

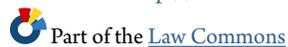
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Examination of the Constitutionality of a Mandatory Front Package Labeling
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IS THE HEALTH STAR RATING SYSTEM A THIN RESPONSE TO A FAT PROBLEM? AN EXAMINATION OF THE CONSTITUTIONALITY OF A MANDATORY FRONT PACKAGE LABELLING SYSTEM

MARIETTE BRENNAN *

Abstract

The Commonwealth of Australia has begun the implementation of a new front package labelling system for packaged food products. Despite calls from various health groups advocating for a mandatory front package labelling system, the Commonwealth opted for a voluntary system that relies on the goodwill of individual companies for its implementation. In discussing Australia's obesity epidemic that has given rise to a need for front package labelling, this paper examines the constitutionality of mandatory front package labelling requirements. It argues that as the Commonwealth Government has the requisite jurisdiction to make the system mandatory it should forego voluntary implementation in favour of a mandatory system.

I INTRODUCTION

In the 1980's Paul Hogan shaped international opinion of Australia with his ubiquitous tourism line 'I'll slip an extra shrimp on the barbie for you.'¹ By the time Paul Hogan swaggered into the persona of Crocodile Dundee, he seemed to embody the meaning of 'Australia/Australian'. The image Australia portrayed to the world was beautiful beaches and sunshine, and happy, healthy people. Fast forward to 2008 and the image of the happy, healthy Australian was replaced with a startling reality: Australia was named as the country with the highest levels of obesity in its general population.² Today, although no longer leading the world, obesity rates remain extremely high, particularly for a country that prides itself on its image as a nation with an active, outdoor lifestyle and healthy people.³

The Commonwealth government has invested billions of dollars into programs that raise public awareness about the risks associated with obesity; more still needs to be done.⁴ One of the most recent programs endorsed by the government in its battle against obesity is front package labelling for food products. Front package labelling has been considered in several

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¹ Robert Upe, 'Hogan hero: why this is our best tourism ad ever', Traveller (online), January 20, 2014, <<http://www.traveller.com.au/hogan-hero-why-this-is-our-best-tourism-ad-ever-311eg>>.

² Jill Stark, 'Australia now world's fattest nation', The Age (online), June 20, 2008, <<http://www.theage.com.au/news/health/australia-worlds-fattest-nation/2008/06/19/1213770886872.html>>;

AAP, 'Australia pips US as world's fattest nation' Sydney Morning Herald (online), June 20, 2008, <<http://www.smh.com.au/news/health/australia-pips-us-as-worlds-fattest-nation/2008/06/19/1213770827371.html>>.

³ Anne Lu, 'Australia and NZ Still High in Most Obese Nation List; Mexico Beats U.S., Now No. 1' International Business Times (online), July 10, 2013, <<http://www.ibtimes.com/australia-nz-still-high-most-obese-nation-list-mexico-beats-us-now-no-1-1312277>>. See generally, National Preventative Health Taskforce, *Australia: The Healthiest Country By 2020* (Commonwealth of Australia, 2009).

⁴ According to the Lancet, a leading medical journal, 'Halting and then reversing the obesity pandemic by changing our societal approach to food, beverages, and physical activity is not an optional choice or a target that can be missed. It is one of the most important challenges that must be tackled collectively': Sabine Kleinert and Richard Horton, 'Rethinking and Reframing Obesity' (1985) 385 (1985) *The Lancet* 2326, 2328. See also, National Preventative Health Taskforce, above n 3, which outlines the economic cost of obesity, current government programs to tackle obesity, and programs and policies that should be adopted.

jurisdictions and implemented in the United Kingdom (UK).⁵ Although Australia has taken a different approach from the traffic light system adopted in the UK, it has, however, followed the UK's lead in making the system voluntary and dependent on the goodwill of food companies.⁶ Health experts have advocated for a mandatory system.⁷ This paper argues that a mandatory front package labelling system is within the constitutional capacity of the Commonwealth government and should therefore be done. This paper begins with a general overview of the obesity epidemic, including its risks and causes. It then examines Australia's current food labelling requirements, including the new Health Star Rating system. It then proceeds to an analysis of the constitutionality of the Health Star Rating System, with the focus upon potential arguments arising under s 51(xxxi) of the *Australian Constitution*.

II OBESITY EPIDEMIC

The obesity problem is not Australia's alone. In the past thirty years, the number of obese people has risen dramatically across the world. In fact, obesity has become so prevalent that, in 2013, the American Medical Association (AMA) declared it a disease. The AMA hopes that the change in language surrounding obesity will have a positive impact in the way the medical community treats obese patients.⁸ The World Health Organization defines obesity and overweight "as abnormal or excessive fat accumulation that presents a risk to health."⁹ Currently, a body mass index calculation is used to determine whether a person can be considered obese or overweight.¹⁰ Individuals with a body mass index of over 25 are considered overweight; a body mass index of over 30 indicates the person is obese.¹¹ The most recent statistics on obesity, in Australia, are troubling: currently 29 per cent of all Australian adults are considered obese and the number is increasing.¹² More alarmingly, the number of obese children is also incredibly high: current statistics indicate that 25 per cent of all Australian children are obese.¹³

⁵ Jacqui Wise, 'Consistent Food Labelling System is Rolled Out Across UK' (2013) 346 *British Medical Journal* 4010. See also, US Food and Drug Administration, *Front of Package Labeling Initiative* (2014) FDA <<http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202726.htm>>.

⁶ Kyle Turner and Steven Allender, *Eat Well: Goodbye Health Star Rating System* (30 June 2014) SBS <<http://www.sbs.com.au/food/article/2014/06/30/eat-well-goodbye-health-star-rating-system>>.

⁷ The Royal Australasian College of Physicians, *Mandatory Front-of-Pack 'Traffic Light Labelling' on Food and Beverages*, A Policy Position Statement by the Royal Australasian College of Physicians <[http://www.foodlabellingreview.gov.au/internet/foodlabelling/submissions.nsf/lookupsubmissionattachments/1atan-85jvsb20100518094116dml0/\\$file/448a.pdf](http://www.foodlabellingreview.gov.au/internet/foodlabelling/submissions.nsf/lookupsubmissionattachments/1atan-85jvsb20100518094116dml0/$file/448a.pdf)>.

⁸ American Medical Association, *AMA Adopts New Policies on Second Day of Voting at Annual Meeting* (18 June 2013) <<http://www.ama-assn.org/ama/pub/news/news/2013/2013-06-18-new-ama-policies-annual-meeting.page>>.

⁹ World Health Organization, *Health Topics: Obesity* (2014) <<http://www.who.int/topics/obesity/en/>>.

¹⁰ Ibid. The body mass index calculation is relatively simple: it takes the person's weight (in kilograms) and then divides it by the person's height in meters squared. See Deena Patel, 'Are We Too Darned Fat? Trying to Prevent and Treat Obesity with Health Care Reform' (2004) 8(1) *Quinnipiac Health Law Journal* 141, 141. The body mass index calculation is controversial; critics have claimed that it is a flawed evaluation method and does not accurately predict obesity in all individuals. See Ann Silversides, 'Does the Body Mass Index Get More Attention than it Deserves?' (1999) 161(1) *Canadian Medical Association Journal* 72; Abel Romero-Corral et al, 'Accuracy of Body Mass Index to Diagnose Obesity in the US Adult Population' (2008) 32(6) *International Journal of Obesity* 959.

¹¹ World Health Organization, *Health Topics: Obesity* (2014) <<http://www.who.int/topics/obesity/en/>>.

¹² In 2006, the rate of obesity in Australia was approximately 22 per cent of the adult population; in eight years it has risen by seven per cent. More troubling is the fact that rates of obesity are increasing at a faster rate in Australia than any other country in the world. Lesley Russell, 'Tackling Obesity Will Help Reduce Budget Fat', *The Age* (online), 10 September 2014 <<http://www.theage.com.au/comment/tackling-obesity-will-help-reduce-budget-fat-20140909-10eaci.html>>.

¹³ Australia Bureau of Statistics, 'Children who are overweight or obese', 1301.0 Year Book Australia, 2009-

Obesity is considered a significant health problem because of the associated repercussions of the disease. Numerous studies have linked obesity to early mortality.¹⁴ Obesity is a leading factor in several debilitating and life-threatening diseases, including, type 2 diabetes; cardiovascular diseases (including heart attacks and strokes); some cancers (including colon and breast cancer); and musculoskeletal disorders (including osteoarthritis).¹⁵ Childhood obesity is particularly problematic because it is linked to adult obesity and the early onset of the aforementioned obesity related diseases. Moreover, childhood obesity is linked to breathing difficulties, increased risk of fractures, insulin resistance and psychological effects during childhood.¹⁶

In addition to the personal health impact of obesity, there is also a significant public cost. It is estimated that obesity costs the Australian public over \$120 million a year, or put differently, the equivalent of eight per cent the economy's annual output.¹⁷ This is only based on economic impact that can be directly calculated: work absenteeism due to obesity related illness.¹⁸ When adding the costs of publicly funded health care and government subsidies for programs to lower the obesity rate, the yearly cost of obesity is staggering; in 2005, the number was estimated at an annual cost of over \$21 billion dollars.¹⁹ Plainly put, obesity related costs are unsustainable and a strong government response is needed to address the rising public cost of the epidemic.

Both the state and the Commonwealth governments are involved, through various programs and initiatives, with the fight against obesity. Unfortunately, obesity is a difficult social problem to address because the root cause of obesity is not one singular event. Obesity occurs when an individual consumes more calories than the body uses throughout the course of a day; the extra calories are stored in the body as fat.²⁰ To stop the obesity epidemic, it must be determined why a person is overeating and/or not burning enough calories and design an appropriate response to this problem.²¹ Accordingly, one of the most often cited causes for

2010, April 6, 2010 (online) < <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1301.0Chapter11062009-10> >; OECD Directorate for Employment, Labour and Social Affairs, *Obesity Update* (June 2014) <<http://www.oecd.org/health/Obesity-Update-2014.pdf>>, 4.

