

# PROPERTY AND PROPORTIONALITY: EVALUATING IRELAND'S TOBACCO PACKAGING LEGISLATION

EOIN O'DELL\*

*This article evaluates the constitutionality of the restrictions upon tobacco packaging in Ireland in the Public Health (Standardised Packaging of Tobacco) Act 2015 and Part 5 of the Health (Miscellaneous Provisions) Act 2017. Australia is the only country to have commenced this legislative process earlier, so the Irish experience (and, in particular, an analysis of the constitutionality of the Irish legislation) could provide a roadmap for other jurisdictions aiming to implement similar restrictions. This article concludes that public health and the protection of children constitute pressing and substantial reasons sufficient to justify as proportionate these Acts' restrictions upon tobacco companies' property rights protected by the Irish Constitution.*

## I INTRODUCTION

On 10 March 2015, Ireland became the second country in the world — after Australia — to enact legislation requiring standardised tobacco packaging; and, after amendment, it came fully into force on 29 September 2017.<sup>1</sup> The legislative regime prohibits all forms of branding (including trade marks) from appearing on tobacco packaging, except for brand names which will have to be presented in a standard typeface on packages, which must all be in the prescribed colour.

Although early Irish tobacco legislation mainly covered excise matters,<sup>2</sup> tobacco is now increasingly being regulated for public health reasons, and the current packaging legislation is simply the most recent example in a long line of tobacco control legislation. Hence, the regulation of tobacco advertising in Ireland began in 1978;<sup>3</sup> the regulation of the sale of tobacco products began in earnest in 1988;<sup>4</sup> and a comprehensive system to regulate the sale and consumption of tobacco products — including the world's first outright ban on smoking in the workplace — was

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\* BCL (NUI), BCL (Oxon), MA (j o) (Dubl), LLM (a e Oxon) (Dubl), PhD (Cantab), Barrister (Kings Inns). Fellow and Associate Professor, School of Law, Trinity College Dublin. I would like to thank Mark Bell, David Kenny, Caoimhín Mac Maoláin, Deirdre Ní Fhloinn, Rachael Walsh, and Gerry Whyte for their help with this article.

<sup>1</sup> On 10 March 2015, the President signed the *Public Health (Standardised Packaging of Tobacco) Act 2015*. On 16 February 2017, the President signed the *Health (Miscellaneous Provisions) Act 2017*, Part 5 of which amends the 2015 Act. Those parts of the 2015 Act which were not to be amended by the Bill which became the 2017 Act were brought into force on 20 May 2016 by the *Public Health (Standardised Packaging of Tobacco) Act 2015 (Commencement) Order 2016* (SI No 270 of 2016); and the remaining parts of the 2015 Act, as amended by the 2017 Act, were brought into force on 29 September 2017 by the *Public Health (Standardised Packaging of Tobacco) Act 2015 (Commencement) Order 2017* (SI No 115 of 2017). References hereafter simply to the Irish packaging legislation are to the primary and secondary legislation in this footnote.

<sup>2</sup> *Tobacco Act 1934*; *Finance (Excise Duty on Tobacco Products) Act 1977*.

<sup>3</sup> *Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act 1978*.

<sup>4</sup> *Tobacco (Health Promotion and Protection) Act 1988*.



introduced by the *Public Health (Tobacco) Act 2002*.<sup>5</sup> That Act is the foundation for the current system of tobacco control in Ireland.<sup>6</sup> It was amended in 2004,<sup>7</sup> to implement two European Directives,<sup>8</sup> and to give effect to the World Health Organization's *Framework Convention on Tobacco Control 2003*,<sup>9</sup> and has recently been amended to prohibit smoking in cars in which children are present.<sup>10</sup> The *Public Health (Standardised Packaging of Tobacco) Act 2015* ('2015 Act') implemented another European Directive;<sup>11</sup> and that Act, as amended by Part 5 of the *Health (Miscellaneous Provisions) Act 2017* ('2017 Act'), now requires standardised packaging of tobacco products.

The ink was barely dry on the President's signature on the 2015 Act when the tobacco industry sought declarations that it was contrary to EU law. A reference to the Court of Justice of the European Union was refused,<sup>12</sup> and the case subsequently settled.<sup>13</sup> When the Bill that became the 2015 Act was being considered by parliamentary committee,<sup>14</sup> the probability of a constitutional<sup>15</sup> challenge was a theme of submissions, not only from the tobacco industry,<sup>16</sup> but also from the Law

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<sup>5</sup> The workplace ban was introduced by s 47 of the 2002 Act, and the *Tobacco Smoking (Prohibition) Regulations 2003* (SI No 481 of 2003).

<sup>6</sup> As amended, inter alia, by the *Public Health (Tobacco) (Amendment) Act 2009*, the *Public Health (Tobacco) (Amendment) Act 2010*, the *Public Health (Tobacco) (Amendment) Act 2011*, and the *Public Health (Tobacco) (Amendment) Act 2013*.

<sup>7</sup> By the *Public Health (Tobacco) (Amendment) Act 2004*.

<sup>8</sup> *Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale Of Tobacco Products* [2001] OJ L 194/26; and *Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products* [2003] OJ L 152/16.

<sup>9</sup> *World Health Organization Framework Convention on Tobacco Control*, signed 21 May 2003 (2302 UNTS 166, entered into force 27 February 2005). Ireland signed the Convention on 16 September 2003 and, by virtue of the 2004 Act, ratified it on 7 November 2005.

<sup>10</sup> *Protection of Children's Health (Tobacco Smoke in Mechanically Propelled Vehicles) Act 2014*.

<sup>11</sup> *Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products* [2014] OJ L 127/1. It repealed and replaced Directive 2001/37/EC above n 8, and is in part directed to implementing the *Framework Convention on Tobacco Control*. It is given further effect in Irish law by the *European Union (Manufacture, Presentation and Sale of Tobacco and Related Products) Regulations 2016* (SI No 271 of 2016).

<sup>12</sup> In *JTI Ireland Ltd v Minister for Health* [2015] IEHC 481 (07 July 2015) Cregan J refused to make the reference, in part because the same questions had already been referred from the UK in *R (Philip Morris Brands Sàrl) v Secretary of State for Health* [2014] EWHC 3669 (Admin). The questions were answered in Case C-547/14 *R (Philip Morris Brands Sàrl) v Secretary of State for Health* (ECLI:EU:C:2016:325, CJEU, 4 May 2016). These answers were applied in *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin) affd [2016] EWCA Civ 1182.

<sup>13</sup> The case settled after a Directions Hearing on 9 November 2016.

<sup>14</sup> Joint Committee on Health and Children, Parliament of Ireland, *Public Health (Standardised Packaging of Tobacco) Bill 2013*, *Seanad Debates* (13 February 2014)

<<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/HEJ2014021300002>>.

<sup>15</sup> Some relevant constitutional provisions are set out in the Appendix to this article.

<sup>16</sup> Company Submissions by the Irish Tobacco Manufacturers' Advisory Committee <<http://www.itmac.ie/company-submissions/>>; see also Written Submissions on behalf of Philip Morris International <<http://health.gov.ie/wp-content/uploads/2014/07/Philip-Morris-i.pdf>>.

Society of Ireland.<sup>17</sup> In *PJ Carrolls v Minister for Health and Children*,<sup>18</sup> constitutional property rights were central to the tobacco industry's challenge to tobacco advertising prohibitions in the *Public Health (Tobacco) Act 2002*; they were central to the industry's challenge to the Australian legislation;<sup>19</sup> and they would doubtless be equally central to any challenge to the Irish packaging legislation. Such property rights challenges have failed in the High Court of Australia<sup>20</sup> and the Court of Justice of the European Union;<sup>21</sup> they are likely to fail in the European Court of Human Rights;<sup>22</sup> and it is the conclusion of this article that they would also fail in Ireland.

Part II of this article therefore briefly describes the restrictions upon the use of trade marks and other branding that potentially engage constitutional property rights. Part III describes the integrated constitutional protection of property; and it considers the extent to which it is likely to be engaged by restrictions on the tobacco companies' use of their trade marks. Part IV considers the pressing and substantial reasons which the state may proffer to seek to justify the restrictions in the packaging legislation upon constitutional property rights. The state's interests in the promotion of public health in general, and the protection of children in particular, have been relied upon to sustain important legislation in the past; and this Part considers the extent to which they may be relied upon by the state in this context. Part V considers the extent to which the restrictions thereby justified satisfy the proportionality and rationality standards of review or scrutiny.

Part VI concludes that, if the restrictions on constitutional property rights in the 2015 Act and in Part 5 of the 2017 Act are challenged by the tobacco companies, the courts will almost certainly find that those Acts are constitutionally valid.

## II RESTRICTIONS

The restrictions prescribed by the Irish packaging legislation are extensive and broadly of three kinds. In general, many elements of tobacco packaging are prohibited, others are regulated, and still others are required. These three strategies affect the tobacco companies' intellectual property rights. For example, branding and trade marks on wrappers<sup>23</sup> are prohibited; the appearance of

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<sup>17</sup> Submission of the Intellectual Property Law Committee of the Law Society of Ireland <<https://www.lawsociety.ie/Documents/committees/IP/PlainPackagingSubmissionFeb13.pdf>>.

