

**ORIGINAL**

**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**No. S409 of 2011**

**BETWEEN:**

**JT INTERNATIONAL SA  
Plaintiff**

**AND**

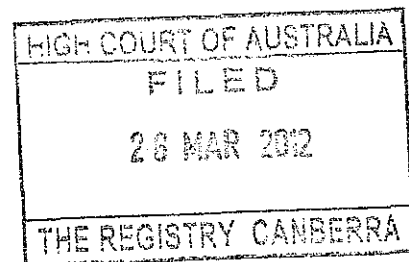
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**COMMONWEALTH OF AUSTRALIA  
Defendant**

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**PLAINTIFF'S SUBMISSIONS**

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Filed on behalf of the Plaintiff by  
Johnson Winter & Slattery  
Level 25, 20 Bond Street  
Sydney NSW 2000

Telephone: (02) 8274 9555  
Fax: (02) 8274 9500  
Ref: Tony Johnson

## ISSUES

**Procedure:** The Plaintiff (JTI) contends that its proceeding should be heard to finality and the Court then consider whether *British American Tobacco Australasia Ltd v The Commonwealth of Australia* should be adjourned to abide the result.

1. ***Does JTI own “property” within s 51(xxxi) of the Constitution?***

- (1) JTI relies on Trade Marks relating to Camel and Old Holborn, which are “property”. The Commonwealth concedes this issue.
- (2) JTI also relies on Get-Up in relation to the packaging of Camel and Old Holborn tobacco products. This is commercially valuable and capable of protection through legal action. *See paras 25 to 28 below*

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2. ***Has there been an “acquisition” of that property within s 51(xxxi)?***

- (1) The *Tobacco Plain Packaging Act 2011 (TPP Act)* extinguishes in substance JTI’s rights in the Trade Marks and the Get-Up.
- (2) This extinguishment gives rise to measurable and identifiable benefits to the Commonwealth.
- (3) This abrogation of rights is not a mere variation, adjustment or regulation of competing rights (contra Defence, paras 5(d) to (g)). *See paras 29 to 41 below*

Absent “just terms”, the TPP Act does not apply to JTI’s Trade Marks and Get-Up, either because it is read down by s 15 or because it is invalid.

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3. ***Is there a “regulatory benefit exception” to s 51(xxxi)?***

There is no basis in law for the Commonwealth’s novel defences (the **regulatory benefit exception**) that the alleged health effects of smoking, and the claimed efficacy of plain packaging, has the effect that: the acquisition of property falls outside s 51(xxxi); or there is fair dealing between the Commonwealth and the Plaintiff which amounts to “just terms” (Defence, paras 15 and 16). *See paras 47 to 54 below*

4. ***Are “just terms” provided for the acquisition?***

The TPP Act does not provide “just terms”. *See paras 57 and 58 below*

## FACTUAL AND LEGISLATIVE BACKGROUND

5. JTI is a company incorporated under the laws of Switzerland;<sup>1</sup> tobacco products are distributed for it in Australia under the brand names “Camel” and “Old Holborn”.<sup>2</sup>
6. JTI is the registered owner or exclusive licensee in Australia of the registered trade marks set out in Schedule A of its Statement of Claim,<sup>3</sup> as the exclusive licensee of the “Camel” trade marks (Schedule A, items 1 to 4); and the owner of the “Old Holborn” trade mark (Schedule A, item 5).
7. The trade dress and get-up of Camel and Old Holborn packaging and Camel cigarettes are set out in Schedule B of JTI’s Statement of Claim,<sup>4</sup> examples of which packet and pouch will be handed to the Court in current format.

### TPP Act

8. **Objects:** The objects of the TPP Act are set out in s 3(1):
- (a) to improve public health by:
    - (i) discouraging people from taking up smoking, or using tobacco products; and
    - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
    - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
    - (iv) reducing people’s exposure to smoke from tobacco products; and
  - (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.<sup>[5]</sup>
9. Parliament’s intention stated in s 3(2) of the TPP Act is:
- to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
    - (a) reduce the appeal of tobacco products to consumers;
    - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
    - (c) reduce the ability of retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.
10. **“Tobacco product requirements”:** Chapter 2, Pt 2 of the TPP Act specifies “tobacco product requirements”, and provides for regulations to specify further requirements.

<sup>1</sup> Statement of Claim, [1]; Defence, [1].

<sup>2</sup> See Defence, [2](d).

<sup>3</sup> Statement of Claim, [2]; Defence, [2](a).

<sup>4</sup> Statement of Claim, para 4; see Defence, para 4(a).

<sup>5</sup> This is the WHO Framework Convention on Tobacco Control (the **Convention on Tobacco Control**): see Australian Treaty Series 2005, No 7. JTI denies that the TPP Act is appropriate and adapted to giving effect to this Convention: Reply and Demurrer, para 15(3).

Demurrer book, [3], [13]

Demurrer book, [14]

Demurrer book, [3], [13]

Demurrer book, [3], [14]

Demurrer book, [48]

11. Trade marks and other marks may not be used in retail packaging of tobacco products (s 20(1) and (2)), other than (as provided in s 20(3)):

- (a) the brand, business or company name for the tobacco products, and any variant name for the tobacco products;
- (b) the relevant legislative requirements;<sup>6</sup> and
- (c) any other trade mark or mark permitted by the regulations.<sup>7</sup>

12. The appearance of the brand, business or variant name is tightly regulated. For example:

(1) the brand, business or variant name may appear only on the front, top and bottom of a packet;<sup>8</sup>

10 (2) on the front face, at least 75% of which must be covered by a graphic health warning,<sup>9</sup> the brand or business name must be in the centre of the space remaining on the front surface beneath the health warning and appear horizontally in the same orientation as the health warning;<sup>10</sup>

(3) on any other face, the brand or business name must appear horizontally and in the centre of the outer surface of the pack;<sup>11</sup>

(4) on any other face, the variant name must appear horizontally and immediately below and in the same direction as the brand or business name;<sup>12</sup>

(5) the brand, business or variant name must conform in size, font and colour to the following:<sup>13</sup>

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**Appearance of names on retail packaging of cigarettes**

Any brand, business or company name, or any variant name, appearing on cigarette packs or cigarette cartons must be printed:

- (a) in the typeface known as Lucinda Sans; and
- (b) for a brand, business or company name – no larger than 14 points in size; and
- (c) for a variant name – no larger than 10 points in size; and
- (d) with the first letter in each word capitalised and with no other upper case letters; and
- (e) in a normal weighted regular font; and

<sup>6</sup> “Relevant legislative requirements” means any of (a) a health warning; (b) a fire risk statement; (c) a trade description; or (d) a measurement mark (see definition in s 4(1)).

<sup>7</sup> See Tobacco Plain Packaging Regulations 2011 (TPP Regulations), Div 2.3.

<sup>8</sup> TPP Act, s 21(2)(b)(i).

