Legal Disputes Concerning the Plain Packaging of Tobacco Products

Professor Andrew Mitchell
Melbourne Law School | The University of Melbourne
a.mitchell@unimelb.edu.au
Introduction to the Australian Case
Graphic Warnings in Australia since 2006

Front

Back

Smoking damages your blood vessels, which can prevent blood circulation, particularly to your legs or feet. This can result in blood clots, infection, gangrene, even amputation.

You CAN quit smoking. Call Quitline 131 848, talk to your doctor or pharmacist, or visit www.quitnow.info.au
Plain Packaging from 2012
Cigarette

FILTER TIP:
+ white

PAPER OVER FILTER TIP:
+ imitation cork or white

ALPHANUMERIC CODE:
+ in specified position
+ no larger than 8 points in size
+ in Lucida Sans font
+ in black
+ not linked to cigarette name or emission yields

PAPER CASING:
+ white
+ no markings except optional alphanumerical code
Cigar

**Cigar Band:**
- Colour is Pantone 448C (a drab dark brown)
- No more than one band is visible

**Brand and Variant Name:**
- Positioned around the circumference
- No larger than 10 points in size
- In Lucida Sans font
- In Pantone Cool Gray 2C colour

**Country of Manufacture:**
- No larger than 10 points in size
- In Lucida Sans font
- In Pantone Cool Gray 2C colour

**Alphanumeric Code:**
- No larger than 10 points in size
- In Lucida Sans font
- In Pantone Cool Gray 2C colour
- Not linked to cigar emission yields
CIGARETTE PACK – FRONT

BRAND AND VARIANT NAME:
- horizontal and centred
- no larger than maximum sizes
- in Lucida Sans font
- in Pantone Cool Gray 2C colour
- in specified capitalisation

MEASUREMENT MARK:
- no larger than required size
- in Lucida Sans font
- in Pantone Cool Gray 2C colour

PACK FORMAT:
- made of rigid cardboard
- no embellishments
- flip top lid

OTHER MARKINGS:
- name and address, country of manufacture, contact number, alphanumeric code
- in Lucida Sans font
- no larger than 10 points in size
- in specified colours

WARNING STATEMENT:
- background fills front of flip top lid – extends to edges of surface
- text fills background
- in bold uppercase Helvetica font
- white text on black background

GRAPHIC:
- not distorted
- extends to edges of surface

BAR CODE:
- rectangular
- black and white, or Pantone 448C and white

PACK SURFACE:
- colour is Pantone 448C (a crab dark brown)
- matt finish

BRAND AND VARIANT NAME:
- control below health warning
- no larger than maximum sizes
- in Lucida Sans font
- in Pantone Cool Gray 2C colour
- in specified capitalisation

MEASUREMENT MARK:
- no larger than required size
- in Lucida Sans font
- in Pantone Cool Gray 2C colour

NOTE:
The graphic and warning statement must:
- cover at least 75% of the front surface
- join without space between them
CIGARETTE CARTON - FRONT

NOTE:
The graphic and warning statement must:
- cover at least 75% of the front surface
- join without space between them

BAR CODE:
- rectangular
- black and white, or Pantone 448C and white

MEASUREMENT MARK:
- no larger than required size
- in Lucida Sans font
- in Pantone Cool Gray 2G colour

GRAPHIC:
- not distorted
- extends to edges of surface

WARNING STATEMENT:
- background extends to edges of surface
- text fills background
- in bold upper case Helvetica font
- white text on black background

BRAND AND VARIANT NAME:
- horizontal and centred on the surface
- no larger than maximum sizes
- in Lucida Sans font
- in Pantone Cool Gray 2G colour
- in specified capitalisation

BRAND AND VARIANT NAME:
- horizontal and centred
- no larger than required size
- in Lucida Sans font
- in Pantone Cool Gray 2G colour
- in specified capitalisation

