

Legal action by Big Tobacco against the Australian government's plain packaging law

Simon Chapman

Now that the Australian government's plain tobacco packaging legislation has passed into law,¹ the three tobacco transnationals which sell cigarettes in Australia are jostling to show who has the hairiest legal chest.²⁻³ British American Tobacco, Philip Morris, Imperial and Japan Tobacco International have commenced court action. Philip Morris has also elected to test a bilateral investment treaty with Hong Kong⁴ that it wants the world to believe will entitle it to massive compensation. In the highly unlikely event that the companies succeed in any of these arenas, they hope to stand triumphant over the corpse of the legislation, holding aloft the Australian government's bloodied scalp and saying to the world 'now, anyone else want to have a go?'

Throughout their failed lengthy campaign to dissuade the Australian government from its course, the rhetorical twins of plain packaging being globally unprecedented and the threat of humungous compensation have walked hand-in-hand. Their shared subtext (that any government thinking it could do this to the noble tobacco package has lost leave of its senses) bears careful scrutiny, as does the notion that the financial loss to each company from being forced into plain livery will be both huge and easily determined.

The last 150 years of history have seen several perfectly legal companies consigned to pariah status as public values changed. The slave trading South Sea Company and the British East India opium trading company were not compensated when nations began outlawing their commerce. Sideshow tent owners exhibiting people with congenital malformations for the entertainment of the curious⁵ did not line up for payouts

when civil society declared this abhorrent. And more recently, the compensation vaults were not opened to the asbestos industry when the disease causation curtain fell unceremoniously on that formerly 'ordinary' product.⁶

But these examples are extreme, involving the banning of products or commerce. The Australian government is not banning cigarettes. There are many more examples where nations decide for health, public safety or cultural reasons that purveyors of a good many perfectly legal products cannot either sell them anymore, period, or that the conditions of sale will be highly restricted. Many Islamic nations either outlaw the sale of alcohol or place restrictions on its sale and display that make Australia's plain tobacco packaging look like a Sunday school picnic. We have yet to see alcohol transnational companies like Pernod Ricard or Diago threaten nations such as Saudi Arabia, Iran, Yemen, Sudan and Brunei for their total alcohol ban, or the state of Gujarat in India for banning alcohol use by locals. Nor for that matter have the publishers of Playboy, Penthouse or Hustler magazines banged the free trade table about their inability to satisfy the latent huge demand for their products in the magazine stands of such nations.

Globally, nearly all nations have had the temerity to restrict the pharmaceutical industry to requiring its customers to visit first a doctor and then a pharmacist to obtain strictly limited supplies of products designed to help them rather than harm them, like tobacco does. These customers are even required to obtain a temporary license to use these drugs: it is called a prescription.

In Australia, manufacturers of semi-automatic rifles and shotguns did not rush off to the World Trade Organization when, in 1996, the government overnight passed a law banning their sale and possession.⁷ And Australians who want to keep exotic pets like monkeys, foreign

reptiles or birds find that they cannot walk into a pet shop and buy them. So why is the international pet industry not up in arms at this heinous assault on its free trade? And why have the tobacco transnationals done nothing to overturn the longstanding ban in Australia of the sale of smokeless chewing tobacco⁸ that they also sell in some other nations?

The very obvious answer to all of these is that governments have always been at liberty to set laws that ban or severely restrict the availability, marketing, display and packaging of any consumer 'good' considered to be inimical to the sovereign interests of a nation. Big Tobacco has spent about 125 years thinking of itself as an industry selling entirely unexceptional products that have been sold alongside confectionary, greeting cards and lottery tickets. But the Australian government's action has signalled to the world that that party is now over. Big Tobacco now needs to get a grip and get used to it: its deadly addictive products are being treated as such, and the world is no longer their ashtray.

Consider the unlikely event that one of the Big Tobacco companies has a win and the court or arbitrators then request submissions on compensation for the losses incurred by the introduction of plain packaging. One or two problems immediately arise. First, all companies have spent the past 2 years repeating ad nauseum that plain packaging 'won't work', by which they mean it will have no impact on sales. So immediately we have a small problem with the basis of their claim: they are requesting compensation for a measure that those at the very top of their industry have said repeatedly will make no difference to tobacco use. Still, we have long been used to the tobacco industry changing its public position.

Another thing Big Tobacco has long said is that it does not want people under 18 to smoke. It just hopes that as many as possible will light up their very first cigarette one minute after their 18th birthday. So we can immediately scrub any compensation for sales losses to young people: the companies have repeatedly told us they don't want their money, although so far they have neglected to return a cent of it.

The proportion of people smoking in Australia has been falling almost continuously since the early 1960s. The speed of this brakeless train has been boosted by a large number of variables, some tangible and others intangible, but very real, and all working synergistically. Price, smoking restrictions, pack warnings, advertising and promotion bans and large public

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awareness campaigns all both individually and in concert have depressed demand. But demand began falling in the early 1960s before any of these measures were introduced because of simple news coverage of the emerging evidence about smoking and disease. Today, there is widespread denormalisation of smoking⁹ to the point that the great majority of houses with smokers see smoking occur only outside the house. Anyone waking from a 30-year coma would be incredulous over the changes that have occurred in the public culture of smoking. This has dramatically reduced the places and occasions when smoking occurs, and greatly reduced demand, as is often acknowledged in internal tobacco industry documents, for example.

So against all this, tobacco companies face the daunting task of having to argue for a precise and costed additive effect of plain packaging. Daily smoking prevalence in Australians aged 14+ is now 15.1%.¹⁰ Supposing 3 years after this, it falls to 14.4%, while the projected decline modelled on the recent rate of decline in the absence of plain packaging was, say, 14.7%. Tobacco companies might seek to argue that the additional 0.3% decline was entirely attributable to plain packaging. But how could any court know that some or all of this decline was not in fact attributable to a simple acceleration in the rate of the decline that was already happening? The industry would doubtless parade a conga line of contracted statisticians all trying to convince the courts that such precise attribution was defensible, but this would be a flimsy house of cards, easily critiqued.¹¹

The question might then be asked 'if in three years, there has been no measurable impact on smoking rates in the population, has plain packaging failed and should it be then abandoned?' Here, comments from the Australian Health Minister and various expert commentators will be important. It has been repeatedly said that

the main target of plain packaging is not current adult smokers, most of whom are brand loyal for many years after uptake. Instead, the target is the next generation of children. Here, the goal is to see all future generations grow into adulthood without ever seeing packs of 'full of highly carcinogenic products' dressed up in beautiful, attractive packs.

The analogy here is with the generation impact of Australia's ban on all forms of tobacco advertising, which commenced in 1976 and which concluded in 1992. In 2011, this means anyone under 19 has never seen a 'domestic' tobacco promotion in Australia (they remain on the internet). Smoking prevalence among Australia's 12–17-year olds today is just 2.5%,¹⁰ the lowest ever recorded. This has occurred without any major government campaign targeted at youth (nearly all such campaigns have been targeted at adult smokers for at least the past 15 years).

Next, the plain packaging laws allow companies to continue to put the name of the brand on packs. It is just colours, logos and other design features that have to go. The challenge for companies should they win in a court or tribunal will be to demonstrate that the absence of the colours (which are often changed by the companies anyway) and logos (and how many smokers could ever identify their brand's coat of arms?) but the continuing presence of the brand name had caused measurable falls. Again, this will present insurmountable problems of attribution.

Finally, the Australian government has been committed to reducing smoking for several decades. This is not a secret. If smoking rates and consumption fall, that is the whole idea. The companies will in effect be trying to argue that governments have no right to introduce measures that actually work.

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