<sup>18</sup> [2003] IEHC 613 (17 January 2003) (Kelly J) (discovery motions); [2004] IEHC 310 (Kelly J) (inadmissibility of expert evidence) revsd [2005] IESC 26 (evidence admissible; courts do not interpret statutes in a vacuum). The case settled on 5 February 2003.

<sup>19</sup> *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1.

<sup>20</sup> *Ibid.* See also Tania Voon, 'Acquisition of Intellectual Property Rights: Australia's Plain Tobacco Packaging Dispute' (2013) 2 *European Intellectual Property Review* 113; Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: the Battle over the Plain Packaging of Tobacco Products' in Tania Voon, Andrew Mitchell, and Jonathan Liberman (eds), *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014) 337; Mark Davison, 'Tobacco Control in Australia: The High Court Challenge to Plain Packaging' in Andrew Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 258. See generally Simon Chapman and Becky Freeman, *Removing the Emperor's Clothes: Australia and Tobacco Plain Packaging* (Sydney University Press, 2014).

<sup>21</sup> See above n 12.

<sup>22</sup> See Jonathan Griffiths, 'On the Back of a Cigarette Packet — Standardised Packaging Legislation and the Tobacco Industry's Fundamental Right to (Intellectual) Property' (2015) *Intellectual Property Quarterly* 343.

<sup>23</sup> 2015 Act ss 7(8)(b)–(e), 9(8)(b)–(e), 10(7)(b)–(e).

branding<sup>24</sup> and the location of brand-names<sup>25</sup> are regulated; and the shape of packets,<sup>26</sup> and the colours of all parts of packaging<sup>27</sup> not taken up by the health warnings and images that have long been mandatory<sup>28</sup> must be as required. Moreover, the Minister has power to make orders<sup>29</sup> prescribing the details of standardised packaging for every brand on the market. Furthermore, tobacco packaging shall ‘not bear a mark or trade mark’ except as permitted pursuant to the 2015 Act. The general powers relating to the regulation of packaging, and the specific rules relating to trade marks, will certainly control the use of trade marks upon — and potentially even effectively ban trade marks from — tobacco packaging.

In all of these ways, therefore, the tobacco companies’ intellectual property rights are plainly affected by the restrictions in the Irish packaging legislation. The question therefore arises whether their constitutionally protected property rights are thereby engaged.

### III RIGHTS

The tobacco companies’ property<sup>30</sup> rights are potentially engaged by these restrictions for two reasons. First, there are restrictions on what tobacco companies can do with the packets of their products. Second, their intellectual property rights are affected; in particular, their trade marks are banned on wrappers and restricted and potentially prohibited on packaging.

#### A Two Articles

In Ireland, two articles of the Constitution are concerned with the protection of property: article 40.3.2 and article 43. This bifurcated protection reflects an uneasy drafting compromise.<sup>31</sup> Although their interpretation and inter-relationship has not been free from difficulty in the past,<sup>32</sup>

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<sup>24</sup> Ibid ss 7(3)–(4), 7(10)–(11), 9(3)–(4), 9(10)–(11), 10(3)–(4), 10(9)–(10).

<sup>25</sup> Ibid ss 7(3)–(4), 9(3)–(4), 10(3)–(4), as extended by 2017 Act ss 13–15.

<sup>26</sup> Ibid ss 7(6), 9(6).

<sup>27</sup> Ibid ss 7(1)(a)–(b), 9(1)(a)–(b), 10(1)(a)–(b).

<sup>28</sup> Ibid ss 7(4), 9(4), 10(4). The first power to require health warnings was contained in *Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act 1978* s 2(f), implemented by the *Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Regulations 1979* (SI No 350 of 1979). See now Part 3 of the *European Union (Manufacture, Presentation and Sale of Tobacco and Related Products) Regulations 2016* (SI No 271 of 2016), implementing the 2015 Act and *Directive 2014/40/EU*, above n 11. To the extent that the Directive is valid, the statutory instrument implementing it is immune from constitutional challenge, as a measure ‘necessitated by the obligations of membership’ of the EU (Constitution, art 29.4.6; *Quinn v Ireland (No 2)* [2007] 3 IR 395). Consequently, the regulations relating to health warnings are not considered further in this article.

<sup>29</sup> 2015 Act ss 7(10)–(11), 9(10)–(11), 10(9)–(10).

<sup>30</sup> The experience in the US and Canada suggests that speech rights are also potentially engaged, and the issue arose in *PJ Carrolls v Minister for Health and Children* [2005] IESC 26. However, they are left aside in this article, as the issue is comprehensively covered in Eoin O’Dell, ‘Is Standardised Tobacco Packaging a Proportionate Restriction on Constitutional Speech Rights?’ (paper delivered at the ICON-S British and Irish Chapter Inaugural Conference, Trinity College Dublin, Ireland, 5 September 2017).

<sup>31</sup> Rachael Walsh, ‘Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise’ (2011) 33 *Dublin University Law Journal* 86.

<sup>32</sup> See eg, *Re Article 26 and the Planning and Development Bill, 1999* [2000] 2 IR 321, 347, [76] (Keane CJ, for the Court); *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 197, [113] (Hamilton CJ, for the Court); *Reid v Industrial Development Agency* [2015] IESC 82, [41]–[42] (McKechnie J; Denham CJ, O’Donnell, Laffoy and Charleton JJ concurring).

it is not in doubt that they ‘mutually inform each other’,<sup>33</sup> and it is increasingly clear that they now work together as part of an integrated constitutional protection of property which pays appropriate attention to the literal text of the articles, but shows equal concern for their structure and interoperation.

On the one hand, Article 43 is directed to the state. The first half of the article is a muscular assertion of the institution of private property: by it, the state acknowledges ‘the right to the private ownership’ and guarantees ‘to pass no law attempting to abolish’ that right.<sup>34</sup> However, the second half of the article provides the state with a relatively wide scope for manoeuvre in restricting the exercise of property rights: it authorises<sup>35</sup> the state to regulate the exercise of property rights on the basis of ‘the principles of social justice’ and to delimit their exercise on the basis of ‘the exigencies of the common good’. On the other hand, Article 40.3.2 is directed to citizens. It provides that the state shall ‘by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the ... property rights of every citizen’.

Hence, both articles 43.1 and 40.3 protect property<sup>36</sup> as part of an integrated constitutional protection of property; and there is, in particular, a close relationship between article 43.2 and article 40.3.2 on the question of when restrictions are justified. In such cases, three questions usually arise.<sup>37</sup> First, the courts examine the nature of the property rights at issue to determine if the integrated constitutional protection of property in articles 43 and 40.3 are engaged by the restriction. Second, if they are, then, pursuant to article 43.2, the courts examine whether the restriction is prima facie justifiable on the basis of social justice or the common good,<sup>38</sup> and they afford the state a wide latitude in regulating on those bases. Third, if such a prima facie justification is made out, then the courts ensure that the state has not carried the restriction too far, by reviewing or scrutinising, pursuant to article 40.3, whether the restriction constitutes an *unjust* (usually, a disproportionate) attack on the engaged property rights.<sup>39</sup>

## B *Integrated Constitutional Protection of Property*

The first case in which the integrated constitutional protection of property in articles 43 and 40.3 was relied upon successfully was *Buckley v Attorney General*.<sup>40</sup> Here, the Supreme Court struck

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<sup>33</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 197 [113] (Murray CJ, for the Court); *J&J Haire v Minister for Health* [2010] 2 IR 615, 644 [90] (McMahon J).

<sup>34</sup> *Blake and Madigan v Attorney General* [1982] IR 117, 135 (O’Higgins CJ, for the Court) (art 43.1 ‘prohibits the abolition of private property as an institution’); *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 366 (Hamilton CJ, for the Court).

<sup>35</sup> *O’Callaghan v Commissioner of Public Works* [1985] ILRM 364, 367 (O’Higgins CJ, for the Court).

<sup>36</sup> *Blake and Madigan v Attorney General* [1982] IR 117, 135–6 (O’Higgins CJ, for the Court).

<sup>37</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 201 [119] (Murray CJ, for the Court); *National Asset Loan Management Ltd v McMahon* [2014] IEHC 71, [40] (Charleton J); *McGrath Limestone Works Ltd v An Bord Pleanála* [2014] IEHC 382, [10.4] (Charleton J).

<sup>38</sup> *Reid v Industrial Development Agency* [2015] IESC 82, [42], [44(ii)] (McKechnie J; Denham CJ, O’Donnell, Laffoy and Charleton JJ concurring).

<sup>39</sup> *Re Article 26 and Part 5 of the Planning and Development Bill 1999* [2000] 2 IR 321, 348–50 (Keane J, for the Court); compare *CRH plc v Competition and Consumer Protection Commission* [2017] IESC 34, [67] (MacMenamin J).

<sup>40</sup> [1950] IR 67, striking down the *Sinn Féin Funds Act 1947* because it infringed not only constitutional property rights but also the constitutional separation of powers: see Gerard Hogan, ‘The *Sinn Féin Funds* Judgment Fifty Years

down an Act intended to prevent pending litigation about funds of a moribund political party, and to divert the funds to a charitable board. In *Cox v Ireland*,<sup>41</sup> the Court struck down the automatic forfeiture of a public job and an employment-related contractually-due pension upon conviction of an offence.<sup>42</sup> Moreover, in *Re Article 26 and the Employment Equality Bill 1996*,<sup>43</sup> the Court struck down a provision that would have required employers to bear the costs of all special accommodations which employees with disabilities may have needed.