<sup>9</sup> The Competition and Consumer (Tobacco) Information Standard 2011, which will be compulsory for all tobacco products supplied after 30 November 2012 (Reg 1.5(2)), requires that a prescribed graphic health warning must cover at least 75% of the front of the packet (Reg 9.13(1)). Until then, the standard for cigarette retail packaging manufactured or imported after 1 March 2006, the Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004, requires that a prescribed graphic health warning must cover at least 30% of the front of the packet (Reg 35(1) and Div 2.1.1 of Sched 2).

<sup>10</sup> TPP Act, s 21(1) and (3)(1).

<sup>11</sup> TPP Act, s 21(3)(3).

<sup>12</sup> TPP Act, s 21(3)(4).

<sup>13</sup> TPP Regulations, reg 2.4.1. See also TPP Act, s 21(1).


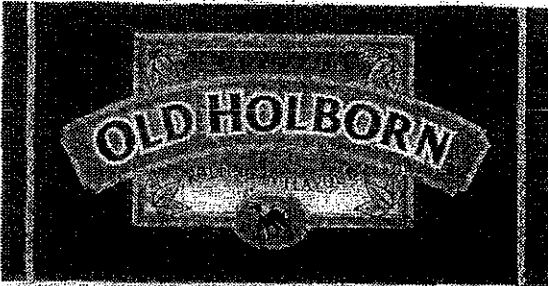
(f) in the colour known as Pantone Cool Gray 2C.

(6) Packets must not have any decorative ridges, embossing, bulges or other irregularities of shape or texture, or any other embellishments, and must be made of rigid cardboard of rectangular shape with 90° angles in a drab colour (known as Pantone 448C), with a matt finish.<sup>14</sup>

(7) No trade mark may appear on tobacco products themselves or on wrappers.<sup>15</sup>

13. In summary, the effect of the TPP Act is to eliminate all distinguishing features of tobacco packaging (including JTI's Trade Marks and Get Up) and permit only the brand or business name and variant name in small plain font thus:

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Existing trade mark	Mark permitted by TPP Act
 <p>The image shows a rectangular cigarette pack with a textured background. At the top, the word "CAMEL" is written in a bold, serif font. Below it, in smaller text, are "SINCE 1913" and "FILTERS". In the center, there is a detailed illustration of a camel standing in a desert landscape with palm trees and pyramids in the background.</p>	<p>Camel</p> <p>Filters</p>
 <p>The image shows a dark, rectangular cigarette pack. A prominent feature is a curved banner across the middle with the words "OLD HOLBORN" written in a bold, serif font. Below the banner, there is a small, circular emblem or crest.</p>	<p>Old Holborn</p>

14. **Offences:** Chapter 3 of the TPP Act contains substantial criminal and civil penalties for manufacturing, selling or purchasing tobacco products, or retail packaging of tobacco products, non-compliant with the "tobacco product requirements".<sup>16</sup>

<sup>14</sup> TPP Act, ss 18(1)(a), 18(2)(a), 18(2)(b) and 19(2); TPP Regulations, reg 2.2.1.

<sup>15</sup> TPP Act, ss 26(1) and 22(2)(b); TPP Regulations, Pt 2, Div 2.5; Pt 3.

<sup>16</sup> These offence provisions commence operation on either 1 October 2012 or 1 December 2012, as specified in s 2(1). There are general offences for non-compliant retail packaging of tobacco products, and for non-compliant tobacco products (Ch 3, Pt 2, Divs 1 and 2). There are comparable offences for non-compliant retail packaging and tobacco products, relating to constitutional corporations (Ch 3, Pt 3, Divs 1 and 2).

15. *Application and reading down:* The TPP Act is expressed as enacted under s 51(xxix) of the Constitution, as a purported implementation of the Convention on Tobacco Control. However, s 14 of the TPP Act sets out the additional operations of Ch 3, Pt 2 (the general offences and civil penalty provisions), relying on the corporations power and other heads of power.<sup>17</sup>

16. Under s 14(2), the offence provisions in Ch 3, Pt 2 have effect as if they were expressly confined to persons that are constitutional corporations. JTI is a foreign corporation within s 51(xx) of the Constitution,<sup>18</sup> and therefore a “constitutional corporation” for the purposes of the TPP Act.<sup>19</sup> The offence provisions in Ch 3, Pt 3 are expressly confined to offences relating to constitutional corporations.

17. Given in its application to JTI that the TPP Act is completely supported by s 51(xx), there is no utility in JTI challenging the purported reliance on s 51(xxix).<sup>20</sup>

18. Section 15 of the TPP Act is an idiosyncratic and qualified reading down provision. It relevantly provides:

**15 Acquisition of property**

(1) This Act does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms.

(2) In particular, if, apart from this section, this Act would result in such an acquisition of property because it would prevent the use of a trade mark or other sign on or in relation to the retail packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark or sign may be used on or in relation to the retail packaging of tobacco products, or on tobacco products, subject to any requirements that may be prescribed in the regulations for the purposes of this subsection.

... (emphasis added)

19. Section 15 appears only to have a possible relieving effect if there has been an acquisition otherwise than on just terms and enabling regulations have been made. No regulations have been made under s 15(2), and therefore s 15 does not assist the Commonwealth for the purposes of the current enquiry.

<sup>17</sup> The TPP Act also relies on the interstate and overseas trade and commerce power (s 14(3) and (4)), and the territories power (s 14(5)).

<sup>18</sup> See Defence, para 1.

Demurrer book, [13]

<sup>19</sup> See definition of “constitutional corporation” in TPP Act, s 4(1).

<sup>20</sup> JTI denies that the TPP Act is appropriate and adapted to giving effect to the Convention on Tobacco Control: Reply and Demurrer, para 15(3).

Demurrer book, [48]

## ARGUMENT

### JTI's demurrer and factual basis of proceeding

20. Further to the denials pleaded in the Reply, which are maintained, JTI has also demurred to the Defence. Grounds 1, 2 and 3 of the demurrer concern whether there is “property”, an “acquisition”, and “just terms” within s 51(xxxi). Ground 4 is that the factual matters alleged in paragraphs 8-12, 14(b)-(d) and 16(b) are irrelevant to the constitutional validity of the TPP Act.<sup>21</sup>
21. The Commonwealth pleads two key factual allegations:
- 10 (1) para 9: about the health effects of smoking; and
- (2) para 12: that various materials referred to form a “rational and/or cogent basis” for concluding that plain packaging will achieve certain results.
22. It is unclear whether para 12 is alleging what is rational or cogent for Parliament, or some wider basis. In either sense, JTI contends that none of the allegations in para 9 or para 12 is relevant to the validity of the TPP Act.
23. On a demurrer, there is no scope for the Court to be invited to consider, let alone to find, such allegations as a “constitutional fact”.<sup>22</sup> There is no reason for the Court to, and procedurally it would not be appropriate for it to, consider the material referred to in the Defence that is said to support these allegations.<sup>23</sup> The fact that JTI has pleaded, as well as demurred, to the Defence<sup>24</sup> provides no basis for making findings of constitutional fact – apart from anything else, only the demurrer has been referred to this Court for hearing.<sup>25</sup>
- 20 24. It follows there is no basis for the Commonwealth to invoke in this matter any of the materials before the Court filed in *British American Tobacco Australasia Ltd v The Commonwealth of Australia*. The Commonwealth would need to seek leave before it could rely on additional material in this proceeding.<sup>26</sup>

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<sup>21</sup> Reply and Demurrer, para 21(4).