¹⁴ Kenneth F Adams et al, 'Overweight, Obesity and Mortality in a Large Prospective Cohort of Persons 50 to 71 Years Old' (2006) 355 *New England Journal of Medicine* 763; David W Haslam and W Philip T James, 'Obesity' (2005) 366 (9492) *The Lancet* 1197; Eugenia E Calle et al, 'Body-Mass Index and Mortality in a Prospective Cohort of US Adults' (1999) 341 *New England Journal of Medicine* 1097. See generally, Barbara Von Tigerstrom and Tristan Culham, 'Food Labelling for Healthier Eating: Is Front-of-Package Labelling the Answer' (2009) 33(1) *Manitoba Law Journal* 87, 90.

¹⁵ World Health Organization, *Fact Sheet on Obesity and Overweight*, (January 2015) <<http://www.who.int/mediacentre/factsheets/fs311/en/>>.

¹⁶ Ibid.

¹⁷ Matt Wade, 'Obesity Costs Drag Down National Good' *Sydney Morning Herald* (online), 9 March 2013, <<http://www.smh.com.au/national/health/obesity-costs-drag-down-national-good-20130308-2fr0b.html>>.

¹⁸ Ibid.

¹⁹ Stephen Colagiuri et al, 'The Cost of Overweight and Obesity in Australia' (2010) *Medical Journal of Australia* 192(5) 260; Australian Medical Association, *Overweight and Obesity Costs Australia over \$21 Billion per Year* (28 February 2010), MJA Media Release <<https://ama.com.au/media/overweight-and-obesity-costs-australia-over-21-billion-year>>. See also, Russell, above n 12.

²⁰ US Department of Health and Human Services: National Heart, Lung and Blood Institute, *What Causes Overweight and Obesity?* (13 July 2012) <<http://www.nhlbi.nih.gov/health/health-topics/topics/obe/causes>>. See also National Preventative Health Taskforce, above n 3; Christina A Roberto et al, 'Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking' (2015) 385 (9985) *The Lancet* 2400.

²¹ Harvard University, TH Chan School of Public Health, *Obesity Prevention Source: Obesity Causes* (2015) <<http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/>>.

obesity is genetics.²² In addition to genetics, environmental causes, including pre and postnatal influences,²³ unhealthy diets,²⁴ lack of physical activity, sleep patterns and socio-economic status are all linked to obesity.²⁵ For the majority of obese individuals a combination of the above risk factors contribute to their obesity.²⁶ For a government trying to control this health epidemic, the numerous causes of obesity are problematic. The government will have to introduce a multitude of programs and initiatives to even begin addressing the obesity problem.²⁷ With no end in sight for the obesity epidemic, demand for government intervention, in the form of legislative intervention, has grown.²⁸

Governments, internationally, have tried to adopt a variety of different legislative responses to obesity and, more specifically, to obesity caused by poor diets. These legislative responses have been difficult to perfect because of the role that food plays in society. Diets are often heavily influenced by social and cultural factors; for instance, the Mediterranean diet has been referred to as a ‘healthy’ diet style, while the American diet has been considered a poor diet.²⁹ Additionally, with the change in the home life structure, in particular, the transition away from stay at home parenting, people have shifted away from traditional domestic food preparation and have started to rely on packaged foods.³⁰ The increased role of convenient pre-packaged

²² Genetics raise the risk of obesity in an individual, although genetics alone do not determine obesity. A combination of genetics and environmental factors contribute to obesity: *ibid.* See also, US Department of Health and Human Services, above n 20.

²³ Studies have found that a mother’s pregnancy diet may influence a child’s likelihood of obesity. Additionally, studies have also found that breastfed children are less likely to become obese in comparison to their formula fed counterparts. See Harvard University, above n 21. See also, Institute of Medicine. *Nutrition During Pregnancy: Part I: Weight Gain, Part II: Nutrient Supplements* (1990, National Academies Press); E Oken et al, ‘Gestational Weight Gain and Child Adiposity at Age 3 Years’ (2007) 196(4) *American Journal of Obstetrics and Gynecology* 322; DS Ludwig and J Currie, ‘The Association Between Pregnancy Weight Gain and Birthweight: A Within-Family Comparison’ (2010) 376 *Lancet* 984; I Rogers, ‘The Influence of Birthweight and Intrauterine Environment on Adiposity and Fat Distribution in Later Life’ (2003) 27 *International Journal of Obesity* 755; S Arenz et al, ‘Breast-Feeding and Childhood Obesity - A Systematic Review’ (2004) 28 *International Journal of Obesity* 1247; C G Owen et al, ‘Effect of Infant Feeding on the Risk of Obesity Across the Life Course: A Quantitative Review of Published Evidence’ (2005) 115 *Pediatrics* 1367.

²⁴ The ‘western’ diet of high sugar and salt consumption, fast food and large portion sizes is a significant contributor to obesity: Harvard University, above n 21. See also, M B Schulze et al, ‘Dietary Patterns and Changes in Body Weight in Women’ (2006) 14 *Obesity (Silver Spring)* 1444; P K Newby et al, ‘Food Patterns Measured by Analysis and Anthropometric Changes in Adults’ (2004) 80 *American Journal of Clinical Nutrition* 504.

²⁵ US Department of Health and Human Services, above n 20. See also National Preventative Health Taskforce, above n 3. Christina A Roberto, ‘Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking’ (2015) 385 (9985) *The Lancet* 2400.

²⁶ See Harvard University, above n 21.

²⁷ This paper focusses on only one of the proposed methods of helping to control obesity: mandatory front package labelling of food products. Studies have shown that obesity prevention requires a multitude of on-going strategies to achieve the best result. As such, studies have concluded, that there is no single government program that can, alone, cure or prevent obesity. See Tim Lobstein et al, ‘Child and Adolescent Obesity: Part of a Bigger Picture’ (2015) *The Lancet* <[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)61746-3/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61746-3/fulltext)>. See also National Preventative Health Taskforce, above n 3.

²⁸ National Preventative Health Taskforce, above n 3. See also Mark Lawrence, ‘Reflections on Public Health Policy in the Food Regulatory System: Challenges, and Opportunities for Nutrition and Food Law Experts to Collaborate’ (2009) 14 *Deakin Law Review* 397; Nola M Ries and Barbara von Tigerstrom, ‘Legal Interventions to Address Obesity: Assessing the State of the Law in Canada’ (2011) 43(2) *University of British Columbia Law Review* 361, 362.

²⁹ Neal Blewett et al, *Labelling Logic: Review of Food Labelling Law and Policy* (Australian and New Zealand Food Regulation Ministerial Council, 2011) 18. See also, F Sofi et al, ‘Accruing Evidence on Benefits of Adherence to the Mediterranean Diet on Health: An Updated Systematic Review and Meta-Analysis’ (2010) 92 *American Journal of Clinical Nutrition* 1189.

³⁰ Neal Blewett et al, above n 29.

foods has altered traditional diets and nutritionists are concerned with the lack of nutrition in pre-packaged foods.³¹ This shift to convenience foods is a major factor in the rise of obesity rates.³² For years, academics have debated how governments should respond to this health crisis: the issues of taxation on candy and carbonated beverages (such as Coca-Cola), the pros and cons of health labelling at fast food restaurants and labelling of processed foods have all been considered or implemented.³³

Recently, experts have been calling for changes to the mandatory labelling of processed foods; in particular, there has been a push to create an easy to comprehend front package labelling system for packaged foods.³⁴ Experts have argued that such a system, if properly used, increases consumer knowledge on food, impacts on consumer purchases and can create incentives for food manufacturers to alter their products to achieve a 'healthier' nutrition profile.³⁵ These dietary changes can lead to a reduction in a person's overall calorie consumption, which can lead to weight loss. As indicated, this paper focusses on the implementation of front-of-pack labelling in Australia. The section below examines Australia's current labelling requirements for pre-packaged foods and moves on to critique the newly developed Health Star Rating system.

III FOOD LABELLING REGULATIONS FOR PRE-PACKAGED FOOD

Australia already has food labelling requirements for processed and packaged foods. Food labelling requirements cover a variety of goals: some relate to the content of the food (ie, health and safety information, for instance allergen content); others relate to consumer protection laws (ie, foods cannot be labelled in a manner that will mislead the public); while others advertise nutritional information about the food (ie, calorie content).³⁶ Given the broad scope of purposes of food labelling, a myriad of government laws and agencies, both at the state and

³¹ Ibid. See also B A Swinburn et al, 'Diet, Nutrition and the Prevention of Excess Weight Gain and Obesity' (2004) 7(1A) *Public Health Nutrition* 123.

³² Ibid.

³³ Merav W Efrat and Rafael Efrat, 'Tax Policy and the Obesity Epidemic' (2012) 25 (2) *Journal of Law and Health* 233; Laura Hoffman, 'The Fight over Fizz: Soda Taxes as a Means of Curbing Childhood Obesity' (2011) 5(2) *Pittsburgh Journal of Environmental and Public Health Law* 123; Kara Marcello, 'The New York City Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic' (2013) 46(2) *Connecticut Law Review* 807; David Orentlicher, 'Health Care Reform and Efforts to Encourage Healthy Choices by Individuals' (2014) 92(5) *North Carolina Law Review* 1637; Michelle I Banker, 'I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience' (2010) 65 (4) *Food and Drug Law Journal* 901.

³⁴ The Royal Australasian College of Physicians, above n 7. See also Amy Corderoy, Mark Kenny and Dan Harrison, 'Health Experts Say Food Star System is Critical', *The Sydney Morning Herald* (online) 26 February 2014 <<http://www.smh.com.au>>. See also, US Food and Drug Administration, above n 5.