On the other hand, many pieces of legislation relating to the regulation of pensions, and of markets, trades, professions, businesses, and industries, have survived constitutional challenge.<sup>44</sup> For example, the regulation of taxis has been upheld on several occasions.<sup>45</sup> In *Maher v Minister for Agriculture, Food and Rural Development*,<sup>46</sup> the Supreme Court upheld the Irish implementation of an EU system of quotas of milk production and levies for over-production. Moreover, in *PC v Minister for Social Protection*,<sup>47</sup> the Court held that a statutory pension that could be varied from time to time, could not constitute a 'property right' within the meaning of the Irish Constitution.

### C *Property and Tobacco Packaging*

The restrictions in the Irish packaging legislation do indeed restrict tobacco companies' use of their property. While they are being manufactured and until they are sold, the packets of tobacco products are the property of the tobacco companies, and so the various restrictions on the packaging of those products are restrictions on the companies' use of their property. Moreover,

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On' (1997) 2 *Bar Review* 375; Ronan Keane, 'The *Sinn Féin Funds* Case. Across the Cherokee Frontier of Irish Constitutional Law' in Eoin O'Dell (ed), *Leading Cases of the Twentieth Century* (Round Hall, 2000) 185. In *Buckley v Attorney General (No 2)* (1950) 84 ILTR 9, Kingsmill Moore J held against Sinn Féin's claim on the merits.

<sup>41</sup> [1992] 2 IR 503, striking down section 34 of the *Offences Against the State Act 1939*; see Richard Humphreys, 'Constitutional Law — Techniques of Analysis: Blacklists and Shortcuts' (1991) 13 *Dublin University Law Journal* 118; see also *Lovett v Minister for Education* [1997] 1 ILRM 89 (HC, Kelly J) (contributory pension a constitutionally protected property right).

<sup>42</sup> Contrast *PC v Minister for Social Protection* [2017] IESC 63 (MacMenamin J; Denham CJ, and McKechnie, Clarke and O'Malley JJ concurring) impugning regulations made pursuant to s 249(1) of the *Social Welfare (Consolidation) Act 2005*, which provided for the automatic cessation of a contributory state pension upon imprisonment resulting from conviction of an offence. The Court struck them down, not for property reasons, but because they constituted an additional punishment not imposed by a court, contrary to the right to trial in due course of law secured by art 34 of the Constitution: [2017] IESC 63 [59].

<sup>43</sup> [1997] 2 IR 321, striking down s 35 of the *Employment Equality Bill 1996*.

<sup>44</sup> See Eoin O'Dell, 'Property Rights, Proportionate Restrictions, and Media Pluralism' (paper delivered at the Conference on the Irish Constitution at 80: 80 Years of Constitutional Change, University of Limerick, Ireland, 11 November 2017).

<sup>45</sup> *Hempenstall v Minister for the Environment* [1994] 2 IR 20 (HC, Costello J), upholding the *Road Traffic (Public Service Vehicles) (Amendment) (No 2) Regulations 1992* (SI No 172 of 1992); *Gorman v Minister for the Environment and Local Government* [2001] 2 IR 414 (HC, Carney J), upholding all but one of the provisions of the *Road Traffic (Public Service Vehicles) (Amendment) (No 3) Regulations 2000* (SI No 367 of 2000) (the provision which was struck down infringing constitutional doctrines other than property); *Muldoon v Minister for the Environment and Local Government* [2015] IEHC 649 (Peart J) (same).

<sup>46</sup> [2001] 2 IR 139, upholding the *European Communities (Milk Quota) Regulations 2000* (SI No 94 of 2000).

<sup>47</sup> [2017] IESC 63, [28] (MacMenamin J; Denham CJ, and McKechnie, Clarke and O'Malley JJ concurring). Instead, the court struck down regulations made pursuant to s 249(1) of the *Social Welfare (Consolidation) Act 2005*, which provided for the automatic cessation of a contributory state pension upon imprisonment resulting from conviction of an offence, because that constituted an additional punishment not imposed by a court, contrary to the right to trial in due course of law secured by art 34 of the Constitution (at [59]).

the provisions regulating packaging permit the Minister to make orders to require standardised packaging, which will not be allowed to bear a trade mark, except as permitted pursuant to the 2015 Act.<sup>48</sup> This will certainly control the use of trade marks upon tobacco packaging. Furthermore, it seems to be the government's intention to rely on these powers to go further and ensure 'that *all* forms of branding — *trade marks*, logos, colours and graphics — would be removed from tobacco packs'.<sup>49</sup> Indeed, the matters prohibited on wrappers include trade marks.<sup>50</sup> If a trade mark is a form of property, then a control or prohibition on the use of trade marks would be a restriction on the companies' use of their property.

However, at least three hurdles must be jumped before it can be concluded safely that these restrictions engage the integrated constitutional protection of property.<sup>51</sup> First, no relevant property right may be engaged, either because none arises on the facts,<sup>52</sup> or because the particular interest relied upon by the plaintiff does not possess sufficient characteristics of 'proprietaryship and dominion'<sup>53</sup> to count as property for the purposes of the constitutional protection of property. Since the scope of that protection is remarkably capacious,<sup>54</sup> the interest relied upon would have to be uncommonly precarious for it not to count. Even so, there is a line between property rights that are constitutionally protected and other interests that are not. On the former side of the line lie real property,<sup>55</sup> personal property,<sup>56</sup> money,<sup>57</sup> shares,<sup>58</sup> the benefit of contractual rights,<sup>59</sup> causes of

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<sup>48</sup> 2015 Act, ss 7(1)(c), 9(1)(c), 10(1)(c), but see s 5(1).

<sup>49</sup> Ireland, *Seanad Debates*, 'Public Health (Standardised Packaging of Tobacco) Bill 2014: Second Stage' Seanad, 17 June 2014 (Deputy James Reilly, Minister for Health) [emphasis added] <<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2014061700039?open=document#PP00100/>>.

<sup>50</sup> 2015 Act, ss 7(8)(d), 9(8)(d), 10(7)(d), but see s 5(1).

<sup>51</sup> Irish law does not require that the state have *acquired* the property, which was a hurdle that the tobacco companies were unable to jump in *JT International v Cth of Australia* (2012) 250 CLR 1, [41]–[44] (French CJ), [101], [144]–[147] (Gummow J), [164], [181], [180]–[190] (Hayne and Bell JJ), [294]–[296] (Crennan J) [341]–[344], [353]–[372] (Kiefel J); contrast [216]–[219], [225]–[231] (Heydon J, dissenting)).

<sup>52</sup> For example, where there is no diminution in the value of property, there may be no attack on property rights: see eg, *Hempstall v Minister for the Environment* [1994] 2 IR 20, 28 (HC, Costello J) (regulation of taxi licence). Indeed, some diminution in value may still not be an attack on property rights see eg, *Kerry Co-Operative Creameries Ltd v An Bord Bainne* [1991] IRLM 851 (dilution of shareholding); *Pine Valley Developments v Minister for the Environment* [1987] IR 23, 38 (Finlay CJ) (planning decision); *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84, 128 [62] (Keane CJ).

<sup>53</sup> *Maher v Minister for Agriculture, Food and Rural Development* [2001] 2 IR 139, 234 [260] (Murray J).

<sup>54</sup> *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, 287 [326] (12 April 2011) (Hardiman J); compare *JT International v Cth of Australia* (2012) 250 CLR 1, [263] (Crennan J), [366] (Kiefel J).

<sup>55</sup> See eg, *Blake and Madigan v Attorney General* [1982] IR 117; *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181.

<sup>56</sup> See eg, *Attorney General v Southern Industrial Trust* (1960) 94 ILTR 161 (car); *Webb v Ireland* [1988] IR 353, 389–90 [93] (Walsh J) (chattels).

<sup>57</sup> See eg, *Buckley v Attorney General* [1950] IR 67; and see above n 40.

<sup>58</sup> *Private Motorists Provident Society v Attorney General* [1983] IR 339; *Kerry Co-Operative Creameries Ltd v An Bord Bainne* [1990] IRLM 664 (Costello J) affd [1991] IRLM 851.

<sup>59</sup> *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317, 332 (O'Keeffe P); *Chestvale Properties Ltd v Glackin* [1993] 2 IR 35, 45 (Murphy J); *J&J Haire v Minister for Health* [2010] 2 IR 615, 647 [99] (McMahon J); *Dellway Investments v National Asset Management Agency* [2011] 4 IR 1, 61–2, 67–8, [112], [125], [2010] IEHC 364 [7.10], [7.23] (1 November 2010) (Kearns P, Kelly and Clarke JJ, in a joint judgment).

action,<sup>60</sup> and lawful market street trading rights.<sup>61</sup> Sitting astride the line are various pensions<sup>62</sup> and licences.<sup>63</sup> And, since the Supreme Court has held that milk quotas cannot be equated to a right of property,<sup>64</sup> they are clearly on the other side of the line.