Demurrer book, [49]

<sup>22</sup> In correspondence dated 16 March 2012, the Commonwealth has stated an intention to ask this Court to make findings of constitutional fact in these proceedings. JTI has filed a summons on 20 March 2012 seeking to have that issue addressed in advance of the final hearing.

<sup>23</sup> *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309 at [119] (Gummow and Hayne JJ), citing *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ).

<sup>24</sup> As permitted by the *High Court Rules 2004*, r 27.07.4.

<sup>25</sup> See Orders made by Justice Gummow on 27 February 2012, order 2.

<sup>26</sup> The Schedule C materials cannot be said to be relevant to the interpretation of the TPP Act: cf *Acts Interpretation Act 1901*, s 15AB.

## Ground 1: JTI's Trade Marks and Get Up are "property"

25. "Property" in s 51(xxxi) is "the most comprehensive term that can be used"<sup>27</sup> and extends to "every species of valuable right and interest",<sup>28</sup> and includes "innominate and anomalous interests".<sup>29</sup>
26. The Trade Marks are clearly "property", as is admitted in the Defence.<sup>30</sup>
27. In relation to Get-Up, it is common ground that JTI controls the appearance of the JTI Tobacco Products.<sup>31</sup> The ability (JTI contends a right) to control the appearance of the packaging is a valuable commercial right, amenable to protection by legal action.
28. JTI's Get-Up is more than a mere liberty, ability or capacity.<sup>32</sup> The get up or features of a product may acquire a reputation independently of trade names or marks used in connection with the product, the protection of which may be enforced by an action in passing off or for misleading conduct or representations under ss 18 or 23 of the Australian Consumer Law.<sup>33</sup> The fact that these common law rights are amenable to legislative alteration does not preclude the Get-Up from being "property".<sup>34</sup>

## Ground 2: The TPP Act effects an "acquisition" of JTI's property

29. The operative provisions of the TPP Act would result in an "acquisition" of JTI's property within s 51(xxxi).<sup>35</sup>

### *The TPP Act extinguishes the value of the Trade Marks and the Get-Up*

30. The TPP Act (apart from s 15) explicitly prohibits JTI from using its Trade Marks and the Get-Up in the retail packaging of its tobacco products, and on the tobacco products themselves, in that:

<sup>27</sup> *Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21 (Knox CJ and Starke J); *Australian Tape Manufacturers v The Commonwealth (Blank Tapes)* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

<sup>28</sup> *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290 (Starke J); *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [131] (Hayne, Kiefel and Bell JJ).

<sup>29</sup> *Bank of NSW v The Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1 at 349 (Dixon J); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [88] (French CJ), [356] (Crennan J); see also [294] (Kirby J, dissenting in the result).

<sup>30</sup> Defence, para 5(a). **Demurrer book, [15]**  
See *Blank Tapes* (1993) 176 CLR 480 at 527 (Dawson and Toohey JJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [182]-[184] (Gummow J).

<sup>31</sup> See Defence, para 3(a) (albeit saying that it is merely a liberty). JTI's entitlement to control the appearance of the tobacco packaging is evidenced by the statement on the packaging stating "a product of JT International": Statement of Claim, Sch B. **Demurrer book, [14], [7]-[8]**

<sup>32</sup> Contra Defence, para 3(a)(ii). **Demurrer book, [14]**

<sup>33</sup> See eg *Bodum v DKSH Australia Pty Ltd* (2011) 280 ALR 639 at [185], [268] (Greenwood J, with Tracey J agreeing).

<sup>34</sup> Cf Defence, para 3(b). **Demurrer book, [14]**

<sup>35</sup> Reply and Demurrer, para 21(2). **Demurrer book, [49]**



- (1) It prohibits the use of trade marks on retail packaging, or tobacco products, except for business, brand or variant names.<sup>36</sup> Business, brand or variant names must be presented using a particular typeface, size and colour,<sup>37</sup> thus diminishing to the point of extinguishment the distinguishing features of those parts of the Trade Marks that comprise the name. Logos, stylised word marks and marks which comprise images alone are prohibited from use altogether.
- (2) It prohibits the use of JTI's distinctive Get-Up in requiring the retail packaging to be a drab brown colour.<sup>38</sup>

- 10 31. "Acquisition" is determined as a matter of substance, not form.<sup>39</sup> Apart from s 15, the TPP Act would "impair the bundle of rights constituting the [Trade Marks and the Get-Up] in a manner sufficient to attract the operation of s 51(xxxi)".<sup>40</sup> Its effect would be to deprive JTI of "everything that made [the Trade Marks and the Get-Up] worth having".<sup>41</sup> In essence, it extinguishes them.
- 20 32. JTI's property in the Trade Marks and the Get-Up is effectively destroyed or "sterilised"<sup>42</sup> because the Trade Marks and Get-Up cannot be used to exploit their commercial value. A trade mark derives its commercial value principally from the ability to use it, not just the ability to exclude others from using it.<sup>43</sup> In prohibiting that use the TPP Act has in substance extinguished the Trade Marks.<sup>44</sup> Equally, the Get-Up's commercial value is in the right to use it to identify JTI's goods, enforceable against third parties in the ability to exclude others from using it.

*Identifiable and measurable benefit to the Commonwealth*

33. An extinguishment of one person's property will amount to an acquisition within s 51(xxxi) if there is an "identifiable and measurable countervailing benefit or advantage accruing to [an]other person as a result".<sup>45</sup>

<sup>36</sup> TPP Act, ss 20(1) and (3) (packaging), 22(2)(b) (wrappers), 26(1) (products). See para 10(1) and (4) above.

<sup>37</sup> TPP Act, ss 21(1) and (3). See para 10(2) above.

<sup>38</sup> TPP Act, s 19(2); TPP Regulations, reg 2.2.1. See para 10(3) above.

<sup>39</sup> *Telstra Corp v The Commonwealth* (2008) 234 CLR 210 at [43] (the Court).

<sup>40</sup> Cf *Telstra* (2008) 234 CLR 210 at [52] (the Court); *Smith v ANL Ltd* (2000) 204 CLR 493 at [23] (Gaudron and Gummow JJ).

<sup>41</sup> *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286 (Rich J).

<sup>42</sup> *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 530 (Brennan J), 635 (Gummow J).

<sup>43</sup> As recognised by the Trade Marks Act, s 20(1). That is not to say that the Trade Marks confer a "positive right": see, by analogy, *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479 at [83]-[85] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), discussing patents of invention.

