IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S389 OF 2011

	BRITISH AMERICAN TOBACCO AUSTRALASIA LIMITED (ACN 002 717 160) First Plaintiff
BETWEEN:	**BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED (BCN 00074974)** Second Plaintiff
	BRITISH AMERICAN TOBACCO AUSTRALIA LIMITED (ACN 000 151 100) Third Plaintiff
AND:	**THE COMMONWEALTH OF AUSTRALIA** Defendant

No. S409 OF 2011

BETWEEN:	**JT INTERNATIONAL SA** Plaintiff
AND:	**THE COMMONWEALTH OF AUSTRALIA** Defendant

SUBMISSIONS OF CANCER COUNCIL AUSTRALIA

Filed on behalf of Cancer Council Australia by:

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II SUBMISSIONS

2. Cancer Council Australia (**the Cancer Council**) seeks leave to appear in each of these proceedings as *amicus curiae*.

3. The Cancer Council is a leading public health organisation which includes in its objects "to promote the prevention of cancer in human beings": see clause 2.1 of the Constitution of the Cancer Council.

4. In the Cancer Council's view, the Commonwealth Parliament's legislation for the plain packaging of tobacco products[1] is an important public health initiative to reduce tobacco smoking and thus reduce the incidence of cancer.

5. If leave is granted to the Cancer Council to appear, it wishes to make the following submissions.

6. In *Trade Practices Commission v Tooth & Co Ltd*,[2] in concluding that the impugned legislation did not effect an acquisition of property, Stephen J cited with approval the following passage from the judgment of Brandeis J in *Pennsylvania Coal Co v Mahon*:[3]

> Every restriction upon the use of property ... deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. **But restriction imposed to protect the public health, safety or morals from dangers threatened is not**

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[1] *Tobacco Plain Packaging Act* 2011 (Cth) (**the Act**).

[2] (1979) 142 CLR 397 at 413.

[3] (1922) 260 US 393 at 417.

> **a taking. The restriction here in question is merely the prohibition of a noxious use.** (emphasis added)

7. Although Brandeis J's statement was contained in a dissenting judgment, the majority in the U.S. Supreme Court did not disagree with the principle but merely its application to the facts of the case: see *Pennsylvania Coal Co v Mahon* (1922) 260 US 393 at, esp, 413 per Holmes J.

8. The principle had been previously accepted by the U.S. Supreme Court in *Mugler v Kansas* (1887) 123 US 623 at 668-669 per Harlan J, delivering the opinion of the Court.

9. It has also been subsequently endorsed: see *Keystone Bituminous Coal Association v De Benedictis* (1987) 480 US 470 at 488-489 per Stevens J, delivering the opinion of the Court.[4]

10. These cases establish that, in the context of the "takings" clause in the U.S. Constitution, it is relevant to consider the nature of the law, **including whether it is designed to protect public health, safety or morals**, in determining whether the restriction on the use of property amounts to a "taking". In *Mugler v Kansas*,[5] Harlan J explained the rationale for the exception as follows:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to **the health, the morals, or the safety of the public**, is not – and, consistently with the existence and safety of organized society cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. (emphasis added)

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[4] See also, *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency* (2002) 535 US 302 at 326-327 per Stevens J; *Goldblatt v Hempstead* (1962) 369 US 590 at 592-593 per Clark J; *Miller v Schoene* (1928) 276 US 272 at 279-280 per Stone J; *Hadacheck v Sebastian* (1915) 239 US 394 at 410-411 per McKenna J; *Reinman v Little Rock* (1915) 237 US 171 at 176-177 per Pitney J. See further, R Rotunda & J Nowak *Treatise on Constitutional Law: Substance and Procedure* (3rd ed 1999) 709-714, 722-724.

[5] (1887) 123 US 623 at 668.

11. In *Keystone Bituminous Coal Association v De Benedictis*,[6] it was said that the "special status" of state action of this type is that "since no individual has a right to use his property **so as to** create a nuisance or otherwise **harm others**, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity" (emphasis added).

