

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

No. S409 of 2011

BETWEEN:

JT INTERNATIONAL SA
Plaintiff

AND

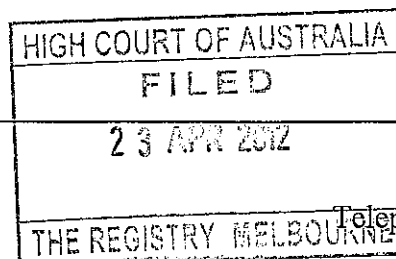
COMMONWEALTH OF AUSTRALIA
Defendant

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PLAINTIFF'S SUPPLEMENTARY NOTE
Tobacco Advertising Prohibition Act 1992 and related State and Territory Acts

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1. During oral argument, senior counsel for JTI submitted that the last 25% of the front of cigarette packs taken for use by the Commonwealth pursuant to the *Tobacco Plain Packaging Act 2011* was the last place of commercial value that JTI could lawfully use its Trade Marks and Get-Up in an amended answer to the Chief Justice’s reference to use of JTI’s Trade Marks on matches. At T7532-7534 (at page 172), JTI proffered to file a note identifying the relevant provisions of the *Tobacco Advertising Prohibition Act 1992* and other legislative provisions prohibiting other use or display of tobacco marks.

10 Commonwealth Legislation

2. Section 15 of the *Tobacco Advertising Prohibition Act 1992* enacts a general prohibition on regulated corporations from publishing a tobacco advertisement in Australia.
3. Section 9(1) provides that a “tobacco advertisement” is:

...any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote:

(a) smoking; or

(b) the purchase or use of a tobacco product or a range of tobacco products; or

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(c) the whole or a part of a trade mark that is registered under the *Trade Marks Act 1955* in respect of goods that are or include tobacco products; or

(d) the whole or a part of a design that is registered under the *Designs Act 2003* in relation to products that are or include tobacco products; or

(e) the whole or a part of the name of a person:

(i) who is a manufacturer of tobacco products; and

(ii) whose name appears on, or on the packaging of, some or all of those products; or

(f) any other words (for example the whole or a part of a brand name) or designs, or combination of words and designs, that are closely associated with a tobacco product or a range of tobacco products (whether also closely associated with other kinds of products).

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4. Section 9(2) excludes words, signs or symbols that appear on tobacco products, packaging and business documents, and section 9(3) excludes words, signs or symbols that appear in or on land or buildings occupied by a manufacturer of tobacco products.

5. Section 10(1) provides that a person “publishes a tobacco advertisement” if that person does any of the following things:

(a) the person includes the advertisement in a document (including, for example, a newspaper, magazine, program, leaflet or ticket) that is available, or distributed, to the public or a section of the public;

(b) the person includes the advertisement in a film, video, television program or radio program that is, or is intended to be, seen or heard by the public or a section of the public;

(c) the person:

(i) sells, hires or supplies the advertisement, or something containing the advertisement, to the public or a section of the public; or

(ii) offers the advertisement, or something containing the advertisement, for sale or supply to, or hire by, the public or a section of the public;

(d) the person displays, screens or plays the advertisement, or something that contains the advertisement, so that it can be seen or heard in or from:

(i) a public place; or

(ii) public transport; or

(iii) a workplace;

10 (e) the person otherwise brings the advertisement, or something that contains the advertisement, to the notice of, or disseminates the advertisement, or something that contains the advertisement, to, the public, or a section of the public, by any means (including, for example, by means of a film, video, computer disk or electronic medium)

6. Section 10(3) enacts an exception for trade communications, stating that “the communication of information that is or includes a tobacco advertisement to a group of people all of whom are involved in the manufacture, distribution or sale of tobacco products does not, of itself, amount to a publication of the tobacco advertisement”.

7. Section 16 of the *Tobacco Advertising Prohibition Act* provides for point of sale advertising:

20 (1) if there is a State or Territory law that regulates the advertising of tobacco products, as to which see below, and that law contains provisions expressly dealing with the display of advertisements for tobacco products at or on places where tobacco products are offered for sale to the public, and under those provisions the display of the advertisement does not constitute an offence, that State or Territory law applies;

(2) if there is no such State or Territory law, regulation 7 of the *Tobacco Advertising Prohibition Regulations 1993* applies.

State and Territory Legislation

8. State and Territory laws further limit the use of marks relating to tobacco products:

30 (1) In New South Wales, Division 2 of Part 2 of the *Public Health (Tobacco) Act 2008* (NSW) regulates the sale and display of tobacco and other smoking products and Part 3 of that Act prohibits certain advertising and promotion of tobacco products.

(2) In Victoria, Division 2 of Part 2 of the *Tobacco Act 1987* (Vic) regulates the advertising and sale of tobacco products.

(3) In Queensland, Part 2A of the *Tobacco and Other Smoking Products Act 1998* (Qld) regulates the advertising, display and promotion of smoking products.

- (4) In Western Australia, Division 2 of Part 2 of the *Tobacco Products Control Act 2006* (WA) regulates the sale of tobacco products and Part 3 of that Act regulates the advertising and promotion of tobacco products.
- (5) In South Australia, Part 3 of the *Tobacco Products Regulation Act 1997* (SA) provides for restrictions on the supply or promotion of tobacco products.
- (6) In Tasmania, Division 2 of Part 4 of the *Public Health Act 1997* (Tas) regulates the display, advertising and packaging of tobacco products.
- (7) In the Australian Capital Territory, Part 2 of the *Tobacco Act 1927* (ACT) regulates points of sale of smoking products, Part 3 regulates the supply of smoking products, and Part 4 regulates advertising, promotion and sponsorship of smoking products.
- (8) In the Northern Territory, Part 3 of the *Tobacco Control Act 2002* (NT) regulates the packaging, advertising and sponsorship, displays and points of sale of tobacco products.

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CERTIFICATION

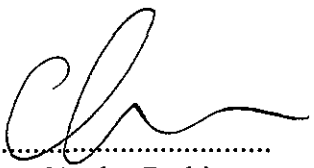
9. These submissions are suitable for publication on the Internet.

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