<sup>44</sup> Cf *Bank Nationalisation Case* (1948) 76 CLR 1 at 349 (Dixon J): the law in that case was a "circuitous device to acquire indirectly the substance of a proprietary interest".

<sup>45</sup> *ICM* (2009) 240 CLR 140 at [82] (French CJ, Gummow and Crennan JJ), citing *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ); *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634 (Gummow J, with Toohey and Gaudron JJ agreeing on this point).

34. Here, the extinguishment of JTI's Trade Marks and Get-Up is said to be for the purposes set out in s 3 of the TPP Act. The pursuit of these expressed legislative purposes is sufficient to confer upon the Commonwealth the requisite "measurable and identifiable advantage" to constitute a constitutional acquisition of property.

35. **Purpose one** is to improve public health (s 3(1)(a)). The extrinsic materials make it clear that the advantage claimed by the Commonwealth includes the reduction in the cost of providing health care for illnesses that the Commonwealth alleges are "tobacco related".<sup>46</sup> The Commonwealth government funds health care in Australia, either directly or indirectly through grants to the States. This intended reduction in expenditure by the Commonwealth on illnesses alleged to be "tobacco related" is both identifiable and measurable, and asserted as such by the Commonwealth.

36. **Purpose two** is to improve the effectiveness of health warnings mandated by Commonwealth law (s 3(2)(b)).

(1) Currently, those warnings are contained in the Competition and Consumer (Tobacco) Information Standard 2011, made under s 134 of Sch 2 of the *Competition and Consumer Act 2010*.<sup>47</sup>

(2) The advantage claimed by the Commonwealth is that plain packaging creates a "blank background" for the health warnings, without trade marks and get up that are said to draw attention away from the warnings. This creation of a blank background is both identifiable and measurable (as distinct from any actual improved effectiveness of health warnings in terms of changing smoking behaviour, which is speculative and denied by JTI).

(3) Further and alternatively, the prohibition in the TPP Act operates in conjunction with the Competition and Consumer (Tobacco) Information Standard 2011, and is intended by the Commonwealth to further the objectives of that standard. The promotion of the objectives of that Standard gives rise to a quantifiable benefit to the Commonwealth.

37. **Purpose three** is to give effect to certain obligations under the Convention on Tobacco Control (s 3(1)(b)). The advantage also is both identifiable and measurable to the Commonwealth in that the TPP Act is expressed as a law meeting the Commonwealth's

<sup>46</sup> Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011, p 1: "The social costs of smoking (including health costs) are estimated at \$31.5 billion each year." See also Preventative Health Taskforce, *Technical Report 2: Tobacco Control in Australia: Making Smoking History* (June 2009) at p v; Debate on the Plain Packaging Bill 2011, House of Representatives Debates, 24 August 2011, at p 9278 (Nicola Roxon MP, Minister for Health).

<sup>47</sup> The previous health warnings were contained in the Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004, Pt 4 and Sch 2. Transitional provisions mean that it is sufficient to comply with this 2004 standard until 30 November 2012: Competition and Consumer (Tobacco) Information Standard 2011, cl 1.5(1) and (2).

international obligations and thereby furthered its foreign policy objectives (irrespective of whether s 51(xxix) in fact supports the TPP Act, which JTI denies).<sup>48</sup>

- 10 38. The requirement that there be an identifiable and measurable advantage is directed to the sufficiency of the advantage conferred by the *legislative purposes*<sup>49</sup> of the TPP Act (as distinct from its proven effect in fact, which JTI denies).<sup>50</sup> The characterisation of an extinguishment of property as an “acquisition” cannot depend on whether a law does in fact give rise to the intended measurable and identifiable advantages. Otherwise proof of such facts following the passage of sufficient time to be certain about the effects of a law would be required. A law concerning the acquisition of property is either valid at its inception or it is not.

For example, in *Georgiadis*<sup>51</sup> it was not necessary for this Court to determine the prospects of a vested common law cause of action against the Commonwealth that had been extinguished. The intended purpose of the law was to extinguish potential liabilities of the Commonwealth (with the intended correlative advantage to the Commonwealth) and that amounted to an “acquisition”.

- 20 39. An acquisition may have a number of different intended effects. For there to be an “acquisition”, it suffices if merely one of these effects amounts to a measurable and identifiable benefit.<sup>52</sup> For example, the extinguishment of mining leases in *Newcrest Mining*<sup>53</sup> was to protect the environment in a national park (which was not a “benefit”), but it also expanded the scope of the Commonwealth’s radical title over the land (which was).<sup>54</sup>
40. JTI contends that it is not necessary for the benefit to be proprietary in nature.<sup>55</sup> The notion of “property” in s 51(xxxii) is broad, and an “acquisition” can occur indirectly by

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<sup>48</sup> *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [258] (Kirby J).

<sup>49</sup> This is purpose objectively ascertained and not the subjective intention of the legislators: *Zheng v Cai* (2009) 239 CLR 446 at [27]-[28] (the Court).

<sup>50</sup> As well as the TPP Act, one of the advantages is the promotion of the objectives of the Competition and Consumer (Tobacco) Information Standard 2011. The Commonwealth has not alleged that plain packaging will achieve these effects, just that there is a “rational and/or cogent basis” for concluding that it will: Defence, para 12. **Demurrer book, [17]-[18]**

Therefore, JTI through its demurrer is not taken to have admitted that plain packaging will have the effects claimed.

<sup>51</sup> (1994) 179 CLR 297.

<sup>52</sup> By analogy, the fact that a law has a protectionist purpose will lead to invalidity under s 92 of the Constitution, even if the law also has other, non-protectionist purposes: *Befair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [48] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

<sup>53</sup> (1997) 190 CLR 513.

<sup>54</sup> See the analysis of *Newcrest Mining* in *ICM Agriculture* (2009) 240 CLR 140 at [85] (French CJ, Gummow and Crennan JJ).

<sup>55</sup> *ICM* (2009) 240 CLR 140 at [82] (French CJ, Gummow and Crennan JJ), citing *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ); *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634 (Gummow J, with Toohey and Gaudron JJ agreeing on this point). Contrary views have been expressed: *ICM* (2009) 240 CLR 140 at [147] (Hayne, Kiefel and Bell JJ), citing *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 145 (Mason J)

acquiring the substance of a property interest.<sup>56</sup> Further, Parliament may legislate to create or confer rights, interests or powers of control untrammelled by existing notions of property law. Thus an “acquisition” may be without analogue in the law of property and incapable of characterization according to any established principles of property law.<sup>57</sup> Further, what is acquired need not correspond precisely with what is taken.<sup>58</sup>

*The TPP Act is not a mere regulation*

41. This extinguishment of JTI’s rights cannot be justified as a mere regulation of these rights.
42. Although the Trade Marks (as with any right created by statute) may be altered by later legislation,<sup>59</sup> “[i]t is too broad a proposition ... that the contingency of subsequent legislative modification removes all statutory rights and interests from the scope of s 51(xxxi)”.<sup>60</sup> Trade Marks are not “inherently unstable”,<sup>61</sup> unlike statutory rights such as rights of access to fish and to water.<sup>62</sup> Indeed, this Court has held that a law reducing the content of subsisting statutory exclusive rights attracts the operation of s 51(xxxi).<sup>63</sup>
43. Unlike the laws considered in *Nintendo*,<sup>64</sup> the TPP Act is not a law that creates new intellectual property rights. Nor may it be characterised as a law “concerned with the adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity”.
- (1) To the contrary, the essence of the TPP Act is to establish the express prohibition on the use of trade marks on retail packaging and on tobacco products.
- (2) Whatever it is, the TPP Act is not a mere “adjustment” or “regulation” of the rights of tobacco product manufacturers and distributors. It eliminates the rights to use trade marks and get up in tobacco packaging in the course of retail and sale.