³⁵ Corinna Hawkes et al, 'Smart Food Policies for Obesity Prevention' (2015) 385 (9985) *The Lancet* 2410; L Sonnenberg et al 'A Traffic Light Food Labeling Intervention Increases Consumer Awareness of Health and Healthy Choices at the Point-of-Purchase' (2013) 57 *Preventive Medicine* 253; E L Vyth, 'Actual Use of Front-of-Pack Nutrition Logo in the Supermarket: Consumers' Motives in Food Choice' (2010) 13 *Public Health and Nutrition* 1882; E L Vyth, 'Front-of-Pack Nutrition Label Stimulates Healthier Product Development: A Quantitative Analysis' (2010) 7 *International Journal of Behavioral Nutrition and Physical Activity* 65; L Young and B Swinburn, 'Impact of the Pick the Tick Food Information on the Salt Content of Food in New Zealand' (2002) 17 *Health Promotion International* 13.

³⁶ See *Australia New Zealand Food Standards Code (Cth); Competition and Consumer Act 2010 (Cth)*. See generally, Lawrence, above n 28.

federal level are involved.³⁷ This paper focusses on food regulation labelling that centres on nutrition content.

In Australia, food regulation and labelling requirements are the result of a complex web of international and domestic legislation. The Australia and New Zealand Ministerial Forum on Food Regulation ('the Forum') oversees food regulation and develops domestic policy for food regulation.³⁸ The Food Regulation Standing Committee ('FRSC') is responsible for the implementation of the policies developed by the Forum.³⁹ Domestically, food labelling in Australia is dictated by the standards established pursuant to the *Australia New Zealand Food Standards Code* ('FSC'). Pursuant to the FSC packaged foods must contain a nutrition information panel.⁴⁰

Information panels play a pivotal role in public education regarding the packaged food. A 2007 study concluded that 84 per cent of all Australians stated that food labels are their main source of nutrition information for the packaged food.⁴¹ Given the important educational role that the food label plays, it is obvious why the majority of packaged foods must contain a nutrition information panel. There are only four exceptions to the requirement that packaged food contain a nutrition information panel: first, if the food package is too small to contain a nutrition information label; second, if the food is made and packaged at the location where it is sold; third, if the customer is present when the food is packaged; and fourth, if a customer requests that the food be packaged and delivered.⁴²

For packaged foods that require the nutrition information panel, companies must include information related to the average quantity per serve and per 100g of protein, total fat, saturated fats, carbohydrates, sugars and sodium.⁴³ Information related to total fats, saturated fats, sugars and sodium are vital because excessive amounts of any of these drastically increase health problems and obesity.⁴⁴ The panels may also include additional information related to the percentage of daily intake for the above information. The style of the nutrition panel is generic across all foods: typically located on the side or back of the packaged with a white background

³⁷ Neal Blewett et al, above n 29, 23. For example, see the *Competition and Consumer Act 2010* (Cth). These types of consumer protection are monitored by state consumer protection agencies. These labelling requirements are separate from the ones dictated by the Australia New Zealand Food Standards Code.

³⁸ The Forum membership is comprised of a Minister from New Zealand and the Health Ministers from Australian States and Territories, the Australian Government as well as other Ministers from related portfolios (Primary Industries, Consumer Affairs etc). The purpose of the membership is to ensure a 'whole-of-food chain' approach to food safety regulation.

³⁹ The FRSC is a sub-committee of the Forum.

⁴⁰ The standards found in the *FSC* are considered legislative instruments pursuant to the *Legislative Instruments Act, 2003* (Cth). (It should be noted that a revised Code is intended to take effect on 1 March 2016.) See *FS Code*, standard 1.2.8. See also Food Standards Australia New Zealand, 'Health Star Rating System: Style Guide' (30 June 2014) <<http://www.foodsafety.govt.nz/industry/general/labelling-composition/health-star-rating/hsr-style-guide-30-june-2014.pdf>>.

⁴¹ Food Standards Australia New Zealand, *Consumer Attitudes Survey 2007: A Benchmark Survey of Consumers' Attitudes to Food Issues* (2008).

⁴² Most of these exceptions are for foods made for immediate consumption and more akin to a restaurant-for instance a deli counter at a grocery store will not have to include a nutrition label on the ham it slices and packages for a specific customer nor will a pizza restaurant have to include a label on a pizza box for food it has prepared and delivered to a specific customer. Some information may still be required for foods that meet these exceptions, including information on whether the food has been genetically modified, warning statements and/or information on country of origin of the food. See FSC, standard 1.2.1 subclause 2(1). See generally, Independent Panel for the Review of Food Labelling Law and Policy, above n 29, 27.

⁴³ Ibid FSC standard 1.2.8.

⁴⁴ Harvard University, above n 21.

and black writing.⁴⁵ Although standards for such labelling have been developed, studies have concluded that people still do not completely understand the meaning of the information or how to use the information to ensure that they are eating a balanced and healthy diet.⁴⁶

A Health Star Rating System

Despite the existence of mandatory labelling requirements for nutrition information, there have been calls for more user-friendly labelling methods. In the United Kingdom, a user-friendly label on the front of the food package has been adopted and implemented. Australia, following the United Kingdom's lead, has developed and adopted a voluntary front package labelling system for food products. The Forum has approved the new Health Star Rating system. This system, which was developed in consultation with various consumer groups and industry leaders, was adopted in June 2013. The development of the Health Star Rating system began when the Australia and New Zealand Food Regulation Ministerial Council commissioned, on the request of the Council of Australian Governments, a review of food labelling law and policy.⁴⁷ Originally, experts had called for a traffic light system to be used as front package labelling - green for healthy choices, red for unhealthy choices.⁴⁸ Consumer groups rejected the traffic light scheme and the star rating system (similar in design to the one used for energy ratings) was accepted as a compromise. The voluntary implementation of the system began in June 2014.⁴⁹

The star rating system works in the same manner that the name implies. Foods will be given a rating based on their nutritional content; this rating will then be converted into a star scale (each food will receive a star rating from ½ star to 5 stars, with ½ star increments) and this scale will then be displayed on the front of the packaged food.⁵⁰ Above the stars, there will be a sliding scale that will highlight and correspond to the number of stars that the food received. Healthier foods will receive more stars. In addition to the stars, the label will include a 'Nutrient Profiling Scoring System'. This system will contain several of the same features that can be found on the more traditional back package labelling requirements, including information regarding the amount of saturated fat, sugars and sodium and an energy icon denoting how many kilojoules will be consumed.⁵¹ Companies will also have the option of including one fact on positive nutrient information about the product (ie, it may include a statement that the packaged food fulfils the daily requirement for vitamin C). All of this information will be contained in a standard label on the front of the package.

Experts have argued that front package labelling is an essential tool that allows the general public to make proper food choices.⁵² One of the key features of the front package labelling is

⁴⁵ Neal Blewett et al, above n 29, 28.

⁴⁶ A Shine, S O'Reilly and K O'Sullivan, 'Consumer Use of Nutrition Labels' (1997) 99(8) *British Food Journal* 290; C Ni Mhurchu and D Gorton, 'Nutritional Labels and Claims in New Zealand and Australia: A Review of Use and Understanding' (2007) 31 (2) *Australian and New Zealand Journal of Public Health* 105. See generally, The Royal Australasian College of Physicians, above n 7.

⁴⁷ Turner and Allender, above n 6.

⁴⁸ The United Kingdom has recently introduced a mandatory traffic light labelling system for its food packages. See Wise, above n 5.

⁴⁹ Katherine Rich, *Work to be Done on Australia's Health Star Rating Labelling System*, New Zealand Food and Grocery Council <www.fgc.org.nz/media/work-to-be-done-on-aust-health-star-rating-labelling-system-says-katherine-rich>.

⁵⁰ Commonwealth of Australia, *About Health Star Ratings* (6 December 2014) Health Star Rating System <<http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/content/About-health-stars>>.

⁵¹ Ibid.

⁵² The Royal Australasian College of Physicians, above n 7. See also Amy Corderoy, Mark Kenny and Dan

that the serving size will be standardised across all food products; this will allow easy comparisons between varieties of food choices. Back package labelling can be based on different serving sizes (with a secondary column that has a standardised 100g serving size) and thus makes it more complicated for the average consumer to make proper comparisons. With stars directly on the front of the package, consumers will not be able to avoid seeing the nutrition information and will be able to make such comparisons as to which cereal is healthier by simply walking down an aisle at the grocery store and looking at the packages. Moreover, companies currently include statements on the front package of their food products (ie, low fat, healthy, etc) that do not accurately reflect the entire health benefits or detriments of the food; a standardized government label will overcome any misconceptions.⁵³ The ease of obtaining the information is key to the success of front package labelling.⁵⁴

Despite the wide spread endorsement of front-package labelling by various health groups, the model adopted in Australia has not been without criticism.⁵⁵ There have been several recurrent criticisms ranging from the cost of the program to how the program evaluates food and assigns a star rating.⁵⁶ The Australian Food and Grocery Council has been critical of the volunteer rating system since its development. One of its criticisms is the cost of the program: accordingly, the Council has estimated that the cost of implementation will exceed \$200 million. The Council has called for a cost-benefit analysis to determine the true nature of the cost and how it will be handled by the industry.⁵⁷ Fear persists that the cost of implementation will result in higher food prices and therefore, ultimately, be paid for by consumers.⁵⁸

More concerning are the criticisms attacking the calculation method used to assess the quality

Harrison, 'Health Experts Say Food Star system is Critical' *The Sydney Morning Herald* (online) 26 February 2014 <<http://www.smh.com.au>>.