As to the restrictions imposed by the packaging legislation, the general restrictions on packaging restrict the tobacco companies' use of their chattels, which plainly engage the constitutional protection of property. As to the particular restrictions upon — and potential prohibitions on — the tobacco companies' use of their trade marks, it is clear that trade marks possess sufficient characteristics of proprietorship and dominion to count as property to engage the constitutional protection of property rights. Intellectual property rights are similar to personal property, the benefit of contractual rights, causes of action, and street trading rights, which have all been held to count; and although they are probably close to the line straddled by pensions and licences, they are not on the other side of it with milk quotas. Hence, copyright has been held to constitute 'a right of private property within the meaning of article 40.3.2 and article 43.1 of the Constitution'.<sup>65</sup> Similarly, in the context of the tort of passing off, a trading reputation has also been held to constitute a property right.<sup>66</sup> By parity of reasoning, trade marks would, in an appropriate case, likewise be held to constitute constitutionally protected property rights.<sup>67</sup> Indeed, the point is potentially stronger in relation to trade marks than it is in the context of passing off. The state registers and regulates trade marks, affording them a high level of protection; whereas unregistered rights protected by actions like passing off may not attract as high a level of protection. Hence if the latter are constitutionally protected property rights, so also must the former be. Indeed, in *Maher v Minister for Agriculture*,<sup>68</sup> Keane CJ came very close to holding that trade marks are constitutionally protected property rights. In rejecting the submission that a fishing quota

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<sup>60</sup> *O'Brien v Keogh* [1972] IR 144, 155 (Ó Dálaigh CJ, for the Court); *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 182 [86] (Murray CJ for the Court).

<sup>61</sup> *DPP (Long) v McDonald* [1983] ILRM 223, 225 (Henchy J; Walsh and Griffing JJ concurring).

<sup>62</sup> See above, nn 41 and 47.

<sup>63</sup> On the one hand: *Muldoon v The Minister for the Environment* [2015] IEHC 649, [175] (Peart J) (right to property certainly engaged in relation to the holding of a taxi licence). On the other hand: *State (Pheasantry Ltd) v Donnelly* [1982] ILRM 512, 516 (Carroll J) (intoxicating liquor licence not property capable of existence separate from the premises); *Nuerendale v Dublin City Council* [2009] IEHC 588 (21 December 2009) [190]–[193] (McKechnie J) (interests generated by state regulation will not generally give rise to a property right; no property right vests in a party 'merely by the possession of a licence'); *Hand v Dublin Corporation* [1991] 1 IR 409 (open question whether casual trading licences constitutionally protected). Contrast *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 (petroleum exploration licences outside scope of constitutional protection).

<sup>64</sup> *Maher v Minister for Agriculture* [2001] 2 IR 139, 186 [107] (Keane CJ), 223 [217] (Denham J, Murphy J concurring), 234 [260] (Murray J), 265 [388] (Fennelly J, concurring with Murray J).

<sup>65</sup> *Phonographic Performance (Ireland) Ltd v Cody* [1998] 4 IR 504, 511, affd without reference to this point [1998] IESC 64; *EMI Records (Ireland) Ltd v Eircom Ltd* [2010] 4 IR 349, 366, [28]–[29] (Charleton J); *EMI Records (Ireland) Ltd v UPC* [2010] IEHC 377, [85] (Charleton J); *Sony v UPC (No 1)* [2015] IEHC 317 [122] (Cregan J), affd [2016] IECA 231 [18] (Hogan J); Rónán Kennedy, 'Was it Author's Rights All the Time? Copyright as a Constitutional Right in Ireland' (2011) 33 *Dublin University Law Journal* 253.

<sup>66</sup> *Falcon Travel Ltd v Owners Abroad Group plc* [1991] 1 IR 175, 183 (Murphy J).

<sup>67</sup> Compare *Anheuser-Busch Inc v Portugal* 73049/01 (2007) 45 EHRR 36 (trade marks constitute 'possessions' within the meaning of art 1 of Protocol 1 to the European Convention on Human Rights); *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin) [716]–[717], [783] (Green J); affd [2016] EWCA Civ 1182, [115] (Lewison, Beatson and Richards LJ) (same); *SIA AKKA/LAA v Latvia* 562/05 [2016] ECHR 631 (copyright; same); see also *JT International v Cth of Australia* (2012) 250 CLR 1, [105], [137] (Gummow J), [267] (Crennan J), [192], [202]–[205] (Heydon J, dissenting).

<sup>68</sup> [2001] 2 IR 139.



amounted to property, he did not ‘find that any assistance is to be derived from comparisons with patents, trade marks or copyright rights which under our legal system are nowadays generically described as “intellectual property rights”’.<sup>69</sup> It is therefore clear that trade marks are property rights for the purposes of the constitutional protection of property.

The second hurdle to be jumped to reach the conclusion that constitutional protection of property is engaged by restrictions on the tobacco companies’ property and trade marks is that, whilst there may be a relevant property right, what looks like a restriction may turn out not to be so on the facts.<sup>70</sup> For example, the restrictions imposed by the Irish packaging legislation upon the tobacco companies’ use of their trade marks are likely to have a negative impact on the value of their brands in general and of their trade marks in particular.<sup>71</sup> However, this diminution in value may not necessarily amount to a restriction on the tobacco companies’ property rights: ‘a change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights’.<sup>72</sup> On the other hand, there remains a wide range of restrictions on packaging and on the use of trade marks, and these restrictions will certainly engage the integrated constitutional protection of property.

Third, there may indeed, on the facts, be a restriction on a relevant property right, but it may turn out not to be one the plaintiffs can challenge. For example, article 40.3.2 refers to the ‘property rights of every citizen’, and article 43.1.1 provides that ‘man, in virtue of his rational being’ has the right to the ‘private ownership of external goods’. The emphasised words in these provisions might well have confined the enjoyment of the constitutional protection of property to natural persons who are citizens. Nevertheless, it is now well established that such protections may also be enjoyed by corporate entities<sup>73</sup> and non-citizens.<sup>74</sup> Therefore a challenge by the tobacco companies to the Irish packaging legislation would almost certainly not be excluded on this ground.

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<sup>69</sup> [2001] 2 IR 139, 186–7 [110].

<sup>70</sup> *BUPA Ireland v Health Insurance Authority (No 2)* [2013] IEHC 103, [91]–[92] (Cooke J) (no attack on property rights, as no compelled payments actually made); *Dellway Investments v National Asset Management Agency (No 1)* [2011] 4 IR 1, [2011] IESC 4 (3 February 2011) (no attack on property rights, as no valid decision made to acquire loans); *Criminal Assets Bureau v Kelly* [2012] IESC 64, [33] (MacMenamin J; Denham CJ and Hardiman J concurring) (forfeiture of proceeds of crime ‘cannot be said to impinge on a right to private property, as the property was acquired unlawfully’); *McFeely v Official Assignee in Bankruptcy* [2017] IECA 21, [29] (Peart J; Hogan and Hedigan JJ concurring) (landlord cannot complain about search of leased premises conducted pursuant to warrant, as any property rights engaged were those of tenant).

<sup>71</sup> But this impact should not be overstated: see *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin) [698]–[706] (Green J); affd [2016] EWCA Civ 1182.

<sup>72</sup> *Hempenstall v Minister of the Environment* [1994] 2 IR 20, 28–9 (Costello P); *Maher v Minister for Agriculture* [2001] 2 IR 139, 220 [202] (Denham J, Murphy J concurring); *BUPA Ireland v Health Insurance Authority* [2006] IEHC 431, [242] (McKechnie J); *Dellway Investments v National Asset Management Agency* [2011] 4 IR 1, 64 [116], [2010] IEHC 364 [7.14] (1 November 2010) (Kearns P, Kelly and Clarke JJ, in a joint judgment), affd *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, 325–6, [452]–[454], [2011] IESC 14, [91]–[93] (12 April 2011) (Fennelly J); *Muldoon v The Minister for the Environment* [2015] IEHC 649, [164], [181]–[183] (Peart J).

<sup>73</sup> *Iarnród Éireann v Ireland* [1996] 3 IR 321, 345, [1995] 2 ILRM 161, 183 (Keane J), affd [1996] 3 IR 321; *Shirley v O’Gorman* [2012] 2 IR 170, 174 [6] (Fennelly J; Denham CJ, and Murray, Macken and Finnegan JJ concurring); see also *CRH v Competition and Consumer Protection Commission* [2017] IESC 34, [61]–[68] (MacMenamin J). See generally, Ailbhe O’Neill, *The Constitutional Rights of Companies* (Thomson Round Hall, 2007) Part III.

<sup>74</sup> *NVH v Minister for Justice and Equality* [2017] IESC 35.