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and *Blank Tapes* (1993) 176 CLR 480 at 500 (Mason CJ, Deane, Brennan and Gaudron JJ), 528 (Dawson and Toohey JJ). Cf *Defence*, para 13(b). **Demurrer book, [18]-[19]**

<sup>56</sup> On the breadth of “property”, see para 25 above. On indirect acquisitions, see *Bank Nationalisation Case* (1948) 76 CLR 1 at 349 (Dixon J).

<sup>57</sup> *ICM* (2009) 240 CLR 140 at [190] (Heydon J), quoting *Smith v ANL Ltd* (2000) 204 CLR 493 at 542 [157] (Callinan J).

<sup>58</sup> *Newcrest* (1997) 190 CLR 513 at 634 (Gummow J, with Toohey and Gaudron JJ agreeing on this point); *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ).

<sup>59</sup> Cf *Defence*, para 5(e). **Demurrer book, [15]**

<sup>60</sup> *Telstra* (2008) 234 CLR 210 at [49] (the Court), quoting *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [24] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

<sup>61</sup> Cf *WMC Resources* (1998) 194 CLR 1 at [195] (Gummow J), describing the rights conferred by an exploration permit.

<sup>62</sup> Reductions in statutory rights to fish was held not to be contrary to s 51(xxxi) in cases such as *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 and *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567. Reductions in the rights of water access was held not to be an acquisition of property within s 51(xxxi) in *ICM Agriculture* (2009) 240 CLR 140.

<sup>63</sup> *Chaffey* (2007) 231 CLR 651 at [24] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

<sup>64</sup> (1994) 181 CLR 134 at 160, 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

44. Commonwealth trade marks legislation has long contained grounds on which registration of a mark could be refused. However, the common thread in these provisions is that registration may be refused on the basis of some quality of the trade mark itself. By contrast, the TPP Act prohibits the use of trade marks on the basis of the effects of the product associated with the marks, not the marks themselves.

(1) The *Trade Marks Act 1905* contained relatively confined grounds for refusing registration, such as “the use of [the mark] would by reason of its being likely to deceive or otherwise be disentitled to protection in a court of justice, or the use of which would be contrary to law or morality”.<sup>65</sup>

10 (2) The *Trade Marks Act 1955* contained similar provisions,<sup>66</sup> as well as the ground that the use of the mark “would be contrary to law” (s 28(b)).<sup>67</sup>

(3) The current grounds for rejecting registration are set out in Pt 4, Div 2 of the Trade Marks Act; it includes that the mark consists of scandalous matter (s 42(a)), and additional grounds that the mark cannot be represented graphically (s 40), and that the mark is not capable of distinguishing the applicant’s goods or services (s 41).

45. The TPP Act cannot be justified as regulating the “noxious use” of property.<sup>68</sup> Trade marks on the retail packaging of tobacco products (including JTI’s products) are being used exactly for the core function of all trade marks: to identify the origin of goods. The TPP Act prohibits the use of trade marks primarily because of the use (and alleged effects of use) of tobacco products, not the use or effects of the marks associated with the product.<sup>69</sup>

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46. In any event, the regulatory defence in para 5(d)-(e) of the Defence cannot apply to the property constituted by the Get-Up, as these rights derive from the common law and not a Commonwealth Act.

#### **Ground 4: Alleged health effects of tobacco products and efficacy of plain packaging are irrelevant to validity**

47. The purported “regulatory benefit exception” pleaded by the Commonwealth in paras 15 and 16 of the Defence has no basis in law.

48. This purported exception arises from factual allegations that:

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<sup>65</sup> *Trade Marks Act 1905*, s 114 (which also prohibited “scandalous designs”). See also ss 18 (certain words prohibited) and 19 (prohibiting words implying Royal patronage).

<sup>66</sup> See *Trade Marks Act 1955*, ss 28(a), (c) and (d) (broadly similar to s 114 of the 1905 Act) and 29 (broadly similar to ss 18 and 19 of the 1905 Act).

<sup>67</sup> See now Trade Marks Act, s 42(b).

<sup>68</sup> Cf *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 415 (Stephen J).

<sup>69</sup> The partial exception is the legislative concern that trade marks may be misleading (TPP Act, s 3(2)(c)). However, the legislative response – total prohibition – does not match this concern.

- (1) The consumption of tobacco products is said to be “harmful to the public and to the public interest as described in Schedule A to this defence” (para 9); and
- (2) The material set out in Schedule C to the Defence “provide a rational and/or cogent basis for concluding that the plain packaging of tobacco products will”: (a) reduce the appeal of tobacco products to the public; (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and (c) reduce the ability of retail packaging to mislead the public about the harmful effects of smoking (Defence, para 12; cf TPP Act, s 3(2)). (It is not clear whether this rational and/or cogent basis would be that of the Parliament, or some other person or body.)

10 49. From these allegations, it is said that the TPP Act has the purpose of restricting tobacco product manufacturers from: promoting tobacco products to the public; and maintaining or increasing the consumption of tobacco products (Defence, para 14(c)).

50. That statutory purpose is alleged to support the proposition that any acquisition of property otherwise than on just terms is said to be incidental to achieving the objects, and a necessary or characteristic feature (Defence, para 14(d)), such that the provision of just terms would be “incongruous or inconsistent” (Defence, para 15).

51. The essence of the Commonwealth’s argument is that an acquisition of property will fall outside s 51(xxxi) upon demonstrating that the TPP Act will achieve an important public purpose (here, reducing the alleged public health effects of smoking). That cannot possibly be correct.

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52. First, it is a basal principle of Australian constitutional law that the wisdom or expediency of a law is a matter for Parliament, not the courts.

(1) In deciding whether a law is supported by a head of power, this Court has long stated that “once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary”.<sup>70</sup>

(2) In determining constitutional freedoms and limitations on legislative power, this Court has uniformly eschewed value judgments about the merits of the impugned law as a touchstone of validity, whether the appropriate test is the extent to which the law is “reasonably appropriate and adapted”,<sup>71</sup> or the “reasonable necessity” for the law,<sup>72</sup> or (in limited circumstances) the “proportionality” of the law.<sup>73</sup>

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<sup>70</sup> *Burton v Honan* (1952) 86 CLR 169 at 179 (Dixon CJ, with McTiernan, Webb and Kitto JJ agreeing). See also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>71</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [27]-[39] (Gleeson CJ).