⁵³ The Australian Competition and Consumer Commission regulates front packaging claims (for eg, claims that the food is made with real fruit or is low in fat). The ACCC ensures compliance with the *Competition and Consumer Act 2010* (Cth), formerly the *Trades Practices Act 1974* (Cth). Despite the regulation, front package claims can still meet standards (ie, low in fat) but still not be a healthy food. A standardised government label will eliminate any potential conflict. See Australian Competition and Consumer Commission, *Food Labelling Guide* (2009) <<http://www.pca.org.au/site/cms/documents/00776.pdf>>. The Heart Foundation has also used front package labelling quite successfully. Despite the popularity of the Heart Foundation's Tick Program (companies can apply to the heart and stroke foundation to allow their product to display the Foundation's Tick on the front package; this Tick certifies that the food meets the Heart Foundation health standards), it is entirely voluntary and free from government oversight. A Tick on the food product does not necessarily mean that the food choice is healthier than those of the competitor; rather, it may simply mean that one company chose not to participate. Moreover, the Tick does not evaluate substantial differences between products - it is a single standard, once a company reaches the standard, a competitor with a substantially healthier product will also be rewarded with the same tick. In short, the Tick program has more limitations than the new government front package labelling scheme. In light of the introduction of a government standard, the Heart Foundation has announced that a review of its Tick program has started (the expected date of completion is the end of 2015). See Heart Foundation, *25 Years of Heart Foundation Tick* <<http://www.heartfoundation.org.au/healthy-eating/heart-foundation-tick/Pages/default.aspx>>.

⁵⁴ Teri E Emrich, JoAnne Arcand and Mary R L'Abbe, 'Front-of-pack Nutrition Labelling Systems: A Missed Opportunity?' (2012) 103(4) *Canadian Journal of Public Health* e260.

⁵⁵ Katherine Rich, above n 49. See also Grace Smith, *AusVeg 'Appalled' at Health Star Rating System for Shunning Vegetables* (20 July 2014) Australian Institute of Food Safety <<https://www.foodsafety.com.au/2014/07/ausveg-appalled-at-health-star-rating-system-for-shunning-vegetables/>>.

⁵⁶ Amy Bainbridge, 'Health Star Rating Website for Food and Beverages Disappears 24 hours after being Published Online' *ABC News* (online), 7 February 2014 <<http://www.abc.net.au/news/2014-02-08/star-rating-website-disappears-24-hours-after-being-posted/5246990>>.

⁵⁷ *Ibid.*

⁵⁸ Katherine Rich, above n 49.

and health of a given food. Creating a system that accurately reflects the nutritional profile of a food is a very difficult task. To make the system work, a number of significant methodological issues need to be resolved from the outset. These issues include: ‘the selection of index nutrients, the choice of reference daily value and the choice of reference amounts...[m]ost importantly, all indices need to be validated against an accepted independent measure of diet quality’.⁵⁹ In the Health Star Rating system, the actual calculation of the healthiness of a food (the nutritional profile of the food) is based on a complex algorithm; the algorithm was hotly contested and amended to meet the needs of the dairy industry.⁶⁰ Despite the complexity of the algorithm, concerns remain that it fails to properly assess the full nutritional profile of all foods and that the selection of index nutrients fails to reflect the actual nutritional value of the food.⁶¹ These concerns can be best demonstrated by the criticism of the Health Star Rating system’s assessment of fruits and vegetables.

The Health Star Rating system’s initial algorithm was criticized when it was revealed that certain vegetables and fruits failed to receive a five star rating (a five star rating indicates that the food is a healthy choice); in fact, almost 50 per cent of vegetables received less than a five star rating. AusVeg, the leading vegetable industry body, has been highly critical that many fruit, vegetables and nuts only receive three stars due to their fat and sugar content. Comparatively, a lot of known junk foods have received a 2.5 star rating. There is a fear that the low star ratings for certain fruits and vegetables, when compared with known junk foods, will cause people to forego consuming fruits and vegetables.⁶² There have been attempts to rectify the problem and the most current algorithm now gives the majority of fruits and vegetables a four out of five star rating.⁶³ Despite the change, AusVeg is still not satisfied and has noted that important nutritional elements, such as beta-carotene, are not used to calculate the health value of the food. These omissions lead to a lower star rating and therefore indicate that the vegetable is less nutritious than it actually is.⁶⁴

Finally, another important criticism is that this system, in its present state, is completely voluntary. Although there has been widespread endorsement of the system, it is up to individual companies to decide whether to follow through and adopt the measures.⁶⁵ The United Kingdom, which has implemented a front package labelling system, has had a mixed reaction from food companies; several companies, including Cadbury, have refused to adopt

⁵⁹ F Foltran et al, ‘Nutritional Profiles in a Public Health Perspective: A Critical Review’ (2010) 38 *Journal of International Medical Research* 318, 320-21. More complex issues can arise in this context. Accordingly, ‘modelling and creating nutrient profiles involves the definition of a set of targets, such as: (i) the purpose for which the model is to be used; (ii) the group or population that the model is relevant to; (iii) the appropriateness of specific criteria; (iv) the decision on how and if to include specific food components; and (v) the choice of reference amounts to use (eg, per 100g, per serving or per 100KJ).

⁶⁰ Bainbridge, above n 56.

⁶¹ Rich, above n 49.

⁶² Smith, above n 55.

⁶³ Ibid.

⁶⁴ Ibid. See also, Alex Sampson, ‘Health Star Rating System Still Doesn’t Rank Vegetables Five Out of Five’, *The Weekly Times* (online), 14 July 2014 <<http://www.weeklytimesnow.com.au>>. Numerous scientific studies have concluded that the regular consumption of fruits and vegetables is vital to a healthy diet; moreover, a diet rich in fruits and vegetables decreases the risk of mortality. See Xia Wang et al, ‘Fruit and Vegetable Consumption and Mortality from All Causes, Cardiovascular Disease, and Cancer: Systematic Review and Dose-Response Meta-Analysis of Prospective Cohort Studies’ (2014) *British Medical Journal* 349; X Zhang et al, ‘Cruciferous Vegetable Consumption is Associated with Reduced Risk of Total and Cardiovascular Disease Mortality’ (2011) 94 *American Journal of Clinical Nutrition* 240; A Bellavia et al, ‘Fruit and Vegetable Consumption and All-Cause Mortality: A Dose-Response Analysis’ (2013) 98 *American Journal of Clinical Nutrition* 454.

⁶⁵ Department of Health, ‘Front-of-Pack Labelling Updates’ 23 February 2015 <<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-front-of-pack-labelling-1>>.

the system.⁶⁶ In fact, estimates have found that the voluntary system only covers around 60 per cent of packaged foods.⁶⁷ The Australian government is hoping for widespread endorsement - the system only works if there is widespread endorsement. The Australian government has stated that the first two years of the system will be voluntary but that after the two years, a thorough assessment of the system will be done. If, at that point, the uptake of the system is minimal, the government may choose to legislate mandatory compliance.⁶⁸ The fact remains that Australia is in the midst of a costly obesity epidemic that needs to be immediately addressed.

At this stage, the lack of a mandatory front-of-pack labelling system is concerning since it will provide incomplete information to the consumer. For some food choices, the consumer will easily understand the nutrient information but will still struggle to understand the information regarding other food choices. The lack of consistency fails to address the underlying purpose of the system: the system is meant to make Australians aware of their food choices and encourage healthy choices. The Commonwealth government is obviously hopeful that the widespread consultation process with the food industry will ensure that there is a large uptake of the voluntary provisions; however if this fails to materialize, the government should not hesitate to make the system mandatory. As this paper will now discuss, a mandatory system requiring front package labelling on food products is likely to be deemed constitutional and within the proper jurisdiction of the Commonwealth government.

IV CONSTITUTIONAL CHALLENGES TO MANDATORY FRONT OF PACK LABELLING

Should Australia opt to make front package labelling a requirement, the government may face opposition from food companies. Food packaging is ‘one of the most highly valued and sought after communication channels in the market place’.⁶⁹ Food companies spend considerable time and resources designing packaging for their food; the package detailing is often filled with various trademarked logos and designs that have been carefully planned to enhance brand recognition and consumer preferences.⁷⁰ Forcing companies to alter their current packaging

⁶⁶ John Hall, ‘Plans for New Food Labeling to Combat UK Obesity are Dealt a Blow as Cadbury and Coca-Cola Reject ‘Traffic Light’ System’, *The Independent* (online), 19 June 2013 <<http://www.theindependent.co.uk>>; Denis Campbell, ‘Food Packaging Traffic Lights to Signal Health Choices on Salt, Fat and Sugar’, *The Guardian* (online), 19 June 2013 <<http://www.theguardian.com>>. Coca-Cola has since adopted the system, although large food companies continue to refuse to implement it. See Dennis Campbell, ‘Coca-Cola Agrees to Traffic Light Labeling on Drinks Sold in UK’, *The Guardian* (online), 5 September 2014 <<http://www.theguardian.com>>.

⁶⁷ Lisa Dowd, ‘Major UK Supermarkets Launch New Food Labels’, *Sky News* (online), 19 June 2013 <<http://www.news.sky.com>>.

⁶⁸ Department of Health, above n 65. In fact, since its implementation, several companies have refused to adopt the new health star rating system, including Kellogg’s and McCain. This has led to calls that the system should be made mandatory much sooner than the two year period. See, Melissa Davey, ‘Kellogg’s and McCain Criticised for Not Signing up to Health Star Rating Scheme’, *The Guardian* (online), 17 March 2015 <<http://www.theguardian.com/australia-news/2015/mar/17/kelloggs-mccain-criticised-not-signing-up-health-star-rating>>. See also ‘Food Companies Failing on Health Stars’, *The Australian* (online), 17 March 2015 <<http://www.theaustralian.com.au>>.