SMOKING CAUSES PERIPHERAL VASCULAR DISEASE

INFORMATION MESSAGE:
- background fills at least 25% of the side surface
- text fills background
- in Helvetica font
- in specified size, capitalisation and weighting
- black text on yellow background

CARTON FORMAT AND SURFACE:
- colour is Pantone 448C (a dark brown)
- matt finish
- made of rigid cardboard
- no embellishments
Small cigar tin - front

NOTE:
The graphic and warning statement must:
• cover at least 75% of the front surface
• join without space between them

GRAPHIC:
• not dissected
• extends to edges of surface
• includes Quitline logo

TIN FORMAT AND SURFACE (INCLUDING HINGES AND CLASPS):
• colour is Pantone 448C
  (occasional dark brown)
• matt finish
• no embellishments

WARNING STATEMENT:
• background extends to edges of surface
• text fills background
• in bold uppercase Helvetica font
• white text on black background

MEASUREMENT MARK:
• no larger than required size
• in Lucida Sans font
• in Pantone Cool Gray 20 colour

BRAND AND VARIANT NAME:
• horizontal
• no larger than maximum size
• in Lucida Sans font
• in Pantone Cool Gray 20 colour
• in specified capitalization
# Passage of Legislation

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>29 April 2010</td>
<td>• Australian Government announces decision to implement plain packaging.</td>
</tr>
<tr>
<td>6 July 2011</td>
<td>• Legislation introduced into Parliament.</td>
</tr>
<tr>
<td>21 Nov 2011</td>
<td>• <em>Tobacco Plain Packaging Bill 2011</em> (Cth) passes Australian Parliament.</td>
</tr>
<tr>
<td>1 Dec 2011</td>
<td>• Legislation receives Royal Assent: <em>Tobacco Plain Packaging Act 2011</em> (Cth)</td>
</tr>
<tr>
<td>1 Dec 2012</td>
<td>• Full compliance required.</td>
</tr>
</tbody>
</table>
Tobacco Plain Packaging Act 2011, s 4

- To improve public health, eg by discouraging smoking initiation, encouraging smoking cessation, discouraging relapse, and reducing exposure to second-hand smoke
- To implement certain of Australia’s obligations as a party to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC).
Health Evidence


Big Tobacco’s Legal Challenges

- International Investment Law
- WTO Law
- Australian Constitutional Law
- Freedom of Information Requests
- Plain Packaging
Australian Constitutional Law
## Constitutional Challenge

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Dec 2011</td>
<td>• Legislation receives Royal Assent.</td>
</tr>
<tr>
<td></td>
<td>• British American Tobacco issues writ.</td>
</tr>
<tr>
<td>6 Dec 2011</td>
<td>• Imperial Tobacco issues writ.</td>
</tr>
<tr>
<td>15 Dec 2011</td>
<td>• Japan Tobacco issues writ.</td>
</tr>
<tr>
<td>20 Dec 2011</td>
<td>• Philip Morris issues writ.</td>
</tr>
<tr>
<td>15 Aug 2012</td>
<td>• High Court of Australia announces <strong>decision in favour of the Australian government</strong>.</td>
</tr>
<tr>
<td>5 Oct 2012</td>
<td>• High Court issues reasons for decision (6:1).</td>
</tr>
</tbody>
</table>
Australian Constitution

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
International Investment Law
No. 30808

AUSTRALIA

and

HONG KONG (UNDER AN ENTRUSTMENT OF AUTHORITY FROM THE GOVERNMENT OF THE UNITED KINGDOM)

Agreement for the promotion and protection of investments.  
Signed at Hong Kong on 15 September 1993

Authentic texts: English and Chinese.
Registered by Australia on 8 March 1994.