<sup>72</sup> *Thomas v Mowbray* (2007) 233 CLR 307 at [24] (Gleeson CJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134-6 [436]-[444] (Kiefel J).

<sup>73</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 131-132 [424]-[430], 136-139 [445]-[455] (Kiefel J).

(3) Indeed, this Court has made no exceptions to this principle, even in relation to the defence power (which, as a purposive power, raises special issues).<sup>74</sup>

53. Second, the Commonwealth may acquire property only when the acquisition comes within one of its heads of power.<sup>75</sup> It may be assumed that the Parliament would always consider that the acquisition of property is in the public interest. It is also trite that s 51(xxxi) applies even when the Commonwealth Parliament considers that an acquisition is in the public interest.

(1) In *Smith v ANL Ltd*,<sup>76</sup> Gleeson CJ stated:

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The guarantee contained in s 51 (xxxi) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by s 51 (xxxi) it must pay for them, or in some other way provide just terms of acquisition.

(2) To similar effect, French CJ stated in *Wurridjal* that “[a]n acquisition of property is no less an acquisition of property because it also has a regulatory or other public purpose”.<sup>77</sup>

If accepted, the Commonwealth’s argument would largely negate the effect of s 51(xxxi).

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54. There are some statements in cases considering s 51(xxxi) that appear to ask whether an acquisition is appropriate and adapted, or reasonably incidental, to a head of Commonwealth legislative power.<sup>78</sup> On analysis, however, those statements are merely asking whether a law is capable of being supported by a head of power other than s 51(xxxi). The test for whether an acquisition falls outside s 51(xxxi) is whether the provision of just terms is “inconsistent or incongruous” with the essential nature of the law.<sup>79</sup>

55. Here, JTI accepts that the TPP Act is supported by the corporations power, as set out in s 14(2).<sup>80</sup> The test of validity under the corporations power is whether the TPP Act:

... regulat[es] the activities, functions, relationships and the business of a [s 51(xx) corporation], the creation of rights, and privileges belonging to such a corporation, the imposition of

<sup>74</sup> *Miller v The Commonwealth* (1946) 73 CLR 187 at 203 (Dixon J); *Marcus Clarke & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 256 (Fullagar J); *The Communist Party Case* (1951) 83 CLR 1 at 277 (Kitto J).

<sup>75</sup> *Trade Practices Commission v Tooth* (1979) 142 CLR 397 at 403 (Barwick CJ, dissenting in the result).

<sup>76</sup> (2000) 204 CLR 493 at [9].

<sup>77</sup> (2009) 237 CLR 309 at [103].

<sup>78</sup> See particularly *Mutual Pools* (1994) 179 CLR 155 at 179, 180 (Brennan J); *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 292-293, 294 (McHugh J).

<sup>79</sup> *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>80</sup> Reply and Demurrer, para 15(1).

Demurrer book, [48]

obligations on it and, in respect of those matters, [regulates] the conduct of those through whom it acts, its employees and shareholders and, also, [regulates] those whose conduct is or is capable of affecting its activities, functions, relationships or business.<sup>81</sup>

56. Hence, the alleged health effects of smoking, and the efficacy (if any) of plain packaging, are irrelevant to validity under s 51(xx).

### Ground 3: No “just terms” is provided for this acquisition

57. The TPP Act does not provide any terms, let alone “just terms”, for the acquisition of property.<sup>82</sup>

- 10 (1) The words “just terms” require that the claimant receive the equivalent of full value of his property.<sup>83</sup>
- (2) Parliament has a measure of latitude in determining what constitutes “just terms”, so long as the method for assessing compensation is reasonable.<sup>84</sup> The term “fair dealing”<sup>85</sup> used in relation to the provision of “just terms” means nothing more than that.<sup>86</sup>

58. Hence, no terms are provided at all. There is no “Shipwreck clause”. The matters referred to in para 16 of the Defence<sup>87</sup> cannot constitute “just terms”.

### CERTIFICATION AND SECTION 78B NOTICES

59. These submissions are suitable for publication on the Internet.

- 20 60. JTI’s notice of a constitutional matter under s 78B of the *Judiciary Act 1903* dated 15 December 2011 is at **Demurrer Book [10]**.

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<sup>81</sup> *New South Wales v The Commonwealth (The Work Choices Act Case)* (2006) 229 CLR 1 at [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>82</sup> Reply and Demurrer, para 21(3). **Demurrer book, [49]**

<sup>83</sup> *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 85 (Williams J); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-11 (Brennan J); *Smith v ANL Ltd* (2000) 204 CLR 493 at 500-501 [8] (Gaudron and Gummow JJ).

<sup>84</sup> *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 279 at 290 (Dixon J); *Smith v ANL Ltd* (2000) 204 CLR 493 at 512-513 [48] (Gaudron and Gummow JJ).

<sup>85</sup> *Nelungaloo Pty Ltd v The Commonwealth* (1946) 75 CLR 495 at 600 (Kitto J); see also at 569 (Dixon J).

<sup>86</sup> *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [67] (Toohy J); *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 309 at [190], [197]-[198] (Gummow and Hayne JJ), at [305]-[308] (Kirby J).

<sup>87</sup> Defence, para 16. **Demurrer book, [20]**



**ORDERS SOUGHT**

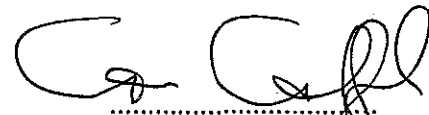
61. The Plaintiff seeks the following orders:

- (1) A declaration that the TPP Act does not apply and has no operation in its application to the Trade Marks and the Get-Up referred to in the Statement of Claim;
- (2) Alternatively, a declaration that the TPP Act is invalid in its application to the Trade Marks and the Get-Up;
- (3) Costs;
- (4) Any further order that the Court sees fit.

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**Date of filing:** 26 March 2012

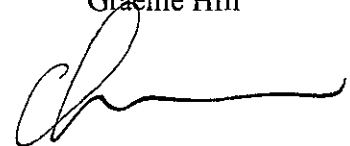
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.....  
Gavan Griffith  
0418 250 666  
03 9640 3108 (fax)  
ggqc@gavangriffith.com

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.....  
Graeme Hill



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Charles Parkinson

**Counsel for the Plaintiff**

## APPENDIX – LEGISLATIVE PROVISIONS

### Tobacco Plain Packaging Act 2011

#### 3 Objects of this Act

- (1) The objects of this Act are:
- (a) to improve public health by:
    - (i) discouraging people from taking up smoking, or using tobacco products; and
    - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
    - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
    - (iv) reducing people's exposure to smoke from tobacco products; and
  - (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.
- (2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
- (a) reduce the appeal of tobacco products to consumers; and
  - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
  - (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

#### 14 Additional operation of this Act

- (1) Without prejudice to its effect apart from this section, this Act also has effect as provided by this section.