⁶⁹ Blewett et al, above n 29, iii; see also, Paula O’Brien, ‘The Contest over Valuable Label Real Estate: Public Health Reforms to the Laws on Alcohol Beverage Labelling in Australia’ (2014) 37 (2) *University of New South Wales Law Journal* 565, 565.

⁷⁰ See Laura Stampler, ‘Here’s How Much Money the World’s Biggest Brands Spent Designing their Logos’, *Business Insider* (online), 15 August 2012 <www.businessinsider.com>. Redesigning packaging can be an expensive undertaking for a company. For instance, Cadbury spent over £6 million to redesign how its Dairy Milk chocolate bar is placed in its package to optimise how clients view it at a grocery store checkout. See Rupert Steiner, ‘Cadbury Spends £6m on Making its Chocolate Bars Stand Up’, *Daily Mail* (online), 28 December 2011

would impact on the way the food companies are able to display their preferred designs. Companies, although they were invited to participate in the discussion on the implementation of a front package labelling system, may ultimately choose to ignore the voluntary legislation in favour of their current packaging designs. Food companies have a history of jealously guarding their packaging from front package labelling requirements.⁷¹ Should the Commonwealth opt to make the system mandatory, companies may attempt to litigate to prevent its implementation. In Australia, companies may challenge the constitutionality of the system.⁷²

In Australia, the most likely argument alleging that the law is unconstitutional would be based on an allegation that the government was acquiring property without providing just terms compensation in violation of s 51(xxxi) of the *Constitution*⁷³ which states:

s 51

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:

...

(xxxi) 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.

Although, s 51(xxxi) was enacted for the purposes of protecting state property rights, the High Court has ruled that this section extended to protect private property interests.⁷⁴ This allows private persons, including corporations, to challenge the Commonwealth's expropriation of their property. In reviewing below the High Court's jurisprudence on s 51(xxxi) it is argued that although a food company's packaging may be considered property, a mandatory front package labelling system will not violate s 51(xxxi) even if the Commonwealth fails to provide just terms.

Before undertaking an analysis of s 51(xxxi), the need for the Commonwealth government to demonstrate that it has the jurisdiction to enact front-of-pack food labelling laws will be looked into. The wording of s 51(xxxi) specifically limits its application to instances where the

<<http://www.dailymail.co.uk>>. See also, David Shannon, 'The Law of the Label' (1976) 1 *University of New South Wales Law Journal* 241, 241.

⁷¹ It is estimated that companies spent over \$1 billion euros to advocate against the adoption of a traffic light front package labelling system by the European Union: 'A Red Light for Consumer Information', *Corporate Europe Observatory* (online), 10 June 2014 <<http://corporateeurope.org/news/red-light-consumer-information>>.

⁷² Aside from domestic legal challenges, companies may also pursue international legal challenges. For instance, tobacco companies have argued that the *Tobacco Plain Packaging Act* is a violation of international law enacted by the World Trade Organization. See below n 85.

⁷³ In *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v The Commonwealth* (2012) 291 ALR 669, 746 [314] ('*JT International SA*'), the plaintiffs had agreed that the impugned legislation, the *Tobacco Plain Packaging Act 2011* (Cth), did not violate ss 51 (i), (xviii), (xx), (xxix) (the Commonwealth powers over trade and commerce, intellectual property, corporations and external affairs respectively). See below for the argument on the relevance of the *JT International SA* jurisprudence on front package labelling.

⁷⁴ Some academics have raised questions over whether s 51(xxxi) was meant to protect privately held property interests. As has been pointed out, at the time the section was negotiated into the *Constitution*, States had the ability to seize privately held property with the mere passage of legislation; just compensation was not required. It seems at odds that states would have negotiated such a right against the Commonwealth government when it was not common practice. Despite these reservations, the High Court has concluded that s 51(xxxi) extends beyond the mere protection of state held property to also cover privately held property. See, David Jackson and Stephen Lloyd, 'Compulsory Acquisition of Property' [1998] *Australian Mining and Petroleum Law Association Yearbook* 75, 76.

Commonwealth has ‘power to make laws’.⁷⁵ As such, it is necessary to consider under which head of power the Commonwealth government has been given jurisdiction to make laws in relation to food labelling.

The most likely grant of power to make laws in relation to food labelling can be found in either s 51(i): the trade and commerce provision; and/or s 51(xx): the provision relating to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. Section 51(i) grants the Commonwealth government the power to make laws in relation to ‘trade and commerce with other countries, and among the States’. This section has been used to enact laws related to a variety of public health objectives.⁷⁶ More recently, this section has also been used by the Commonwealth to adopt national labelling requirements for a variety of different products ranging from cigarette packaging⁷⁷ to energy efficiency ratings for electrical appliances.⁷⁸ These precedents can be relied on to support national labelling requirements for food products.

The corporations power may also be used by the Commonwealth to support the implementation of mandatory front-package labelling for food products. Pursuant to the corporations power, the Commonwealth government has the power to enact laws in relation to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.⁷⁹ Most relevant in this analysis is the commonwealth power to make laws in relation to trading corporations.⁸⁰ To determine whether food companies could be considered trading corporations for the purposes of s 51(xx), a Court would have to determine the character of the corporation by reference to the nature of its activities.⁸¹ The High Court of Australia, in

⁷⁵ *Australian Constitution* s 51(xxxi). See also *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 402-3 (Latham CJ).

⁷⁶ See *Tobacco Advertising Prohibition Act 1992* (Cth). This Act had the improvement of public health as a primary objective, see s 3(2). The Act applied to particular corporations and defined corporations by explicitly referencing s 51(i); see also s 8. See also the *Therapeutic Goods Act 1989* (Cth) which, again, specifically refers to the trade and commerce power in s 6, amongst others. See generally, Brian R Opeskin, ‘The Architecture of Public Health Law Reform: Harmonisation of Law in a Federal System’ (1998) 22 *Melbourne University Law Review* 337, 342.

⁷⁷ In its arguments before the High Court of Australia, the Commonwealth government relied on s 51(i), amongst others, to justify its powers to enact the *Tobacco Plain Packaging Act 2011* (Cth). See generally, Commonwealth of Australia, ‘Submissions of the Commonwealth of Australia,’ Submission in *British American Tobacco Australasia Ltd and Ors v The Commonwealth of Australia*, s389/2011, 5 April 2012, [3].

⁷⁸ Prior to the development of national energy efficiency rating labels for electrical appliances, some states had already begun implementing systems for appliances sold within their jurisdiction. See for instance, *State Electricity Commission (Energy Efficiency Labelling) Regulations 1987* (Vic); *Electricity (Electrical Articles) Regulation 1994* (Qld) and the *Electrical Products Regulations 1990* (SA). See generally, Adrian Bradbrook, ‘Eco-Labeling: Lessons from the Energy Sector’ (1996) 18 *Adelaide Law Review* 35, 37-38. Despite state regulation, the Commonwealth chose to implement legislation to standardize the labelling across Australia. In its *Greenhouse and Energy Minimum Standards Act 2012* (Cth), the legislation is limited by reference to both constitutional trade or commerce (see Div 4, s 5) and constitutional corporation (see Div 4, s 5). As such, the Commonwealth is relying on the grant of powers from ss 51(i) and 51 (xx) to justify the law. To review the labelling requirements for a particular appliance, see the *Greenhouse and Energy Minimum Standards Determinations* enacted pursuant to s 23 of the *Greenhouse and Energy Minimum Standards Act 2012* (Cth).

⁷⁹ *Australian Constitution*, s 51(xx).

⁸⁰ Patrick Keyzer, *Principles of Australian Constitutional Law* (LexisNexis Butterworths, 3rd ed, 2010) 152.

⁸¹ *New South Wales v Commonwealth* (1990) 169 CLR 482; *ibid* 154. To determine the character of the corporation, the court will generally rely on an examination of the actual activities of the corporation and not the purpose of the corporation. See *R v Federal Court of Australia; Ex parte WA National Football League (Adamson’s Case)* (1979) 143 CLR 190. See also, *Fencott v Muller* (1983) 152 CLR 570. In *Muller*, the Court considered the purpose of the corporation because the corporation had not yet engaged in any activity. See generally Keyzer, above n 80, 154-156.

its decision in *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* ('Adamson's Case'), stated that the definition of trading is to be interpreted in its current sense.⁸² Trading implies that the corporation engages in the activity of trade; trade, has a broad definition and includes 'buying and selling, negotiations, bargains, transport for reward and the purchase or sale of money, credit, news or information, tangibles or intangibles'.⁸³ From this expansive definition of trading, a company that sells food products may be considered a trading corporation for the purposes of s 51(xx) and may therefore be subject to Commonwealth regulation.⁸⁴

Similar to s 51(i), s 51(xx) has also been cited as justification for the Commonwealth to establish national labelling standards. In both the *Greenhouse and Energy Minimum Standards Act 2012* and the *Tobacco Plain Packaging Act 2011* the Commonwealth limited the application of the Acts to 'constitutional corporations'. Both Acts define constitutional corporations as 'a corporation to which paragraph 51(xx) of the Constitution applies'.⁸⁵ More significantly, the Commonwealth government, with the implementation of the FSC, has already passed mandatory food labelling requirements. This code, enacted pursuant to *Food Standards Australia New Zealand Act 1991* (Cth), applies to all corporations and trading corporations as defined by s 51(xx) of the *Constitution*.⁸⁶ Both ss 51(i) and (xx) could, arguably, grant the Commonwealth power to pass mandatory front-package labelling legislation.