AUSTRALIE

et

HONG-KONG (EN VERTU D’UNE DÉLÉGATION DE POUVOIRS DU GOUVERNEMENT DU ROYAUME-UNI)

Accord relatif à l’encouragement et à la protection des investissements. Signé à Hong-Kong le 15 septembre 1993

Textes authentiques : anglais et chinois.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>29 April 2010</td>
<td>• Australian Government announces decision to implement plain packaging.</td>
</tr>
<tr>
<td>23 Feb 2011</td>
<td>• Philip Morris Asia Limited (PMA) purchases Philip Morris (Australia) Limited.</td>
</tr>
<tr>
<td>27 June 2011</td>
<td>• PMA issues Notice of Claim under the Hong Kong – Australia Bilateral Investment Treaty.</td>
</tr>
</tbody>
</table>
| 21 Nov 2011  | • Tobacco Plain Packaging Bill 2011 (Cth) passes Australian Parliament.  
                • PMA issues Notice of Arbitration.                             |
| 21 Dec 2011  | • Australian Government submits response.                             |
Expropriation

• Investors’ property cannot be taken without compensation

Fair & Equitable Treatment

• Investors must be dealt with in a fair & equitable manner.
Expropriation

• Arbitral tribunals have found a number of different factors relevant in distinguishing non-compensable regulation by the State from compensable expropriation.
• Relevant considerations:
  – whether the government has acquired the investor’s property rights;
  – whether the interference with those rights is proportionate to a public interest objective;
  – the degree and duration of the interference;
  – whether the measure entails an exercise of the State’s sovereign police powers;
  – and the legitimate expectations of investors.
Fair and Equitable Treatment

• Pursuant to Article 2(2) of the Hong Kong–Australia BIT, ‘[i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment ... in the area of the other Contracting Party’.

• Assess government conduct according to principles of reasonableness, consistency, nondiscrimination, transparency, and due process.
Fair and Equitable Treatment

• No breach of legitimate expectations:
  – Australia’s legitimate regulatory interests.
  – Rational relationship between health objectives and plain packaging measure.
  – PMA cannot have reasonable expected regulatory environment would remain frozen.
  – No specific assurances made.
  – Time of PMA’s investment.
## The Arbitrators

<table>
<thead>
<tr>
<th>Professor Donald McRae</th>
<th>Professor Dr Karl-Heinz Böckstiegel (Presiding Arbitrator)</th>
<th>Professor Gabrielle Kaufmann-Kohler</th>
</tr>
</thead>
<tbody>
<tr>
<td>appointed by Australia</td>
<td>appointed by the Secretary-General of the Permanent Court of Arbitration</td>
<td>appointed by Philip Morris Asia</td>
</tr>
</tbody>
</table>
WTO Law: The TRIPS Agreement
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Dec 2011</td>
<td>• Legislation receives Royal Assent.</td>
</tr>
<tr>
<td>13 March 2012</td>
<td>• Ukraine requests consultations.</td>
</tr>
<tr>
<td>4 April 2012</td>
<td>• Honduras requests consultations.</td>
</tr>
<tr>
<td>18 July 2012</td>
<td>• Dominican Republic requests consultations.</td>
</tr>
<tr>
<td>14 August 2012</td>
<td>• Ukraine requests Panel.</td>
</tr>
<tr>
<td>15 Oct 2012</td>
<td>• Honduras requests Panel.</td>
</tr>
<tr>
<td>9 Nov 2012</td>
<td>• Dominican Republic requests Panel.</td>
</tr>
</tbody>
</table>
TRIPS Art 2.1

• Incorporates Paris Convention Art 6 *quinquies* (B):

  Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: ...

  (3) When they are contrary to morality or public order and, in particular, of such a nature as to deceive the public.
TRIPS Art 15.4

- Reproducing Paris Convention Art 7:

  The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.
TRIPS Art 16

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.
Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.
TRIPS Art 20

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as ... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. ...
Conclusion

• Tobacco industry public relations and litigation strategies are intertwined.
• Australia has not been intimidated by the tobacco industry’s litigation.
• Australia has good prospects of winning against legal challenges.
• **Public Health & Plain Packaging of Cigarettes: Legal Issues** (Edward Elgar, 2012)
