

Worldwide news and comment

AUSTRALIA: HIGH COURT UPHOLDS PLAIN PACKAGING

In response to Australia's introduction of tobacco plain packaging laws in 2011, Japan Tobacco International and British American Tobacco brought legal action in the High Court of Australia, complaining that the legislation amounted to an acquisition of property on less than just terms under the Australian constitution. Philip Morris Ltd and Imperial Tobacco intervened in the case, and supported their fellow tobacco companies.

The Australian government defended the constitutionality of the Act, with the solicitor-general for the Commonwealth Stephen Gageler arguing: "This legislation is no different in principle from any other specification of a product standard or an information standard for products or, indeed, services that are to become the subject of trade in the future". The Australian government was supported by the governments of the Australian Capital Territory, the Northern Territory, and Queensland; and the Cancer Council of Australia.

On 15 August 2012, the high court rejected the challenges by tobacco companies, and awarded costs against them. The orders noted: "At least a majority of the court is of the opinion that the act is not contrary to the Australian constitution". The court will published its reasons on 5 October (link available on the Tobacco Control blog). The High Court of Australia is a well-respected superior court, with great expertise in intellectual property. The ruling will be an important and influential precedent throughout the world.

The trade minister, Craig Emerson, stressed that the victory will strengthen Australia's defence of the plain packaging of tobacco products in international forums. He emphasised that the Australian government would vigorously defend a challenge against it by Ukraine, Honduras, and the Dominican Republic through the World Trade Organization. Emerson maintained: "Australia will strongly defend its right to regulate to protect public health through the plain packaging of tobacco products".

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Current branded tobacco packs in India (A) and proposed plain pack design (B).

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INDIA: LAYING THE GROUNDWORK FOR PLAIN PACKAGING

A report on the case for plain packaging was recently released in India by the Australia India Institute Taskforce on Tobacco Control. The taskforce sought to assess need, feasibility and provide key recommendations for future action towards implementing plain packaging in India. With Australia implementing plain packaging from December 2012, this document helps lay the policy groundwork for India to follow suit.

The policy research report captured perspectives of key stakeholders from multiple disciplines and representative groups including community based organisations, national and international experts from trade, law, policy, health and business. Across all demographic groups most of the respondents considered current tobacco packs to be attractive and agreed they serve the purpose of promoting tobacco products to adolescents and adults. The findings also suggested various colours, brand names, logos, graphic design and misleading descriptors on tobacco product packs are more widely noticed compared to the pictorial warnings. Expensive brands with flashy packs were perceived to be associated with a style factor reflecting aspirational value.

The majority of respondents felt plain packaging of tobacco products will reduce attractiveness, appeal and promotional

value of the tobacco packs and prevent experimentation and initiation of tobacco use among children and youth. Most also believed it might help motivate tobacco users to quit. Respondents were of the opinion that this will increase noticeability and effectiveness of the pictures of the health warnings on tobacco products.

The findings align with earlier studies conducted in Australia, Canada and Europe. Key stakeholders from the expert group expressed the opinion that public health must be considered a priority over any business or trade agenda. Strong political will and leadership is required to take the agenda forward.

The report can be downloaded at <http://www.aii.unimelb.edu.au/sites/default/files/Taskforce%20on%20Tobacco%20Control-Final.pdf>

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NEW ZEALAND: WAR AGAINST PLAIN PACKS

The plain packs campaign in New Zealand has warmed up after a slow start. The NZ minister of health, Tony Ryall, had said in 2011 'plain packaging is inevitable'. He also stated in parliament: "... I do agree with the information outlined in a recent *New Zealand Medical Journal* article that demonstrates that plain packaging has two main benefits for public health: it removes or minimises brand elements that promote the product, and it facilitates more effective, dissuasive packaging".



BAT 'If I create it, I should own it' campaign

From April this year there has been a more formal opening of combat, with the three major tobacco companies in New Zealand (BAT, Imperial and Philip Morris) implying threats of legal action. In July, the NZ government issued a discussion document for consultation on plain packs, with submissions received until October 4th.

In August, BAT launched an intensive campaign, with frequent TV, radio and full page newspaper adverts, and the website www.agreedisagree.co.nz, supported by social media promotion. The campaign is based on 'intellectual property' arguments under the slogan 'If I create it I should own it'. (A lively Twitter response has issued from the tobacco control community, with wags suggesting that if the company's products created disease, early death, widows and orphans, perhaps the company might be ready to 'own' those as well.)

Ryall has said that the industry is 'wasting their money' with this campaign, and will not win public support. Noting BAT's refusal to engage with the public and acknowledge opposing views, a Professor at the Otago Polytechnic established a website (<http://www.agree2disagree.co.nz>) that allows the public to respond to the claims BAT has made in their campaign.

