the ownership or use of property' (at [225]) by, in particular, enabling the Commonwealth to 'command the publication [on cigarette packets] of messages it desires to have sent, without charge, to the public' (at [218]). He also found that the Act does not make provision for compensation of any kind (at [235]).

Only Heydon J came to a conclusion on the Commonwealth's argument (3), which he rejected.

Implications

The decision rests on an application of relatively settled constitutional principle, albeit in a way that emphasises the requirement that, for s 51(xxxi) to be engaged, someone must obtain a benefit of a proprietary kind. Where appropriate, government departments should seek advice on the constitutional risk that legislation may acquire a benefit of a proprietary character and, if it does, on ways in which the legislation might provide compensation so as not to breach s 51(xxxi).

The Commonwealth was represented in the litigation by the Constitutional Litigation Unit of AGS and lawyers from AGS Dispute Resolution in Canberra.

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