## IV REASONS

### A *Pressing and Substantial Reasons*

In general, where there is a restriction upon a constitutional right, the state may advance ‘pressing and substantial’<sup>75</sup> reasons to seek to justify the restriction. The textual limitations on the integrated constitutional protection of property are threefold: the state’s obligation in article 40.3.2 is to protect ‘as best it may’ citizens’ property rights, whilst article 43 permits restrictions on the basis of ‘the principles of social justice’<sup>76</sup> (article 43.2.1) and ‘the exigencies of the common good’ (article 43.2.2).<sup>77</sup> It would be unwise to overparse the similarities and differences between these concepts,<sup>78</sup> or the public policy underlying impugned legislation or the legitimate aim pursued by it.<sup>79</sup> Rather, they are simply different assertions of the same point that the state may advance ‘pressing and substantial’ reasons to seek to justify a restriction upon a right. The state can lead expert evidence on these issues.<sup>80</sup> Indeed, it may be fatal not to. In *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981*,<sup>81</sup> the Supreme Court struck down rent control provisions for which no justification was provided. And so, the question here is simply whether there are ‘pressing and substantial’ reasons upon which the state may rely in seeking to justify the restrictions upon property contained in the Irish packaging legislation. It may potentially be justified by many reasons, but two in particular stand out: public health, and the protection of children.

### B *Public Health*

Public health is the main reason for the Irish packaging legislation.<sup>82</sup> In the case of the 2015 Act, the clue is in the name: the *Public Health (Standardised Packaging of Tobacco) Act 2015*. And

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<sup>75</sup> *Heaney v Ireland* [1996] 1 IR 580, 607 (Costello J) affd [1996] 1 IR 580.

<sup>76</sup> Rachael Walsh, ‘“The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1.

<sup>77</sup> See in particular, *Keane v An Bord Pleannála (No 3)* [1998] 2 ILRM 241, 262 (Keane J; Hamilton CJ and Barrington J concurring), construing s 26(5)(c) of *Local Government (Planning and Development) Act 1963* as inserted by s 3 of the *Local Government (Planning and Development) Act 1992*.

<sup>78</sup> Contrast Donal Barrington, ‘Private Property under the Irish Constitution’ (1973) 8 *Irish Jurist (ns)* 1; *Attorney General v Southern Industrial Trust* (1960) 94 ILTR 161, 175–6 (Lavery J).

<sup>79</sup> *Criminal Assets Bureau v Kelly* [2012] IESC 64, [32] (public policy) [34](b) (legitimate aim) (MacMenamin J; Denham CJ and Hardiman J concurring); *Dellway Investments v National Asset Management Agency* [2011] 4 IR 1, 118 [283], [2010] IEHC 364, [10.16] (1 November 2010) (primary policy decision for the Oireachtas) (Kearns P, Kelly and Clarke JJ, in a joint judgment).

<sup>80</sup> *PJ Carrolls v Minister for Health and Children* [2005] IESC 26.

<sup>81</sup> [1983] IR 181, 191 (O’Higgins CJ). Similarly, in *Sister Mary Christian v Dublin City Council* [2012] IEHC 163 and *Sister Mary Christian v Dublin City Council (No 2)* [2012] IEHC 309, Clarke J struck down elements of a city development plan for which no reasons were offered and which therefore could not be assessed for proportionality. See also *Reid v Industrial Development Agency* [2015] IESC 82 (invalid reason).

<sup>82</sup> Compare *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin) [60]–[76] (Green J); affd [2016] EWCA Civ 1182, [21]–[27] (Lewison, Beatson and Richards LJ); *JT International v Cth of Australia* (2012) 250 CLR 1, [4] (French CJ), [145] (Gummow J); [253]–[254] (Crennan J), [308]–[309], [316]–[317] (Kiefel J), but see [193], [209], [227] (Heydon J, dissenting).

public health was one of the justifications offered for the Act by the responsible Minister, Dr James Reilly.<sup>83</sup>

In some of the Supreme Court's most important constitutional rights cases, the state has sought to uphold impugned legislation on the basis of public health concerns. On the one hand, in *Ryan v Attorney General*,<sup>84</sup> the Court dismissed a challenge to the fluoridation of public water supplies, which the state successfully justified on the grounds of public health.<sup>85</sup> And in *Norris v Attorney General*,<sup>86</sup> the Court dismissed a challenge to legislation criminalising male homosexual acts, which the state successfully justified on the grounds, inter alia, of public health.<sup>87</sup> On the other hand, in *McGee v Attorney General*,<sup>88</sup> the Court accepted that there 'may be many reasons, grounded on considerations of public health ...'<sup>89</sup> for a prohibition on the import or sale of contraceptives, but struck it down as a disproportionate infringement of the plaintiff's constitutional rights. Moreover, the state may also argue that such public health concerns implicate the state's positive duty to vindicate the rights of its citizens. The constitution recognises an unenumerated right to bodily integrity implied in article 40.3.1.<sup>90</sup> That article might, in an appropriate case, also provide a home for a right to health.<sup>91</sup> And the duty to vindicate these rights could re-enforce the state's interest in public health.<sup>92</sup>

The state's interest in the promotion of public health was central to *PJ Carrolls v Minister for Health and Children*, in which the Supreme Court held that the state could lead expert evidence of the harmful effects of smoking to meet a challenge to tobacco advertising prohibitions in the *Public Health (Tobacco) Act 2002*. For all of these reasons, therefore, the public health concerns underpinning the Irish packaging legislation would almost certainly constitute pressing and substantial reasons upon which the state may seek to justify standardised packaging restrictions.

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<sup>83</sup> See note 14 above; see further: Ireland, *Seanad Debates* 'Public Health (Standardised Packaging of Tobacco) Bill 2014: [Seanad Bill amended by the Dáil] Report and Final Stages', Seanad, 3 March 2015 (Deputy James Reilly, Minister for Children and Youth Affairs)

<<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2015030300002>>.

<sup>84</sup> [1965] IR 294, upholding the *Health (Fluoridation of Water Supplies) Act 1960*.

<sup>85</sup> [1965] IR 294, 348–9 [28]–[33] (Ó Dálaigh CJ, for the Court) (plaintiff had not established that fluoridation involved any danger to life or health).

<sup>86</sup> [1984] IR 36, upholding ss 61 and 62 of the *Offences Against the Person Act 1861*, and s 11 of the *Criminal Law Amendment Act 1885*. The European Court of Human Rights disapproved of that outcome in *Norris v Ireland* 10581/83 (1988) 13 EHRR 186, and the offence was abolished by s 2 of the *Criminal Law (Sexual Offences) Act 1993*; see also *DPP v Devins* [2012] IESC 7.

<sup>87</sup> [1984] IR 36, 48 (McWilliam J), affd [1984] IR 36, 62, 63, 65 (O'Higgins CJ; Finlay P and Griffin J concurring), 77, 79 (Henchy J, dissenting), 94, 102, 104 (McCarthy J, dissenting).

<sup>88</sup> [1974] IR 284, striking down s 17 of the *Criminal Law Amendment Act 1935* (unconstitutional infringement of plaintiff's right to marital privacy).

<sup>89</sup> [1974] IR 284, 308 (Walsh J).

<sup>90</sup> See eg, *McGee v A-G* [1974] IR 284; *Re a Ward of Court* [1996] 2 IR 73.

<sup>91</sup> Although the Supreme Court has so far resisted the justiciability of economic, social and cultural rights: *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259; there are strong arguments the other way: see eg, Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration, 2002), and the development of a justiciable constitutional right to health cannot be entirely excluded.

<sup>92</sup> It might also lighten the applicable standard of review; see below, Part V, E *Lower and Variable Standards of Review*.

### C Protection of Children

The protection of children was another of the justifications offered for the Act by the Minister,<sup>93</sup> and it has been accepted by the European Court of Human Rights as an aim which the state may legitimately pursue in limiting property rights.<sup>94</sup> In *Landers v Attorney General*,<sup>95</sup> Finlay J held that the protection of children must be part of the common good. Moreover, the state may also argue that such concerns implicate the state's duty to vindicate children's rights,<sup>96</sup> which are expressly secured by article 42A.1 of the Constitution. For these reasons, the concerns to protect children underpinning the Irish packaging legislation would almost certainly constitute pressing and substantial reasons upon which the state may seek to justify standardised packaging restrictions. So too would the state's interests in the promotion of public health. These conclusions hold, whether those concerns or interests are described as principles of social justice, exigencies of the common good, strong public policies, legitimate aims, or pressing and substantial reasons.

### V REVIEW

It is clear that, where there is a restriction upon a right, the state may advance 'pressing and substantial' reasons to seek to justify the restriction. However, it is not enough for the state to advance such reasons; those reasons must support and justify the restrictions, and not go too far in doing so. On this question of review or scrutiny, following the lead of the European Court of Human Rights<sup>97</sup> and the Supreme Court of Canada,<sup>98</sup> the Irish Supreme Court has strongly committed to a proportionality test to review or scrutinise legislative restrictions upon constitutional rights; in particular, the impugned legislation must:

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the right as little as possible;
- (c) be such that their effects on rights are proportional to the objective.<sup>99</sup>

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<sup>93</sup> See Ireland, *Seanad Debates*, 17 June 2014, above n 49, 39–40; also, Joint Committee on Health and Children, Parliament of Ireland, above n 14.

<sup>94</sup> *Vekony v Hungary* 65681/13 [2015] ECHR 5.

<sup>95</sup> *Landers v Attorney General* (1975) 108 ILTR 1, 5 (Finlay J) upholding s 2(b)–(c) of the *Prevention of Cruelty to Children Act 1904*.

<sup>96</sup> It might also lighten the applicable standard of review; see below, Part V, E *Lower and Variable Standards of Review*.