Since it can be argued that the Commonwealth has the power to make front-package labelling laws, the arguments surrounding s 51(xxxi) of the *Constitution* needs to be considered. The High Court has defined the scope and application of s 51(xxxi) in multiple cases.⁸⁷ In one of its earliest decisions on s 51(xxxi), the High Court outlined the section's purposes.⁸⁸ The High Court identified two primary purposes that are served by the section: first, it provides the Commonwealth government the power to acquire property; second, it serves to protect an individual or a State government from having his or her property interest taken away without proper compensation.⁸⁹ Simply put, this section allows the Commonwealth government to acquire property above what was originally granted to it in the Australian Constitution; however, the acquisition must be for a relevant public purpose and the Commonwealth must compensate the impacted party for the deprivation of the property interest.⁹⁰ Section 51 (xxxi) is the only source of constitutional power whereby the Commonwealth government may acquire property interests from the states or private individuals.⁹¹ Once the purpose of the section was understood, the High Court was tasked with defining the specific wording in the

⁸² (1979) 143 CLR 190, 233.

⁸³ Keyzer, above n 80, 152. See *Bank Nationalisation Case* [1948] 76 CLR 1, 382.

⁸⁴ The High Court has had to grapple with the extent to which the Commonwealth can regulate trading corporations pursuant to s 51(xx). In the *Commonwealth v Tasmania* (1983) 158 CLR 1496, 505, 509, 549 ('*Tasmanian Dam Case*'), the High Court addressed whether the power to regulate the corporation extends beyond the trading activity. The High Court concluded that it extended to also include activities undertaken for the purpose of trading activities; three judges further reasoned that the Commonwealth's power over the trading corporation is plenary.

⁸⁵ *Greenhouse and Energy Minimum Standards Act 2012*, div 4 s 5; *Tobacco Plain Packaging Act 2011*, s 5.

⁸⁶ *Food Standards Australia New Zealand Act 1991* (Cth), s 4.

⁸⁷ See for eg, *Bank of NSW v Commonwealth* ('*Bank Nationalisation Case*') [1948] 76 CLR 1, [47] (Dixon J); *Tasmanian Dam Case* (1983) 158 CLR 1; *Georgiadis v Australian Overseas Telecommunications Corporation* (1994) 179 CLR 297; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327.

⁸⁸ *Bank Nationalisation Case* [1948] 76 CLR 1, [47] (Dixon J).

⁸⁹ *Ibid*; Rosalind Dixon, 'Overriding Guarantee of Just Terms of Supplementary Source of Power? Rethinking s 51 of the Constitution' (2005) 27(4) *Sydney Law Review* 638.

⁹⁰ Jackson and Lloyd, above n 74, 75.

⁹¹ *Ibid* 77. The authors have noted that a series of exceptions to this rule have been developed.

section.

When determining the meaning of s 51(xxxi), the Court relied on general approaches to constitutional interpretation. This means that the wording of s 51(xxxi) is not to be limited by a ‘narrow and technical construction’; rather the words should be given a ‘large and liberal interpretation’.⁹² As such, when the High Court defined the term ‘acquisition’ it gave it a broad definition. Accordingly, the term included both direct and indirect acquisitions of property and the acquisition of property for a third party beneficiary.⁹³ Furthermore, when examining the history of s 51(xxxi), the Court concluded that the term acquisition requires that the Commonwealth government acquire an interest in the property and not merely extinguish another party’s proprietary interest.⁹⁴ In the *Tasmanian Dam Case*, Mason J concluded (with Murphy and Brennan JJ concurring on this aspect):

‘To bring the constitutional provision into play it is not enough that the legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however, slight or insubstantial it may be.’⁹⁵

Moreover, the acquisition of property must be for a purpose over which the Commonwealth government has jurisdiction.⁹⁶

The Court also had to define the terms ‘property’ and ‘just terms’. Again, typical constitutional interpretation rules applied to the terms. As such, the High Court employed a broad and purposive approach when defining the terms.⁹⁷ In regards to property, the Court concluded that the term encompassed both real and personal property.⁹⁸ In *R v Toohey; Ex parte Meneling Station Pty Ltd*,⁹⁹ the High Court endorsed a very broad definition of property:

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.¹⁰⁰

⁹² *Bank Nationalisation Case* [1948] 76 CLR 1, 7 [15] (Starke J); *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 611-12 (Higgins J). See *Edwards v Attorney-General for Canada* (1930) AC 124, 136-37; *British Coal Corporation v The King* (1935) AC 500, 518.

⁹³ *Bank Nationalisation Case* [1948] 76 CLR 1. See Dixon, above n 89. See also, *McClintock v The Commonwealth* (1947) 75 CLR 1 (Rich and Williams JJ) (a law authorising the acquisition by pineapple canneries would fall within s 51(xxxi)); *PJ Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 (where the acquisition of land for the benefit of NSW falls within s 51(xxxi)).

⁹⁴ The High Court has looked at American jurisprudence to define the terms of section 51 (xxxi) because the United States Fifth Amendment clause served as inspiration for s 51(xxxi). See Duane Ostler, ‘The Drafting of the Commonwealth Acquisition Clause’ (2009) 28(2) *University of Tasmania Law Review* 211. In terms of acquisition, the Court has noted that the US. clause employs the term “taken” in lieu of acquisition as a result these two terms need separate definitions. ‘Taken’ implies that the simple removal of the property can be a violation of the Fifth Amendment clause; ergo, acquisition has a more technical definition. See, *Tasmanian Dam Case* (1983) 158 CLR 1, 494-495; *Georgiadis v Australian Overseas Telecommunications Corporation* (1994) 179 CLR 297,304-305, 315, 320-21 (Mason CJ, Deane, Gaudron, Dawson, Toohey JJ).

⁹⁵ (1983) 158 CLR 1, [282].

⁹⁶ *Bank Nationalisation Case* [1948] 76 CLR 1, [24].

⁹⁷ *Tasmanian Dam Case* (1983) 158 CLR 1, [207] (Kirby J.).

⁹⁸ *Minister of State for the Army v Dalziel* [1944] HCA 4; (1944) 68 CLR 261, 290; and cf *Australasian United Steam Navigation Co Ltd v The Shipping Control Board* (1945) 71 CLR 508; *Bank Nationalisation Case* [1948] 76 CLR 1, [19].

⁹⁹ *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327.

¹⁰⁰ *Ibid* [27] (Mason J), citing *National Provincial Bank Ltd. v Ainsworth* (1965) AC 1175, 1247-1248. See also Jackson and Lloyd, above n 74, 83.

When defining the ‘just terms’ guarantee, the Court concluded that ‘just terms’ requires that the individual whose property was expropriated by the government be compensated with the ‘pecuniary equivalent of the property acquired’.¹⁰¹ As such, historically, the concept of ‘just terms’ has been associated with monetary interest; recent jurisprudence has departed from this definition. In the *Tasmanian Dam Case*, the Court stated that

there is no precise definition of the meaning of the phrase ‘just terms’ in s 51(xxxi). Compensation provided by the Commonwealth for an acquisition may assume a variety of forms any of which would satisfy the requirement of ‘just terms’.¹⁰²

Furthermore, the High Court has stated that it is the Commonwealth government that determines what is the appropriate level of compensation for the acquisition of property because ‘just terms’ must be weighed against the interests of the public and the Commonwealth.¹⁰³ Nevertheless, the Court has cautioned that it can exercise its discretion to determine whether the Commonwealth government has satisfied the ‘just terms’ requirement.¹⁰⁴

Despite the broad interpretation of the terms of s 51(xxxi), the High Court has developed a series of jurisprudence that outlines several situations where the Commonwealth government may acquire a property interest without providing ‘just terms’ compensation. Accordingly, four categories of exception were identified:¹⁰⁵ i) s 51(xxxi) will not apply to interests that are ‘inherently susceptible to modification’;¹⁰⁶ ii) s 51(xxxi) will not apply where the concept of ‘just terms’ is ‘irrelevant or incongruous’;¹⁰⁷ iii) s 51(xxxi) will not apply if there is no acquisition of property;¹⁰⁸ and iv) s 51(xxxi) will not apply if there are contrary constitutional

¹⁰¹ *Bank Nationalisation Case* [1948] 76 CLR 1, [22]. See also, *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77, 85; *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314, 323-24, 327.

¹⁰² *Tasmanian Dam Case* (1983) 158 CLR 1, [88] (Deane J). See generally, Celia Winnett, ‘“Just Terms” or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition’ (2010) 33(3) *University of New South Wales Law Journal* 776.

¹⁰³ See *Grace Brothers Pty Ltd v The Commonwealth* [1946] 72 CLR 269, 280 where Latham CJ stated, ‘[j]ustice involves consideration of the interests of the community as well as of the person whose property is acquired. See also *Tasmanian Dam Case* (1983) 158 CLR 1, 558 (Deane J).

¹⁰⁴ *Grace Bros. Pty. Ltd. v. The Commonwealth* (1946) 72 CLR 269, 291; *Bank Nationalisation Case* [1948] 76 CLR 1, [20-21].

¹⁰⁵ Dixon, above n 89.

¹⁰⁶ This exception was first identified in the High Court decision in *Health Commission v Peverill* (1994) 179 CLR 226. The Court ultimately concluded that s 51(xxxi) did not apply because the right that was acquired by the Commonwealth through legislation could be repealed or altered at any time by the mere discretion of the Commonwealth government. A majority of the Court upheld this exception in *The Commonwealth v WMC Resources* (1998) 194 CLR 1, 49 (McHugh J) See also Dixon, above n 89.