##### *Corporations power*

- (2) Part 2 of Chapter 3 has, by force of this subsection, the effect it would have if its operation were, by express provision, confined to a person that is a constitutional corporation.

Note: Part 2 of Chapter 3 contains general offences and civil penalty provisions for non-compliant retail packaging and tobacco products.

##### *Trade and commerce power*

- (3) Part 2 of Chapter 3 has, by force of this subsection, the effect it would have if its operation were, by express provision, confined to a person engaging in conduct to the extent to which the conduct takes place in the course of, or in relation to, constitutional trade or commerce.

- (4) Subsection (3) does not apply to the extent (if any) that its application would infringe section 92 of the Constitution.

Note: Section 92 of the Constitution requires trade among the States to be absolutely free.

##### *Territories power*

- (5) Part 2 of Chapter 3 has, by force of this subsection, the effect it would have if its operation were, by express provision, confined to a person engaging in conduct to the extent to which the conduct takes place wholly or partly in a Territory.

## 15 Acquisition of property

- (1) This Act does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms.
- (2) In particular, if, apart from this section, this Act would result in such an acquisition of property because it would prevent the use of a trade mark or other sign on or in relation to the retail packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark or sign may be used on or in relation to the retail packaging of tobacco products, or on tobacco products, subject to any requirements that may be prescribed in the regulations for the purposes of this subsection.

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Note: Offences and civil penalties apply to the supply, purchase and manufacture etc. of tobacco products that do not comply with any requirements specified in the regulations (see Chapter 3).

- (3) To avoid doubt, any tobacco product requirement (within the meaning of paragraph (a) or (b) of the definition of *tobacco product requirement*) that does not result in such an acquisition of property continues to apply in relation to:
- (a) the retail packaging of tobacco products; and
  - (b) the appearance of tobacco products.

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## 18 Physical features of retail packaging

### *Retail packaging of all tobacco products*

- (1) The retail packaging of tobacco products must comply with the following requirements:
- (a) the outer surfaces and inner surfaces of the packaging must not have any decorative ridges, embossing, bulges or other irregularities of shape or texture, or any other embellishments, other than as permitted by the regulations;
  - (b) any glues or other adhesives used in manufacturing the packaging must be transparent and not coloured.

### *Cigarette packs and cigarette cartons*

- (2) A cigarette pack or cigarette carton must comply with the following requirements:
- (a) the pack or carton must be rigid and made of cardboard, and only cardboard (subject to paragraphs (1)(b) and (3)(d));
  - (b) when the pack or carton is closed:
    - (i) each outer surface of the pack or carton must be rectangular; and
    - (ii) the surfaces of the pack or carton must meet at firm 90 degree angles;
  - (c) all edges of the pack or carton must be rigid, straight and not rounded, bevelled or otherwise shaped or embellished in any way, other than as permitted by the regulations.
- (3) A cigarette pack must comply with the following requirements:
- (a) the dimensions of the pack must comply with the requirements prescribed by the regulations;
  - (b) the only opening to the pack must be a flip-top lid which must:
    - (i) be hinged only at the back of the pack; and
    - (ii) have straight edges;

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and neither the lid, nor the edges of the lid, may be rounded, bevelled or otherwise shaped or embellished in any way;

- (c) the inside lip of the cigarette pack must have straight edges, other than corners which may be rounded, and neither the lip, nor the edges of the lip, may be bevelled or otherwise shaped or embellished in any way;
- (d) if the pack contains lining--the lining of the pack must be made only of foil backed with paper, or any other material prescribed by the regulations.

## **20 Prohibition on trade marks and marks generally appearing on retail packaging**

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### *No trade marks*

- (1) No trade mark may appear anywhere on the retail packaging of tobacco products, other than as permitted by subsection (3).

Note: This section does not apply to wrappers (see subsection (4)).

### *No marks*

- (2) No mark may appear anywhere on the retail packaging of tobacco products, other than as permitted by subsection (3).

Note: For the definition of mark, see section 4.

### *Permitted trade marks and marks*

- (3) The following may appear on the retail packaging of tobacco products:

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- (a) the brand, business or company name for the tobacco products, and any variant name for the tobacco products;
- (b) the relevant legislative requirements;
- (c) any other trade mark or mark permitted by the regulations.

Note: For requirements for brand, business, company or variant names, and relevant legislative requirements, see section 21.

### *Section not to apply to wrappers*

- (4) This section does not apply to a plastic or other wrapper that covers:

- (a) the retail packaging of tobacco products; or
- (b) a tobacco product that is for retail sale.

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Note: For the requirements for wrappers, see section 22.

## **21 Requirements for brand, business, company or variant names, and relevant legislative requirements**

### *Requirements for brand, business, company or variant name--general*

- (1) Any brand, business or company name, or any variant name, for tobacco products that appears on the retail packaging of those products must comply with any requirements prescribed by the regulations.

Note: This section does not apply to wrappers (see subsection (5)).

### *Requirements for brand, business, company or variant name--cigarette packs and cigarette cartons*

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- (2) Any brand, business or company name, or any variant name, for cigarettes that appears on a cigarette pack or cigarette carton:

- (a) must not obscure any relevant legislative requirement; and
- (b) must not appear more than once on any of the following outer surfaces of the pack or carton:
  - (i) for a cigarette pack--the front, top and bottom outer surfaces of the pack;
  - (ii) for a cigarette carton--the front outer surface of the carton, and the 2 smallest outer surfaces of the carton; and
- (c) may appear only on the surfaces mentioned in paragraph (b); and
- (d) must appear across one line only; and
- (e) must comply with the requirements in the table in subsection (3).

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(3) The following table has effect:

<b>Requirements for brand, business, company or variant names</b>			
<b>Item</b>	<b>If this name ...</b>	<b>appears on this surface ...</b>	<b>the name ...</b>
1	a brand, business or company name	the front outer surface of a cigarette pack	must appear: <ul style="list-style-type: none"> <li>(a) horizontally below, and in the same orientation as, the health warning; and</li> <li>(b) in the centre of the space remaining on the front outer surface beneath the health warning.</li> </ul>
2	a brand, business or company name	the front outer surface of a cigarette carton	must appear: <ul style="list-style-type: none"> <li>(a) in the same orientation as the health warning; and</li> <li>(b) in the centre of the space on the front outer surface that is not occupied by the health warning.</li> </ul>
3	a brand, business or company name	any outer surface of a cigarette pack or cigarette carton (other than a front outer surface)	must appear: <ul style="list-style-type: none"> <li>(a) horizontally; and</li> <li>(b) in the centre of the outer surface of the pack or carton.</li> </ul>
4	variant name	any outer surface of a cigarette pack or cigarette carton	must appear: <ul style="list-style-type: none"> <li>(a) horizontally and immediately below the brand, business or company name; and</li> <li>(b) in the same orientation as the brand, business or company name.</li> </ul>

*Requirements for relevant legislative requirements (other than health warnings)*

- (4) Any relevant legislative requirement (other than the health warnings) must comply with any requirements prescribed by the regulations.