<sup>97</sup> *Handyside v United Kingdom* 5493/72 (1976) 1 EHRR 737, [49].

<sup>98</sup> *R v Oakes* [1986] 1 SCR 103, [70] (Dickson CJ; Chouinard, Lamer, Wilson and Le Dain JJ concurring).

<sup>99</sup> *Heaney v Ireland* [1996] 1 IR 580, 607 (Costello J), affd [1996] 1 IR 580 (SC); *Rock v Ireland* [1997] 3 IR 484, 500 (Hamilton CJ, for the Court); *Re National Irish Bank* [1999] 1 ILRM 321, 352 [26]–[31] (Barrington J; O'Flaherty, Murphy, Lynch and Barron JJ concurring); *DK v Crowley* [2002] 2 IR 744, 757–8 (Keane CJ, for the Court); *Blehein v Minister for Health and Children* [2009] 1 IR 275, 281 [18] (Denham J; Hardiman, Geoghegan, Kearns and Macken JJ concurring); *Leech v Independent Newspapers (Ireland) Ltd* [2014] IESC 79, [21]–[22] (McKechnie J; Dunne and Murray JJ concurring); *Meath County Council v Murray* [2017] IESC 25, [21] (McKechnie J; Denham CJ, and O'Donnell, Laffoy and Dunne JJ concurring); *CRH plc v Competition and Consumer Protection Commission* [2017] IESC 34 [66]–[67] (MacMenamin J).

The Court has applied this test in the context of the integrated constitutional protection of property.<sup>100</sup> And it would almost<sup>101</sup> certainly be applied in any challenge by tobacco companies to the packaging legislation.

### A *Rational Connection*

The first of the three steps in the Irish proportionality test is a requirement of a rational connection: the impugned legislation must be rationally connected to the pressing and substantial reasons advanced by the state, and not be arbitrary, unfair or based on irrational considerations. Hence, a court ruling that restrictions were ‘impermissibly wide and indiscriminate’<sup>102</sup> is now explained as the application of a proportionality test.<sup>103</sup> Similarly, a ruling that restrictions were ‘shot through with unnecessary anomalies and inconsistencies’<sup>104</sup> is well on course to being explained in similar terms.<sup>105</sup> Moreover, restrictions that are ‘arbitrary’<sup>106</sup> or ‘discriminatory’<sup>107</sup> have also been held

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<sup>100</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 383 (Hamilton CJ, for the Court); *Re Article 26 and the Planning and Development Bill 1999* [2000] 2 IR 321, 349 [83] (Keane CJ, for the Court); *Criminal Assets Bureau v Kelly* [2012] IESC 64 [34] (MacMenamin J, Denham CJ and Hardiman J concurring). See generally, Gerard Hogan, ‘The Constitution, Property Rights, and Proportionality’ (1997) 32 *Irish Jurist (ns)* 373; Rachael Walsh, ‘The Constitution, Property Rights and Proportionality: A Reappraisal’ (2009) 31 *Dublin University Law Journal* 1. This is not an enquiry which much details the Australian courts in property cases at present; however, see *JT International v Cth of Australia* (2012) 250 CLR 1, [336]–[340] (Kiefel J).

<sup>101</sup> Subject to discussion below, Part V — *E Lower and Variable Standards of Review*.

<sup>102</sup> *Cox v Ireland* [1992] 2 IR 503, 524 (Finlay CJ, for the Court), striking down s 34 of the *Offences Against the State Act 1939*.

<sup>103</sup> *Heaney v Ireland* [1996] 1 IR 580, 607 (Costello J); *Rock v Ireland* [1997] 3 IR 484, 500 (Hamilton CJ, for the Court); *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 342–3, 383 (Hamilton CJ, for the Court).

<sup>104</sup> *Brennan v Attorney General* [1983] ILRM 449, 469 (Barrington J), see also 486 (‘eccentric and ludicrous’); affd [1984] ILRM 355, 365 (O’Higgins CJ, for the Court) (‘lack of uniformity, inconsistencies and anomalies’). See also *John Grace Fried Chicken Ltd v Catering Joint Labour Committee* [2011] 3 IR 211, 241 [39] (Feeney J) (striking down the *Employment Regulation Order Catering Joint Labour Committee (for areas other than the areas known, until 1st January 1994, as the County Borough of Dublin and the Borough of Dun Laoghaire) 2008* (SI No 142 of 2008) which provided for inconsistent and arbitrary rates of remuneration and conditions of employment).

<sup>105</sup> In *Shirley v O’Gorman* [2006] IEHC 27 (Peart J), affd on other grounds [2012] 2 IR 170; Peart J in the High Court treated *Brennan v Attorney General* [1983] ILRM 449 and proportionality as interchangeable standards, and concluded that restrictions were ‘arbitrary, unfair and irrational and [were] therefore disproportionate’ [emphasis added].

<sup>106</sup> *Blake and Madigan v Attorney General* [1982] IR 117, 138, 140 (O’Higgins CJ, for the Court) (‘unfair and unjust’; ‘unfair and arbitrary’; ‘arbitrary and unfair’) striking down Part II (restrictions on rent of controlled dwellings) and Part IV (restrictions on recovery of possession of controlled premises) of the *Rent Restrictions Act 1960* (as amended by the *Rent Restrictions (Amendment) Act 1967* and the *Landlord and Tenant (Amendment) Act 1971*).

<sup>107</sup> *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, 209, [2011] IESC 14, [53] (Murray CJ) semble equating ‘arbitrary or discriminatory’ with ‘disproportionate’. In that case, the Supreme Court upheld the *National Asset Management Agency Act 2009* against a comprehensive challenge, but derived from the plaintiff’s property rights certain obligations of fair procedures: see *Dellway Investments v National Asset Management Agency* [2011] 4 IR 1, [2010] IEHC 364 (1 November 2010) (Kearns P, Kelly and Clarke JJ, in a joint judgment), affd on different grounds in three judgments in the Supreme Court: *Dellway Investments v National Asset Management Agency (No 1)* [2011] 4 IR 1, [2011] IESC 4 (3 February 2011) (no valid decision to acquire loans); *Dellway Investments v National Asset Management Agency (No 2)* [2011] 4 IR 1, [2011] IESC 23 (12 April 2011) (right to be heard when decision being taken); *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, [2011] IESC 14 (12 April 2011) (right to be informed of impending decision).

disproportionate. On the other hand, regulations that were ‘neither capricious nor arbitrary’<sup>108</sup> have been upheld easily.

The requirement of a rational connection assesses the strength or weakness of the state’s reasons for the restriction. The less pressing and substantial they are, the less likely is it that a restriction will be considered proportionate. For example, the state failed to provide adequate reasons to justify an anomalous and unfair system of agricultural rates based upon land values set in 1852.<sup>109</sup> Conversely, where the reasons are more pressing and substantial, a restriction is more likely to be upheld as proportionate. For example, an ‘extreme financial crisis or fundamental disequilibrium in the public finances’,<sup>110</sup> could justify very significant restrictions indeed.

The question here, then, is whether the Irish packaging legislation passes the requirement of a rational connection. Subject to the evidence on this point that might be run in any challenge, the answer would almost certainly be yes. The state’s interests in the promotion of public health and in the protection of children (discussed above) are pressing and substantial reasons; the packaging legislation is clearly rationally connected to them; and it does not seem to be arbitrary, unfair or based on irrational considerations.<sup>111</sup>

## B *Minimal Impairment*

The second of the three steps in the Irish proportionality test is a requirement of minimal impairment: the impugned legislation must impair the engaged right as little as possible. That is, the interference must not exceed what is necessary to meet the pressing and substantial concerns in question, and must be the least possible interference with the right consistent with the advancement of those of those concerns.<sup>112</sup> Hence, the imposition of ‘relatively minor’<sup>113</sup> burdens or ‘limited’<sup>114</sup> intrusions upon rights, or restrictions that are not material,<sup>115</sup> have been held to be minimal and thus proportionate interferences with those rights.

The requirement of minimal impairment assesses the strength or weakness of a restriction upon a right. A control upon property is less intrusive than the expropriation of the property, so control is

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<sup>108</sup> *Lawlor v Minister for Agriculture* [1990] 1 IR 356, 377 (HC, Murphy J) (upholding the milk quota system in *European Communities (Milk Levy) Regulations 1985* (SI No 416 of 1985); see now *Maher v Minister for Agriculture* [2001] 2 IR 139.

<sup>109</sup> *Brennan v Attorney General* [1984] ILRM 355, striking down s 11 of the *Local Government Act 1946* which had adopted rateable valuations determined in accordance with s 11 of the *Valuation Act 1852*.

<sup>110</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 208 [132] (Murray CJ, for the Court); *Dellway Investments v National Asset Management Agency* [2011] 4 IR 1, 120 [287], [2010] IEHC 364 [10.20] (1 November 2010) (Kearns P, Kelly and Clarke JJ, in a joint judgment).

<sup>111</sup> Compare *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin) [587]–[649] (Green J), affd [2016] EWCA Civ 1182 (Lewison, Beatson and Richards LJJ).