12. The nature of the State's action is, therefore, critical in considering the application, or otherwise, of the U.S. takings clause.[7] Where the State's action is designed to protect public health, safety or morals from dangers, the legislation falls outside the protection of the takings clause – it is not a taking, for the reasons explained above.

10 13. Brandeis J's statement, set out at paragraph 6 above, has been applied in relation to comparable constitutional provisions of other jurisdictions. It was applied by the House of Lords in *Belfast Corporation v OD Cars Ltd*,[8] which concerned s 5(1) of the *Government of Ireland Act 1920*, which prohibited the legislature from enacting any law so as to "take any property without compensation". It was also applied by the Privy Council in *Campbell-Rodriques v Attorney-General of Jamaica*,[9] which concerned s 18 of the Constitution of Jamaica, prohibiting the compulsory taking of possession of property and compulsory *acquisition* of property without compensation.

14. As indicated above, in *Trade Practices Commission v Tooth & Co Ltd*,[10] Stephen J
20 cited Brandeis J's statement in the context of s 51(xxxi) of the Commonwealth Constitution.

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[6] (1987) 480 US 470 at fn 20 per Stevens J.

[7] See *Keystone Bituminous Coal Association v De Benedictis* (1987) 480 US 470 at 488, where Stevens J observed that "[m]any cases before and since *Pennsylvania Coal [Co v Mahon* (1922) 260 US 393] have recognized that the nature of the State's action is critical in takings analysis".

[8] [1960] AC 490 at 519 per Viscount Simonds.

[9] [2007] UKPC 65 at [17].

[10] (1979) 142 CLR 397 at 413.

15. While the U.S. clause uses the word "taking" and s 51(xxxi) uses the word "acquisition", the U.S. principle is of equal application in the context of s 51(xxxi). As noted above, it was applied by the Privy Council[11] in the context of a constitutional provision using the terminology of acquisition as well as that of taking. While a taking does not necessarily constitute an acquisition, if there is no taking, there is no acquisition.

16. Applying this in the present context, the objects clause (s 3) and the provisions of the Act more generally make clear that the Act is designed to protect public health from the dangers of tobacco smoking. The agreed facts include that:[12]

> Smoking tobacco is a cause of serious and fatal diseases, such as lung cancer, respiratory disease and heart disease.
>
> The risk of such diseases reduces in groups of people who quit smoking, and the reduction of risk increases from quitting earlier.

17. Plainly, the Act proceeds on the footing that stopping tobacco companies using their trademarks and logos on tobacco packaging will reduce the appeal of smoking and thus protect public health from the dangers of tobacco smoking.[13]

18. In these circumstances, the Act restricts the use of property for the purpose of protecting public health from dangers, and does not effect a "taking". It therefore does not effect an acquisition of property for the purposes of s 51(xxxi).

PART III SUBMISSIONS ON LEAVE TO APPEAR

19. The submission set out above is not ventilated by any party on the pleadings filed in these proceedings. It is based on a well-established principle of U.S. jurisprudence on the "takings" clause, which is comparable to s 51(xxxi) of the Commonwealth

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[11] *Campbell-Rodriques v Attorney-General of Jamaica* [2007] UKPC 65.

[12] See paragraphs 19-20 of the Questions Reserved dated 28 February 2012.

[13] See s 3(2)(a) of the Act and the Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011 (Cth), esp at pp 1-2 (the section headed "The rationale for plain packaging").

Constitution. The principle was cited with approval by Stephen J in *Trade Practices Commission v Tooth & Co Ltd*,[14] but the question whether it should be accepted in the context of s 51(xxxi) has not yet been considered by this Court. For these reasons, the Cancer Council may be able to offer significant assistance to the Court.[15]

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[14] (1979) 142 CLR 397 at 413.

[15] *Levy v Victoria* (1997) 189 CLR 579 at 604-605 per Brennan CJ; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312-3 per French CJ; *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205 at 206 [4] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; 284 ALR 222 at 224.