*Section not to apply to wrappers*

- (5) This section does not apply to a plastic or other wrapper that covers:
  - (a) the retail packaging of tobacco products; or
  - (b) a tobacco product that is for retail sale.

Note: For the requirements for wrappers, see section 22.

## **22 Requirements for wrappers**

- (1) This section sets out the requirements that a plastic or other wrapper must comply with if the wrapper covers:
- (a) the retail packaging of tobacco products (within the meaning of paragraph (a) or (b) of the definition of retail packaging ); or
  - (b) a tobacco product that is for retail sale.
- (2) For the purposes of subsection (1), the wrapper must comply with the following requirements:
- (a) the wrapper must be transparent and not coloured, marked, textured or embellished in any way, other than as permitted by the regulations;
  - (b) no trade mark may appear anywhere on the wrapper, other than as permitted by the regulations;
  - (c) no mark may appear anywhere on the wrapper, other than as permitted by the regulations.

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## **26 Requirements for appearance of tobacco products**

- (1) No trade mark may appear anywhere on a tobacco product, other than as permitted by the regulations.
- (2) No mark may appear anywhere on a tobacco product, other than as permitted by the regulations.

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Note: For the definition of mark , see section 4.

## **Tobacco Plain Packaging Regulations 2011**

### **2.2.1 Colour and finish of primary packaging and secondary packaging**

- (1) This regulation is made for subparagraph 19 (2) (b) (i) of the Act.
- (2) All outer surfaces of primary packaging and secondary packaging must be the colour known as Pantone 448C.
- (3) Each inner surface of a cigarette pack or cigarette carton must be white.
- (4) The lining of a cigarette pack must be silver coloured foil with a white paper backing.
- (5) This regulation does not apply to calibration marks.

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Note Section 19 of the Act sets out other requirements relating to the colour and finish of retail packaging.

### **2.3.1 Trade marks or marks appearing on retail packaging**

- (1) The following are permitted to appear on primary packaging and secondary packaging:
- (a) one or more origin marks in accordance with regulation 2.3.2;
  - (b) one or more calibration marks in accordance with regulation 2.3.3;
  - (c) a measurement mark and trade description in accordance with regulation 2.3.4;
  - (d) a bar code in accordance with regulation 2.3.5;

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- (e) a fire risk statement in accordance with regulation 2.3.6;
  - (f) a locally made product statement in accordance with regulation 2.3.7;
  - (g) a name and address in accordance with regulation 2.3.8.
- (2) In addition to subregulation (1), a consumer contact telephone number in accordance with regulation 2.3.9 may appear on primary packaging.
- (3) One or more calibration marks in accordance with regulation 2.3.3 may appear on a plastic or other wrapper that covers primary packaging or secondary packaging or that covers a tobacco product that is for retail sale.
- (4) In addition to subregulation (3):
- 10 (a) one or more origin marks in accordance with regulation 2.3.2 may appear on a plastic or other wrapper that covers a tobacco product that is for retail sale; and
- (b) the following marks may appear on a plastic or other wrapper that covers more than one item of primary packaging:
- (i) a measurement mark and trade description in accordance with regulation 2.3.4;
  - (ii) a bar code in accordance with regulation 2.3.5;
  - (iii) a fire risk statement in accordance with regulation 2.3.6;
  - (iv) one or more marks to conceal bar codes in accordance with regulation 2.5.1.
- (5) The trade mark or mark mentioned in subregulation (1), (2), (3) or (4) must not:
- 20 (a) obscure any relevant legislative requirement; or
- (b) constitute tobacco advertising and promotion; or
- (c) provide access to tobacco advertising and promotion.

#### 2.4.1 Appearance of names on retail packaging of cigarettes

Any brand, business or company name, or any variant name, appearing on cigarette packs or cigarette cartons must be printed:

- (a) in the typeface known as Lucida Sans; and
- (b) for a brand, business or company name -- no larger than 14 points in size; and
- (c) for a variant name -- no larger than 10 points in size; and
- 30 (d) with the first letter in each word capitalised and with no other upper case letters; and
- (e) in a normal weighted regular font; and
- (f) in the colour known as Pantone Cool Gray 2C.

Note Subsections 21 (2) and (3) of the Act set out additional requirements for the appearance of brand, business, company, and variant, names on cigarette packs and cigarette cartons.

### Competition and Consumer (Tobacco) Information Standard 2011

#### 1.5 Application of standard

- (1) Subject to subsections (2) and (3), this information standard applies to a tobacco product that is supplied on or after 1 January 2012.
- 40 (2) If:

- (a) a tobacco product is supplied during the period commencing on 1 January 2012 and ending on 30 November 2012; and
- (b) the tobacco product is of a kind that was not subject to the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*, as in force immediately before 1 January 2012;

the retail packaging of the tobacco product is not required to comply with the requirements of this information standard.

(3) If:

- 10 (a) a tobacco product is supplied during the period commencing on 1 January 2012 and ending on 30 November 2012; and
- (b) the tobacco product is of a kind that was subject to the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*, as in force immediately before 1 January 2012; and
- (c) the retail packaging of the tobacco product complies with the requirements set out in those Regulations;

the retail packaging of the tobacco product is taken to comply with the requirements of this information standard.

*Note* There will be 2 systems of labelling tobacco products in operation in the period commencing on 1 January 2012 and ending on 30 November 2012:

- 20 (a) the system set out in this information standard; and
- (b) the system set out in the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*.

During that period, suppliers of tobacco products that were subject to the 2004 Regulations may continue to supply those tobacco products in compliance with those Regulations, or may supply those tobacco products in compliance with this information standard.

- (4) On and after 1 December 2012, this information standard applies to all tobacco products.

### 9.13 Front outer surface of cigarette packs and general vertical retail packaging

- 30 (1) A warning statement and a graphic must cover at least 75% of the total area on the front outer surface of the following retail packaging:
  - (a) a cigarette pack;
  - (b) a vertical cigarette carton;
  - (c) vertical retail packaging for cigars (other than a cigar tube);
  - (d) a vertical pouch;
  - (e) a large cylinder;
  - (f) any other vertical retail packaging that is not dealt with in another section of this Subdivision.

(2) However, if:

- 40 (a) the retail packaging is vertical retail packaging for cigars (other than a cigar tube); and
  - (b) the area of the front outer surface is at least 250 cm<sup>2</sup>;
- the warning statement and graphic must cover at least 188 cm<sup>2</sup>.

- (3) The warning statement must cover the whole of the flip-top portion (if any).



- (4) No part of the graphic is to be obscured when the flip-top lid (if any) is closed.
- (5) The warning statement and graphic must be displayed using this layout:

<b>Warning statement</b>
<b>Graphic</b>