<sup>112</sup> *Reid v Industrial Development Agency* [2015] IESC 82, [44](iv) (McKechnie J; Denham CJ, O'Donnell, Laffoy and Charleton JJ concurring); *Keane v An Bord Pleannála (No 3)* [1998] 2 ILRM 241, 262 (Keane J; Hamilton CJ and Barrington J concurring).

<sup>113</sup> *Electricity Supply Board v Gormley* [1985] IR 129, 152 (Finlay CJ, for the Court).

<sup>114</sup> *Chestvale Properties Ltd v Glackin* [1993] 2 IR 35, 45 (Murphy J); *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, 327, [2011] IESC 14, [456] (12 April 2011) (Fennelly J).

<sup>115</sup> *Dellway Investments v National Asset Management Agency* [2011] 4 IR 1, 64 [117], [2010] IEHC 364, [7.15] (1 November 2010) (Kearns P, Kelly and Clarke JJ, in a joint judgment).

more likely to be a proportionate restriction than expropriation. On the one hand, the imposition of a prospective charge for health services was held to be a limited and proportionate restriction on rights.<sup>116</sup> On the other hand, the imposition of a retrospective charge for health services (to validate payments unlawfully exacted) was held to be an extensive and disproportionate expropriation.<sup>117</sup> The question here, then, is whether the Irish packaging legislation passes the requirement of minimal impairment. Again, subject to the evidence on this point that might be run in any challenge, the answer would almost certainly be yes. There are pressing and substantial reasons; the packaging legislation, whilst extensive, seems to impair the engaged property rights as little as possible; in particular, there do not seem to be any plausible less restrictive means available to the state to the achieve the same ends.<sup>118</sup>

### C *Proportional Effects*

The third of the three steps in the Irish proportionality test is a requirement of proportional effect: the effects of the impugned legislation on the engaged rights must be proportional to the pressing and substantial reasons advanced by the state. On the one hand, where even a minor transgression has an excessive consequence,<sup>119</sup> the legislation will be disproportionate and unconstitutional. Again, where the effects of the legislation fall excessively upon one person or group,<sup>120</sup> for the benefit of another group<sup>121</sup> or even of society as a whole,<sup>122</sup> the legislation will be disproportionate and unconstitutional. On the other hand, it

is entirely proper that the State should insist that those who profit from an industrial process should manage it as safely, and with as little danger to health, as possible. The cost of doing the job safely and in a healthy manner is properly regarded as part of the industrialist's costs of production. Likewise it is proper that he should pay if he pollutes the air, the land or the rivers. It would be unjust if he were allowed to take the profits and let society carry the cost.<sup>123</sup>

This plainly covers the position of the tobacco industry. Even if the Irish packaging legislation could be called into question on the basis that its effects fall excessively upon the tobacco companies, it is entirely proper that the state should insist that those who profit from tobacco should market it with as little danger to health as possible. It would be unjust if the tobacco companies were to be allowed to take the profits and let society carry the cost of healthcare, a cost that would be reduced if the restrictions in the packaging legislation were effective.

The requirement of proportional effects assesses the strength or weakness of the right which the state has pressing and substantial reasons to restrict: the more central the restricted activity is to

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<sup>116</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105.

<sup>117</sup> *Ibid.*

<sup>118</sup> Compare *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin) [650]–[679] (Green J), *affd* [2016] EWCA Civ 1182 (Lewison, Beatson and Richards LJJ).

<sup>119</sup> *Cox v Ireland* [1992] 2 IR 503, 524 (Finlay CJ, for the Court), as explained in *Murphy v Irish Radio and Television Commission* [1999] 1 IR 12, 26–7 (Barrington J; Hamilton CJ, O'Flaherty, Denham, and Keane JJ concurring).

<sup>120</sup> *Shirley v O'Gorman* [2006] IEHC 27 (Peart J).

<sup>121</sup> *Blake v Attorney General* [1982] IR 117, 139 (O'Higgins CJ, for the Court); *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181, 191 (O'Higgins CJ).

<sup>122</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 367 (Hamilton CJ, for the Court).

<sup>123</sup> *Ibid.*; see also *O'Callaghan v Commissioner of Public Works* [1985] ILRM 364, 368 (O'Higgins CJ, for the Court); *Re Article 26 and the Planning and Development Bill 1999* [2000] 2 IR 321, 354 [93]–[94] (Keane CJ, for the Court).

the enjoyment of the right in question, the less likely the restriction will be proportionate, whereas the further the restricted activity is from the core of the right, the more likely a restriction is to be proportionate. Trade marks may not be central to the integrated constitutional protection of property. For example, where licences are created by law, not only may they be regulated in the interests of the common good,<sup>124</sup> but they are also 'subject to the conditions created by law and to an implied condition that the law may change those conditions'.<sup>125</sup> There are similar comments in respect of pensions<sup>126</sup> and copyright.<sup>127</sup> It is just as true of trade marks.

The question here, then, is whether the Irish packaging legislation passes the requirement of proportionate effects. Again, subject to the evidence on this point that might be run in any challenge, the answer would almost certainly be yes. The effects do not fall excessively upon the tobacco companies, and their property rights are not central to the freedoms or protections engaged by the restrictions in the packaging legislation.

#### D Deference

The courts are particularly reluctant to second guess legislative judgments on controversial<sup>128</sup> or sensitive<sup>129</sup> social, economic and medical matters and on major issues of national policy. Accordingly, in applying the three steps of the proportionality test, courts often afford a great deal of deference to the state.<sup>130</sup> This may 'be an application of the presumption of constitutionality',<sup>131</sup> by which legislation enacted by the Oireachtas after the Constitution came into force in 1937 is presumed to be constitutional, unless and until the contrary is clearly established.<sup>132</sup> The Court has applied this presumption in the context of the integrated constitutional protection of property,<sup>133</sup>

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<sup>124</sup> *State (Pheasantry Ltd) v Donnelly* [1982] ILRM 512, 516 (Carroll J), approved in *Maher v Minister for Agriculture* [2001] 2 IR 139, 220 [202]–[203] (Denham J, Murphy J concurring); *Muldoon v The Minister for the Environment* [2015] IEHC 649 [167]–[175], [180]–[183] (Peart J).

<sup>125</sup> *Hempenstall v Minister of the Environment* [1994] 2 IR 20, 28 (Costello P); *Maher v Minister for Agriculture* [2001] 2 IR 139; *Muldoon v Minister for the Environment* [2015] IEHC 649; see also *O'Dwyer v Minister for the Environment* [2001] 1 IR 255, 262, [12] (Geoghegan J) (no obligation not to change the conditions); *Gorman v Minister for Environment and Local Government* [2001] 2 IR 414, 429–30 (Carney J). However, see *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 439–40 [363]–[364] (Crennan J) (contingency does not automatically remove a statutory right from scope of constitutional protection); *JT International v Cth of Australia* (2012) 250 CLR 1, [102]–[108] (Gummow J) (same).

<sup>126</sup> *PC v Minister for Social Protection* [2017] IESC 63 [27]–[28], [45] (MacMenamin J; Denham CJ, and McKechnie, Clarke and O'Malley JJ concurring).

<sup>127</sup> *Phonographic Performance (Ireland) Ltd v Cody* [1998] 4 IR 504, 511.

<sup>128</sup> *Ryan v Attorney General* [1965] IR 294, 312 (Kenny J); *Dellway Investments v National Asset Management Agency* [2011] 4 IR 1, 119–20 [284]–[287], [2010] IEHC 364, [10.17]–[10.20] (1 November 2010) (Kearns P, Kelly and Clarke JJ, in a joint judgment) affd *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, 225, [2011] IESC 14 [110] (12 April 2011) (Denham J).

<sup>129</sup> *MD v Ireland* [2012] IESC 10, [50] (Denham CJ; Murray, Hardiman, Fennelly and Macken JJ concurring).

<sup>130</sup> *BUPA Ireland v Health Insurance Authority* [2006] IEHC 431, [247] (McKechnie J); *CRH plc v Competition and Consumer Protection Commission* [2017] IESC 34, [67] (MacMenamin J) ('substantial latitude').

<sup>131</sup> *Colgan v Independent Radio and Television Commission* [2000] 2 IR 490, 512 (O'Sullivan J).

<sup>132</sup> The classic statements are *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413, 417 (Hanna J); *McDonald v Bord na gCon* [1965] IR 217, 239 (Walsh J); *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317, 340–41 (Walsh J); see most recently *Collins v Minister for Finance* [2016] IESC 73 [70] (Denham CJ, and O'Donnell, McKechnie, Clarke, Dunne and Charleton JJ, in a joint judgment).

<sup>133</sup> *White v Dublin City Council* [2004] 1 IR 545, 569 [81] (Denham J; Murray, McGuinness, Fennelly and McCracken JJ concurring); *Clinton v An Bord Pleanána (No 2)* [2007] 4 IR 701, 716 [26], 725 [53] (Geoghegan J; Denham,



and the packaging legislation would almost certainly benefit from it and from any attendant judicial deference to legislative judgment.