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PAKISTAN: LEGAL ACTION AGAINST PHILIP MORRIS FOR ADVERTISING BAN VIOLATION

In November and December 2011, Philip Morris Pakistan Limited advertised

Marlboro cigarettes in several newspapers and magazines. The ads exceeded permissible size limitations of not more than one square inch (approximately 2.5 cm), and did not carry health warnings to the required size of not less than one fifth of the total ad.

To counter this breach of advertising regulations, the Pakistan Tobacco Control Cell served an explanation notice to Philips Morris Pakistan. It also directed its coordinators in all four provinces of Pakistan to meet with key stakeholders including provincial and district health departments and tobacco control committees, local media, NGOs, and local police officers to clarify actions and seek cooperation to prevent future violations.

As a result of the efforts from the Tobacco Control Cell, together with action from provincial government and civil society organisations, the police registered a number of cases in all four provinces of the country.

The case was heard in Hyderabad and resulted in the magistrate issuing a bail warrant against the head of marketing Philip Morris Pakistan. In handing down his ruling, the magistrate stated:

I have considered the submission of the parties and perused the record. No doubt the accused has admitted his guilt while talking the plea that it was done in good faith (sic) and he never intended to violate the law. No matter what the intention of accused was whether it was good or bad but one thing is clear that the accused has violated the law and ignorance of law is no excuse.

While the resulting fine was regrettably miniscule (approximately US\$50), the case demonstrates the commitment and cooperation that can be generated with a wide range of stakeholders, and sets an important precedent in the region as the first such legal action.

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UK: IMPERIAL TOBACCO WRAP HOUSE OF COMMONS MAGAZINE IN 'PLAIN PACKAGING'

Now the UK government's consultation on plain packaging has been completed amid expectations that the UK will follow Australia's lead in passing legislation on plain packaging, the opposition campaign has reached a new level. With the health secretary committed to excluding the tobacco industry from meetings related to plain packaging,

Imperial Tobacco has sought an alternative method to get its message across.

On 14 June 2012, The House (a weekly political magazine delivered directly to members of parliament (MPs), peers, and civil servants), was presented in a plain gold wrapping with the warning 'Plain Packaging: Bad for Business Good for Criminals'. On page 19 of the magazine a full-page advert claimed that plain packaging would not benefit wholesalers, consumers, business, retailers or the government—but would benefit criminals. These arguments echo those that have been made by transnational tobacco companies, front groups such as FOREST and the Tobacco Manufacturers Association for many years.

The advert featured the logo of Asian Trader, a trade magazine, and in small font at the bottom of the page explained: 'This advert has been produced and placed by Imperial Tobacco in association with Asian Trader magazine'.

Reacting in the House of Commons, Stephen Williams MP, chair of the all-party group on smoking and health described it as "an advertorial on behalf of the tobacco industry, but it does not disclose that that has been paid for by the industry". Williams again expressed this view in a letter to the editor of House magazine and suggested that this disclaimer should have been more prominently placed and further questioned why such a misleading advertorial was permitted in the publication.

In response to his letter, Gerry Murray, a publisher of The House magazine, presented the argument often used by the industry that the plain packaging cover was "not about promoting smoking. It is about counterfeiting which is an issue that affects many of our clients some of whom are indeed part of the tobacco lobby".

It is unclear whether Mr Murray is aware of the industry's use of the counterfeiting argument as a tactic to stall the passage of plain packaging legislation and that evidence to support this position comes from industry funded reports from third party organisations. Either way, industry rhetoric is permeating, as intended.

A subsequent edition of The House features a statement acknowledging that the front cover should have included an attribution of funding by Imperial, adding that the cover 'in no way represents the views of The House Magazine'.

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Plain packaging cover of The House Magazine, June 2012

POLAND: INDUSTRY LOBBYING DELAYS PICTORIAL WARNINGS

A 2010 revision of the Tobacco Act in Poland obliged the government to issue pictorial health warnings on cigarette packs, chosen from an EU approved list. The ministry of health prepared an ordinance and held a public consultation in June/July 2011.

A consultation meeting held in September 2011 included stakeholders from both the tobacco industry and public health, with three times more tobacco lobbyists than health advocates attending. Although the tobacco industry forcefully resisted strong, large warnings, a weak ordinance was finally agreed upon and was to come into effect in May, 2012 with time to remove old text warnings before March 2013.

Following national elections in October 2011, a new health minister was appointed. Requests to publish the ordinance were rebuffed by the ministry of health, based on the justification that new minister needed time to become acquainted with his brief.

In February 2012, media articles criticising pictorial warnings began to appear. It was claimed that the policy would cause retailers losses of 200 million Polish Zloty (US\$62.2 million). Finally in March 2012, the minister announced that he would not sign the agreed ordinance, arguing that the EU Tobacco Product Directive was being revised and would include a new set of images that could be used for EU pictorial health warnings, despite the fact that he was aware of this before consultations started. The case is characteristic of tobacco industry pressure to delay

implementation when faced with increased regulation.

