

BRITISH AMERICAN TOBACCO AUSTRALASIA & ORS v THE COMMONWEALTH OF AUSTRALIA (S389/2011)

Date writ of summons filed: 1 December 2011

Date questions referred into the Full Court: 27 February 2012

Between them, the Plaintiffs either own or hold (or claim to own or hold) a constellation of rights relating to the production, packaging and marketing of certain tobacco products in Australia.

The First Plaintiff owns certain Trade Marks, some of which are registered pursuant to the *Trade Marks Act* 1995 (Cth). It also claims to own the copyright subsisting in various artistic and literary works, the distinctive trade dress and get up as well as the associated licencing goodwill relating to those tobacco products. The Second Plaintiff is the registered owner of a design registered under the *Design Act* 2003 (Cth). It is also the patentee of patents registered pursuant to the *Patents Act* 1990 (Cth). The Third Plaintiff manufactures, imports into, owns and sells both tobacco products and the packaging of such products, in Australia. It also claims to own the goodwill attaching to the exploitation in Australia of the packaging rights.

The Plaintiffs submit, inter alia, that the *Tobacco Plain Packaging Act* 2011 (Cth) (“the TPP Act”) would, but for the operation of section 15, result in an acquisition of their property rights otherwise than on just terms. They further submit that, by reason of section 15, the provisions of the TPP Act do not apply to (nor have any operation with respect to) either their tobacco products or the packaging of their tobacco products.

The Defendant submits that the Plaintiffs’ claimed rights have always been the subject of restrictions arising from Commonwealth, State or Territory legislation and the common law. It further submits that the provisions of the TPP Act do not amount to an acquisition of the Plaintiffs’ property within the meaning of section 51(xxxi) of the Constitution.

The Defendant alternatively submits that, even if the Plaintiffs’ property has been acquired by the TPP Act, the objects identified in section 3(1) of the TPP Act are within the scope of the Commonwealth’s legislative power pursuant to sections 51(i), (xx) and (xxix) of the Constitution. It also claims that the means selected in the TPP Act, as identified by section 3(2), are appropriate or reasonably necessary to achieve those goals. The Defendant further submits that section 51(xxxi) of the Constitution would not therefore require the provision of just terms on any such acquisition.

The Defendant additionally submits that, even if the Plaintiffs’ property has been acquired by the TPP Act (and that just terms are required), the relevant provisions of the TPP Act constitute fair dealing and that any such acquisition is therefore on just terms.

On 27 February 2012 Justice Gummow referred certain questions into the Full Court for the Full Court's consideration.

On 9 March 2012 Justice Gummow ordered that Philip Morris Limited, Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Limited be granted leave to intervene in this matter.

Various interested parties have filed "Section 78B Notices", while the Attorneys-General of Queensland, the Australian Capital Territory and the Northern Territory have all advised this Court that they will be intervening in this matter.

On 26 March 2012 the Cancer Council of Australia also filed a summons seeking leave to intervene as *amicus curiae* in this matter.

The questions referred into the Full Court for its consideration include:

- Apart from section 15 of the TPP Act, would all or some of the provisions of the TPP Act result in an acquisition of any, and if so what, property of the Plaintiffs or any of them otherwise than on just terms, of a kind to which section 51(xxxi) of the Constitution applies?
- If the answer to the question above is "yes", are all or some, and if so which, provisions of the TPP Act in whole or in part beyond the legislative competence of the Parliament by reason of section 51(xxxi) of the Constitution?
- Are all or some, and if so which, provisions of the TPP Act in whole or in part beyond the legislative competence of the Parliament by reason of the matters raised in paragraphs 10-12 of the Statement of Claim?