This presumption of constitutionality leads to two further presumptions. First, it is presumed that the Oireachtas intended a constitutional construction of legislation; so where constitutional and non-constitutional constructions are reasonably open, the Court must choose the constitutional one.<sup>134</sup> Again, the Courts have applied this presumption in the context of the integrated constitutional protection of property,<sup>135</sup> and the Irish packaging legislation would almost certainly benefit from it. Second, the presumption of constitutionality leads to the further presumption that a statutory discretion will be exercised constitutionally<sup>136</sup> and that fair procedures will be followed.<sup>137</sup> Again, the Courts have applied this presumption in the context of the integrated constitutional protection of property.<sup>138</sup> The making of a statutory instrument by the Minister for Health, pursuant to the discretion conferred by the packaging legislation,<sup>139</sup> would almost certainly benefit from this presumption too.

### E *Lower and Variable Standards of Review*

The Supreme Court applies the proportionality test in a flexible or variable fashion, assessing the strengths and weaknesses of the restrictions, rights and reasons at issue in the cases.<sup>140</sup> But it also seems to have developed an alternative, lower standard of review. In particular, where it considers that the Oireachtas is essentially engaged in a balancing of constitutional rights and duties, the Court effectively applies a rationality test rather than a proportionality test. In such cases, the role of the Court

is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.<sup>141</sup>

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Fennelly, Kearns and Macken JJ concurring); *Reid v Industrial Development Agency* [2015] IESC 82 [44(v)] (McKechnie J; Denham CJ, O'Donnell, Laffoy and Charleton JJ concurring).

<sup>134</sup> *McDonald v Bord na gCon* [1965] IR 217, 239 (Walsh J); *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317, 340–41 (Walsh J).

<sup>135</sup> *National Asset Loan Management Ltd v McMahon* [2014] IEHC 71, [42] (Charleton J).

<sup>136</sup> *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317, 340–41 (Walsh J).

<sup>137</sup> *Garvey v Ireland* [1981] IR 75, 97 (O'Higgins CJ); *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, 282, [2011] IESC 14, [311] (12 April 2011) (Hardiman J).

<sup>138</sup> *Dellway Investments v National Asset Management Agency (No 3)* [2011] 4 IR 1, 202–4, [2011] IESC 14 [26]–[29] (Murray CJ); [2011] 4 IR 1, 225, 234, [2011] IESC 14 [111], [135] (Denham J), [2011] 4 IR 1, 282, [2011] IESC 14 [312] (Hardiman J), [2011] 4 IR 1, 321–2, [2011] IESC 14 [435]–[437] (Fennelly J).

<sup>139</sup> 2015 Act ss 7(10)–(11), 9(10)–(11), 10(9)–(10).

<sup>140</sup> See discussion above: sub-headings B *Minimal Impairment* through D *Deference*.

<sup>141</sup> *Touhy v Courtney* [1994] 3 IR 1, 47 (Finlay CJ, for the Court); *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, 1995* [1995] 1 IR 1, 45, (Hamilton CJ, for the Court); *Iarnród Éireann v Ireland* [1996] 3 IR 321, 376 (O'Flaherty J, for the Court); *In re Article 26 and the Employment Equality Bill, 1996* [1997] 2 IR 321, 334 (Hamilton CJ, for the Court).

This rationality test is a lower, less stringent, more tractable standard of review or scrutiny than the three-step proportionality test. Even so, legislation can fail this test<sup>142</sup> and be found unconstitutional. If the Irish packaging legislation is justifiable not only on the basis of the state's interests in public health and the protection of children, but also on the basis of constitutional rights,<sup>143</sup> then the state may seek to argue that its constitutionality should be assessed on the basis of this rationality standard rather than on the basis of the stricter three-step proportionality standard. And if the rationality test were to be applied, then the packaging legislation would almost certainly survive review or scrutiny; it could not be said that the balance of rights contained in the packaging legislation is 'so contrary to reason and fairness' as to constitute an unjust attack on the tobacco companies' property rights.

#### F *Absence of Review*

It was not always clear that legislation restricting rights will be subjected to a standard of review or scrutiny. In *Attorney General v Southern Industrial Trust*, it was enough for Lavery J that the legislation restricting the plaintiff's property rights was directed to the constitutionally-sanctioned legitimate aims of the 'exigencies of the common good' and the 'principles of social justice'.<sup>144</sup> He did not go on to subject that aim to further review or scrutiny, to determine for example whether the restriction went too far in the pursuit of that aim. Moreover, there is an oft-repeated *dictum* of Walsh J in *Dreher v Irish Land Commission* that might mean that legislation authorised by the principles of social justice or the exigencies of the common good in article 43 cannot amount to an unjust attack for the purposes of article 40.3.<sup>145</sup>

These cases predate the development of the proportionality and rationality standards of review or scrutiny discussed above. To the extent that they could preclude further review or scrutiny once a pressing and substantial reason to justify the legislation has been established, then they can no longer be right. It is unthinkable that the Irish packaging legislation would not be subject to some standard of review or scrutiny. The only question is which one: a tractable rationality test, or a more stringent three-step proportionality test. However, it is clear that the packaging legislation would almost certainly satisfy any applicable test.

#### VI CONCLUSION

The tobacco companies' litigation strategy<sup>146</sup> has seen them challenge legislation restricting tobacco packaging in many jurisdictions and before international tribunals. These cases can turn

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<sup>142</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 198 [115] (Murray CJ, for the Court) (striking down retrospective health charges); *White v Dublin City Council* [2004] 1 IR 545, 568–9 [80] (Denham J; Murray, McGuinness, Fennelly and McCracken JJ concurring), striking down an absolute two-month limitation period in s 82(3B)(a)(i) of the *Local Government (Planning and Development) Act 1963*, as inserted by s 19(3) of the *Local Government (Planning and Development) Act 1992*.

<sup>143</sup> See discussion above, Part IV Reasons.

<sup>144</sup> (1960) 94 ILTR 161 (SC) 176 upholding s 5(1) of the *Customs (Temporary Provisions) Act 1945* (forfeiture of car used in a crime).

<sup>145</sup> [1984] ILRM 94, 96 ('a piece of legislation which is authorised by Article 43 cannot fall foul of Article 40.3'); cited in *O'Callaghan v Commissioner of Public Works* [1985] ILRM 364, 368 (O'Higgins CJ, for the Court); *Electricity Supply Board v Gormley* [1985] IR 129, 150 (Finlay CJ, for the Court).

<sup>146</sup> Ankita Ritwik, 'Tobacco Packaging Arbitration and the State's Ability to Legislate' (2013) 54 *Harvard International Law Journal* 523.

as much on general principles common to many constitutions and treaties as they can on the specifics of a particular constitutional text. The proportionality analysis of the Court of Appeal for England and Wales in *British American Tobacco v Secretary of State for Health*<sup>147</sup> probably supplies an example of the former;<sup>148</sup> whereas the analysis of the concept of ‘acquisition of property’ in section 51(xxxi) of the Australian Constitution by the High Court of Australia in *JT International v Commonwealth* probably supplies an example of the latter.<sup>149</sup> The one constant is that the tobacco companies invariably lose. Any challenge to the Irish packaging legislation would have a similar outcome.

Restrictions upon rights can be justified by reasons which survive review. The *Public Health (Standardised Packaging of Tobacco) Act 2015* and Part 5 of the *Health (Miscellaneous Provisions) Act 2017* together provide for comprehensive standardised packaging of tobacco products. In particular, there will be strict regulations upon, perhaps even prohibition of the use of trade marks and other branding. These restrictions potentially engage the integrated protection of property contained in the Irish constitution. This provides a largely stable and relatively coherent basis for analysis and development. The Irish packaging legislation does in fact restrict the tobacco companies’ use of their property, especially trade marks, and the integrated constitutional protection of property is engaged by these restrictions, albeit that statutorily contingent property is not at the core of that protection. In public health and the protection of children, the state has substantial and pressing reasons for the restrictions; and it may even be said that it is vindicating its citizens’ rights to health and bodily integrity in general, and children’s rights in particular.

In reviewing the impact of the restrictions in the packaging legislation on the tobacco companies’ property rights against that backdrop, the legislation must satisfy a three-step proportionality test of rational connection, minimal impairment, and proportional effects. Because statutorily contingent property is not at the core of the integrated constitutional protection of property, it is easier to restrict it proportionally. Moreover, it is unjust for the tobacco companies to continue to take the profits but let society carry the cost of healthcare, a cost that would be reduced if the restrictions in the packaging legislation were effective. However, if the Supreme Court considers that the Irish packaging legislation seeks to balance the tobacco companies’ speech and property rights against citizens’ right to health, and children’s rights, then the legislation would have to satisfy only a rationality test, which it would satisfy easily.

Ireland has been in the vanguard of tobacco control worldwide. With the *Public Health (Standardised Packaging of Tobacco) Act 2015* and Part 5 of the *Health (Miscellaneous Provisions) Act 2017*, it continues to set a very important example. Any challenge from the tobacco industry on property grounds is likely to fail. And Ireland’s children and public health will be all the better for that.

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<sup>147</sup> [2016] EWCA Civ 1182.

<sup>148</sup> See above, nn 111 and 118.

<sup>149</sup> *JT International v Cth of Australia* (2012) 250 CLR 1. See also, above n 51.

VII APPENDIX

Relevant provisions of the Irish Constitution

**Article 40**

3. 1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
- 2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

...

**Article 42A**

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

...

**Article 43**

1. 1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
- 2 The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
2. 1 The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
- 2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.