¹⁰⁷ This exception applies to situations where the Commonwealth government acquires property through the imposition of fines, penalties or forfeitures. The High Court has identified the reason for this exception in the *Ex parte Lawler* case (1994) 179 CLR 270, where it stated, ‘However, the power conferred by s 51(xxxi) is one with respect to “acquisition of property on just terms”. That phrase must be read in its entirety and, when so read, it indicates that s 51(xxxi) applies only to acquisitions of a kind that permit of just terms. It is not concerned with laws in connection with which “just terms” is an inconsistent or incongruous notion. Thus, it is not concerned with a law imposing a fine or penalty, including by way of forfeiture, or a law effecting or authorizing seizure of the property of enemy aliens or the condemnation of prize. Laws of that kind do not involve acquisitions that permit of just terms and, thus, they are not laws with respect to “acquisition of property”, as that expression is used in s 51(xxxi).’ See also *Burton v Honan*, (1952) 86 CLR 160; *Cheatley v The Queen* (1972) 127 CLR 291; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

¹⁰⁸ *Tasmanian Dam Case*, (1983) 158 CLR 1. This concept will be discussed below under the analysis of the High Court’s decision in *JT International SA* (2012) 291 ALR 669.

intentions.¹⁰⁹

Finally, the Court had to grapple with the consequences of the Commonwealth government acquiring property without just terms compensation. Should the government fail to provide just terms to an individual or state whose property has been seized, the law which seizes the property is struck down; it does not grant the individual the right to just terms compensation.¹¹⁰ The reason behind this is simple: the *Constitution* provides that property can only be acquired on just terms; if the Commonwealth fails to provide just terms, the legislation does not conform to s 51(xxxi) and the law is struck down as a result. It was against this historical line of jurisprudence that the High Court was again asked to consider the applicability of s 51(xxxi).

JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v The Commonwealth (*'JT International SA'*)¹¹¹ is the most recent High Court case dealing with the interpretation of s 51(xxxi); it is also a case that would likely provide a strong precedent supporting mandatory front package labelling. Based on the High Court's ruling here an argument that front package labelling violated s 51(xxxi) would likely fail. In this case, tobacco companies, including JT International, challenged the Commonwealth government's legislation that required tobacco companies to use plain packaging for their products. Tobacco companies commonly use packaging as a form of advertising and spend a significant amount of money researching the design of tobacco packaging.¹¹² Pursuant to the legislation, companies would not be able to include any recognisable trademarks or company logos on the package. Instead all cigarettes would be packaged in a plain white package with the name of the company in standard black print. Mandatory alterations of tobacco packaging have widely been opposed to by the tobacco companies because it interferes with the specific design that the companies have sought to achieve.¹¹³

In *JT International SA*, tobacco companies asserted that the Commonwealth's plain packaging legislation violated s 51(xxxi) of the *Constitution*. The tobacco companies asserted that they had property interests in the designs of tobacco packaging. These property interests took the form of intellectual property rights, namely trademarks and trade designs that would be prevalently displayed on the tobacco packaging. The proposed Commonwealth legislation prevents companies from using the packaging as the company desires and, as tobacco

¹⁰⁹ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134. *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155. See also, Dixon, above n 89.

¹¹⁰ Jackson and Lloyd, above n 74, 82.

¹¹¹ (2012) 291 ALR 669.

¹¹² It has been argued that 'the "product package is the communication life-blood of the firm", the "silent salesman" that reaches out to customers and that packaging "act[s] as a promotional tool in its own right". Cigarette packaging conveys brand identity through brand logos, colours, fonts, pictures, packaging materials and pack shapes. The world's most popular cigarette brand, Marlboro, can be identified readily through its iconic red chevron. The Marlboro brand is estimated to be worth \$US27 billion, making it the tenth most valuable (product) brand in the world': Becky Freeman, Simon Chapman and Matthew Rimmer, 'The Case for the Plain Packaging of Tobacco Products' (2007) 103 *Addiction* 4, 581, 587. See also Andrew D Mitchell, 'Australia's Move to the Plain Packaging of Cigarettes and its WTO Compatibility' (2010) 5 *Asian Journal WTO & International Health Law and Policy* 405.

¹¹³ Tobacco companies have long disputed attempts by governments to place limits on how the company may use its packaging. See generally, Mitchell, above n 112. See also the ongoing dispute arising under the Bilateral Investment Treaty between Hong Kong and Australia. In this dispute, Philip Morris (a tobacco company) is arguing that Australia has expropriated its property by banning its use of company trademarks and, additionally, Australia's supposed breach of WTO law has breached the company's legitimate expectations. See, Australian Government, Attorney-General's Department, *Tobacco Plain Packaging: Investor-State Arbitration*, <<http://www.ag.gov.au/tobaccoplainpackaging>>.

companies argue, the Commonwealth acquires this property and obtains benefits; the benefits includes compliance with and the fulfilment of the purposes of the *Tobacco Plain Packaging Act, 2011*.¹¹⁴ Since the legislation removes property rights without any form of compensation to the tobacco companies, it is argued that the Commonwealth has failed to provide just terms for the acquisition of the property and therefore violates s 51(xxxi).

The High Court's 2012 judgment concluded that the plain packaging legislation was constitutionally valid. French CJ, Gummow, Hayne and Bell, Heydon, Crennan, and Kiefel JJ all wrote separate judgments; with the majority of the Court ultimately concluding that s 51(xxxi) did not apply to the situation.¹¹⁵ The reasons for the decision are examined below. In-depth attention to the decision is important because this case will likely form a strong precedent should food companies seek to challenge the constitutionality of mandatory front package labelling of food products.

To determine whether s 51(xxxi) applied, the High Court had to determine whether the intellectual property that was in dispute could fall within the definition of property pursuant to s 51(xxxi). Patents, trademarks and copyrights all owe their legal character to various statutes; the question was whether these rights can be considered property. An examination of the relevant statutes (*Trade Marks Act, Designs Act, Patents Act* and *Copyright Act*) reveals that the 'interest' created by these statutes is, in fact, personal property that is capable of transmission by assignment or operation of law.¹¹⁶ The High Court has long endorsed a broad definition of property that includes things that are 'definable, identifiable by third parties, capable in its nature of assumption by third parties'.¹¹⁷ Quite simply, intellectual property rights are capable of fitting into the High Court's broad definition of property. The conclusion that intellectual property, including trademarks and patents, is property pursuant to s 51(xxxi) prevents the Commonwealth government from acquiring it without providing just terms compensation.

While the Commonwealth government is prohibited from acquiring intellectual property without providing just terms compensation, the main issue in *JT International SA* was whether the Commonwealth made an acquisition when it limited how the tobacco companies could package their products. Previous jurisprudence has established that the term 'acquisition' implies that the Commonwealth government must not only deprive the party of the property but it must also gain a benefit as a result of the acquisition.¹¹⁸ In this instance, although the legislation interfered with the enjoyment of the tobacco companies' use of their intellectual property, the Commonwealth did not gain a benefit. As stated:

While the imposition of those controls may be said to constitute a taking in the sense that the plaintiffs' enjoyment of their intellectual property rights and related rights is restricted, the corresponding imposition of controls on the packaging and presentation of tobacco

¹¹⁴ *JT International SA* (2012) 291 ALR 669, 712[176]-[177]; *Tobacco Plain Packaging Act, 2011* (Cth).

¹¹⁵ *JT International SA* (2012) 291 ALR 669. Heydon J dissented and concluded that the *Tobacco Plain Packaging Act 2011* (Cth) was a violation of s 51(xxxi) and would have declared the Act invalid: at 291 [242].

¹¹⁶ Daniel Fletcher, 'JT International SA v Commonwealth: Tobacco Plain Packaging' (2013) 35(4) *Sydney Law Review* 827, 832. See also *JT International SA* (2012) 291 ALR 669, 691-92, 719, 729, 755 [78]-[86], [202]-[205], [249], [346]-[347]. See generally, *Trade Marks Act 1995* (Cth) ss 21(1), 106; *Designs Act 2003* (Cth) ss 10(2), 10-11; *Patents Act 1990* (Cth) ss 13(2) and *Copyright Act 1968* (Cth) s 196.

¹¹⁷ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247-48 as approved in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 528; *Mutual Pools & Staff Pty Ltd. V The Commonwealth* (1994) 179 CLR 155, 176; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 166; and, *Commonwealth v Western Australia* (1999) 196 CLR 392, 488.

¹¹⁸ *JT International SA* (2012) 291 ALR 669, 684 [42] (French CJ).

products does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition.¹¹⁹

Accordingly, both the judgments of Gummow J, and Hayne and Bell JJ, also concluded that the Commonwealth, by merely limiting the use of the companies' intellectual property, did not do enough to acquire a benefit and therefore the legislation did not violate s 51(xxxi).

Thus begs the question, what does this mean for front package labelling for food products? The current regime is simply permissive. Food companies, if they choose to participate, will update their food packaging to reflect the health star system. A voluntary regime does not run the risk of violating the *Constitution*. However, a permissive regime, as discussed, will sometimes fail to fulfill the goals of such a program. The Commonwealth government has recognized that a permissive regime may fail and has stated that the entire system will be reassessed two years after implementation and, at that point, the government may make the health star rating system mandatory.

Should the Commonwealth government choose to mandate a compulsory front package labelling system, it would have the jurisdiction to do so. It would be difficult for courts not to follow the precedent established in *JT International SA*. Similar to the tobacco companies in *JT International SA*, food companies will be forced to forgo or alter their traditional marketing get-up on packages to comply with government labelling requirements. Like *JT International SA*, food companies will be deprived of their ability to display their intellectual property as they see fit. The similarities between the two cases would make it difficult for food companies to succeed in their argument that the government was acquiring property interests in product packaging without compensation and therefore in violation of s 51(xxxi).

Despite the strong precedent established by the High Court in its decision in *JT International SA*, it may be argued that forcing a mandatory front-package labelling system is different from plain packaging. In plain packaging, the government is simply legislating that the tobacco companies cannot use their commercially designed get up on the package; the actual package, with the exception of compulsory health warnings, is left blank.¹²⁰ With the implementation of mandatory front package labelling, the Commonwealth government will not only prevent the company from displaying its logos and designs in the manner it chooses but it will also be forcing the company to display information on its packages. In mandatory front package labelling, the government will be using the space on the packaging, not simply preventing the company from using it. It may be argued that the government's use of the packaging space is therefore equivalent to the Commonwealth government acquiring and using a proprietary interest without compensating the company for such use.¹²¹

The precedent established in *JT International SA* does not conclusively address the situation where the tobacco company has its right to use its trademarked material limited by the government and then the Commonwealth uses the space for its own purposes. Under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth), tobacco companies are required to include certain graphic health warnings on their cigarette

¹¹⁹ *JT International SA* (2012) 291 ALR 669, 685 [44] (French CJ).

¹²⁰ The *Tobacco Plain Packaging Act 2011* (Cth) did not legislate additional warning signs to be placed on the tobacco packages; however, it did stipulate that previously legislated warning signs would remain in place. As such, the plain packaging of tobacco products would still contain government warning labels and a quitline logo and would not technically be a 'plain' package.

¹²¹ *JT International SA* (2012) 291 ALR 669, 712-13[178].

packages. Moreover, the Commonwealth has legislated that these standardized government warning labels must cover at minimum 30 per cent of the front surface of the tobacco packaging and 90 per cent of the surface of the back of the package.¹²² In the *Tobacco Plain Packaging Act 2011* (Cth), s 10 states that the standardized health warnings would remain in place and must appear on the plain packaging. In *JT International SA*, the tobacco companies did not dispute the issue of mandatory warning labels; their dispute focused on what could appear on the remaining parts of the package.¹²³

Accordingly, should the government choose to implement mandatory front package labelling, it will not be in a situation akin to plain packaging. In the former case, the companies will still be able to use their logos and commercial get-up on the portion of the package that remains; the question remains whether forcing a label on a product amounts to an acquisition under s 51(xxxi). In its submissions, the Commonwealth identified a myriad of legislation that requires labels to be placed on products; these range from children's toys to industrial chemicals to therapeutic goods.¹²⁴ As the Commonwealth argued, there is a long history of government regulation on the packaging and labelling of products in order to protect public health and safety. The Commonwealth then stated that there has never been an instance where a company, facing such a statutory restriction has, challenged the regulation claiming that it modified or extinguished the company's property rights over trademarks, patents, designs or copyrights.¹²⁵ In fact, Crennan J, in obiter, stated: 'The further submission that the plaintiffs have a right to place whatever they wish on their chattels, and that this right has been appropriated by the Commonwealth, must also be rejected. The plaintiffs' ability to place material on their packaging is and has for a long period been limited by law.'¹²⁶ Although, in *JT International SA*, the Court was referring to the legislative restrictions placed on tobacco products, this argument could equally apply to food products since food products have been subject to labelling requirements for decades.¹²⁷

¹²² *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) made under the *Trade Practices Act 1974* (Cth). The front package requirement was modified to cover 75 per cent of the front of the packet by the *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) made under the *Competition and Consumer Act 2010* (Cth).

¹²³ (2012) 291 ALR 669, 686 [53] (Gummow J).

¹²⁴ See for instance: *Therapeutic Goods Act 1989* (Cth); *Therapeutic Goods Order No 69-General requirements for labels for medicine*; *Health Act 1928* (Vic); *Food and Drug Standards Regulations 1935* (Vic); and *Food Standards Australia New Zealand Act 1991* (Cth). See generally, Commonwealth of Australia, 'Submissions of the Commonwealth of Australia,' Submission in *British American Tobacco Australasia Ltd and Ors v The Commonwealth of Australia*, s389/2011, 5 April 2012, [59].

¹²⁵ Commonwealth of Australia, 'Submissions of the Commonwealth of Australia,' Submission in *British American Tobacco Australasia Ltd and Ors v The Commonwealth of Australia*, s389/2011, 5 April 2012, [59].

¹²⁶ (2012) 291 ALR 669, 742 [301]. In *Trade Practices Commissions v Tooth & Co Ltd* (1979) 142 CLR 397, 414-415, the High Court endorsed the application of the following quotation for s 51(xxxi) jurisprudence: 'There is no set formula to determine where regulations ends and taking begins; so the questions depends on the particular facts and the necessities of each case and the Court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest' (at 556). See *Penn Central Transportation Co v New York City* (1978) 438 US 104. See also *Tasmanian Dam Case* (1983) 158 CLR 1, [75]-[77] (Deane J). The High Court has clearly recognised that regulation of a product that reduces an individual's property interest does not automatically correlate to an acquisition for the purposes of s 51(xxxi).

¹²⁷ Crennan J ultimately concluded that '[a]ny 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, does not involve any diminution in or extinguishment of any property': *JT International SA* (2012) 291 ALR 669, 742 [301]. Such a statement, again, could be made in regards to food companies.

Moreover, another compelling argument made by the Commonwealth centred on the recognition of a long-standing exemption that it argued should be found in s 51(xxxi). After a careful examination of American jurisprudence on the Fifth Amendment to the United States' *Constitution*, the Commonwealth argued that in situations where property is taken as a result of fulfilling a public service, compensation is not required. Put simply,

acquisition of property without compensation is outside the scope of s 51(xxxi) if that acquisition is no more than a necessary consequence or incident of a restriction on a commercial trading activity, where that restriction is reasonably necessary to prevent or reduce harm caused by that trading to members of the public or public health.¹²⁸

The High Court has stated that there is usefulness in examining American jurisprudence to interpret s 51(xxxi). The Fifth Amendment provided the inspiration for s 51(xxxi) and the Court has used its interpretation as a barometer to interpret the respective Australian section.¹²⁹ While the Court has deviated from American jurisprudence, this deviation is a result of the difference of wording between the two provisions.¹³⁰ Despite these deviations, jurisprudence on the Fifth Amendment remains influential to the interpretation of s 51(xxxi).

An examination of the Fifth Amendment jurisprudence has indicated that if the 'taking' is the result of an important public purpose, it will not be considered a taking pursuant to the Fifth Amendment. As the United States Supreme Court stated:

The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage'... Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. ... These restrictions are 'properly treated as part of the burden of common citizenship.' ... Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' ... and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.¹³¹

Such an argument should equally apply to Australia. The government has always limited a company's ability to package and label its products in whatever manner it chooses if an important public purpose dictates a different need. Labelling requirements have never been considered an acquisition of property rights by the Commonwealth government; there is no reason that it should change. Labelling requirements are a proper limitation on property rights and seek to achieve a valuable public purpose. Similar to the US jurisprudence, labelling requirements should not be considered an acquisition of property under s 51(xxxi).

¹²⁸ *JT International SA* (2012) 291 ALR 669, 744 [307] (Crennan J). This statement of principle was said to accord with decisions of the Supreme Court of the United States in *Mugler v Kansas* [1887] USSC 277; 123 US 623, 668; *Pennsylvania Coal Co v Mahon* [1922] USSC 193; 260 US 393, 413, 417, 422; *Kimball Laundry Co v United States* [1949] USSC 95; 338 US 1, 5; *Goldblatt v Hempstead* [1962] USSC 68; 369 US 590, 592-593; *Andrus v Allard* [1979] USSC 172; 444 US 51, 65-66; and *Keystone Bituminous Coal Association v DeBenedictis* [1987] USSC 33; 480 US 470, 488-489, 491-492.

¹²⁹ *Andrews v Howell* (1941) 65 CLR 255, 282. See also *The Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77, 82-3; *Wurridjal v Commonwealth* (2009) 237 CLR 209, 425 [306]. See generally, Ostler, above n 94.

¹³⁰ *Andrews v Howell* (1941) 65 CLR 255, 282; *The Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77, 82-3; *Trade Practices Commissions v Tooth & Co Ltd* (1979), 142 CLR 397. See generally, Ostler, above n 94.

¹³¹ *Keystone Bituminous Coal Assn v DeBenedictis* [1987] USSC 33; 480 US 470; 107 S Ct 1232, 1245.

Section 51(xxxi), like all constitutional provisions, is interpreted broadly; despite this broad definition, the Court has clearly identified exceptions when the Commonwealth can acquire property without providing just terms. Moreover, the Court has interpreted the words in s 51(xxxi) in a manner that can imply limitations (ie, an acquisition is more than a mere taking of property). Recent High Court jurisprudence in *JT International SA* has concluded that very invasive packaging limitations (ie, plain packaging) is not a violation of s 51(xxxi). This decision serves as a strong precedent for front package labelling. Although the case did not explicitly consider less restrictive labelling requirements and mandatory government labelling, the history and purpose behind labelling requirements would seem to weigh against a finding of a violation of s 51(xxxi) if front package labelling was made mandatory.

V CONCLUSION

The Commonwealth government has endorsed a voluntary front package labelling system for food products. This new labelling system was designed to provide easy nutritional information about the packaged food in the hope that it would help Australians make healthy food choices. In terms of the front package labelling initiative, the government has tried to find a solution that is amenable to both health advocates and food companies.

Australia is not the first government to propose a front package labelling system; in fact, for years, this type of system has been widely endorsed by various health organisations and other jurisdictions have also begun to implement this type of program. Australia, however, has chosen a weaker response than originally envisioned: a voluntary system that relies on the goodwill of the food companies to change packaging. Realizing that such a system may not result in widespread use, the Commonwealth government has developed a contingency plan and has stated it will assess the program in two years and may, at that time, make it mandatory.

This paper sought to evaluate the constitutionality of a mandatory front package labelling system. Based on possible arguments arising under s 51(xxxi), mandatory front package labelling systems would likely be considered constitutional. Strong case precedents indicate that such a system would not result in an acquisition of property by the Commonwealth government that needs to be compensated on just terms. Domestically, the Commonwealth government does have the jurisdiction to enact mandatory front package labelling. With a growing obesity epidemic that is costing more money each year, it may be wise to forego the voluntary implementation process and implement mandatory front package labelling as soon as possible. After all, healthy food choices can lead to healthier Australians; giving Australians the tools to make healthy food choices needs to happen sooner rather than later.