Despite protests from tobacco control advocates, the Polish medical community and the European Commission, the position of the ministry did not change. The first organisation to congratulate the ministry of health on this decision was the Business Centre Club, whose members include Imperial Tobacco Poland, BAT and others, and which often speaks on behalf of the tobacco industry.

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TOBACCOTACTICS.ORG: A RESOURCE FOR INDUSTRY MONITORING

TobaccoTactics.org aims to provide up-to-date information on the tobacco industry, its allies or those promoting a pro-tobacco agenda. Launched by the University of Bath in June 2012, the website explores how the tobacco industry influences public health debates, using a whole raft of lobbying and public relations tactics. Most recently, TobaccoTactics followed the plain packaging debate both in the UK and abroad.

To provide timely updates, the Tobacco Control Research Group also started a Twitter account @BathTR and a corresponding blog (<http://blogs.bath.ac.uk/tcrg/>). The article below highlights just one of approximately 500 pages that can be found at TobaccoTactics.org.

Big tobacco and opposition to plain packaging

The recent UK government consultation on plain packaging has seen a strong response from seemingly grassroots movements opposed to further legislation, including smokers' rights groups and retailers. For instance, the Hands Off Our Packs campaign, run by industry-funded smokers' rights group FOREST, submitted 235 000 signatures against the introduction of the proposed legislation. However, documents leaked in Australia show that the industry, in Australia at least, was directly involved in the creation of a seemingly independent stakeholders group and its day-to-day activity.

Internal industry documents from 2010 detail how Philip Morris Limited (PML) and the Australian public relations company The Civic Group created the Alliance of Australian Retailers (AAR). The Alliance was to act on behalf of the tobacco industry to "seek a change in policy such that there is [sic] no introduction of 'generic packaging' into the Australian market".

Email correspondence between the director of corporate affairs at PML Chris Argent and the director of the public relations company Jason Aldworth reveals how the AAR was set up to influence public opinion and policy makers. The strategy included discrediting those that advocated the introduction of plain packaging, a tactic also utilised in the UK.

In response to the Civic Group's campaign proposal, Argent requested more detail on how the campaign could influence government: "Please provide representative examples of the messages that might be delivered to Labor and the coalition through the government relations component of the campaign. Who will deliver these messages?" This message and the contents of subsequent emails revealed the plan to use others as the voice of the industry. In correspondence with the Civic Group, Argent asked "What messages will PML communicate in its own voice versus using third-parties?"

Once the AAR was created, Philip Morris was involved in the day-to-day running and management of the group. The Civic Group and Argent decided how the AAR should respond to media requests and what should be said about the funding of the Civic Group and the AAR campaign. It was agreed that no finite amounts were to be disclosed.

Nevertheless, the documents reveal that the three leading tobacco companies in Australia funded the creation and the management of the Alliance. British American Tobacco Australia paid the Civic Group \$2.2 million, PML paid \$2.16 million, and Imperial Tobacco just short of \$1.1 million.

The leaked documents are now housed in a central repository of tobacco industry documents, available on the online Legacy Tobacco Documents Library (<http://legacy.library.ucsf.edu/>). Collated information on the AAR can be located at http://tobaccotactics.org/index.php/Alliance_of_Australian_Retailers.

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AMERICAS/ASIA PACIFIC: BIG TOBACCO AND THE TRANS-PACIFIC PARTNERSHIP

The Trans-Pacific Partnership (TPP) is a plurilateral free trade agreement, spanning the Pacificrim. There has been concern that tobacco companies have been seeking to use this trade agreement to undermine tobacco control measures, such as graphic health warnings, plain packaging, and the implementation of the World Health

Organisation Framework Convention on Tobacco Control (FCTC).

The treaty negotiations have included members of the Pacificrim including Australia, New Zealand, Brunei Darussalam, Malaysia, Singapore, Vietnam, Peru, Chile, Canada, Mexico, and the USA. Lori Wallach of Public Citizen has described the proposed agreement as 'NAFTA on Steroids', saying: "Think of the TPP as a stealthy delivery mechanism for policies that could not survive public scrutiny".

British American Tobacco has previously lobbied the USA trade representative on intellectual property and trade. In the course of the Anti-Counterfeiting Trade Agreement discussions, British American Tobacco argued: 'We would strongly advocate tobacco and tobacco products being prioritised in the course of the negotiations when specific areas of concern are being addressed'.

There has been much concern about the lack of transparency, due process, and public participation in the TPP. A number of those with inside access to the TPP have an interest in tobacco and tobacco control—including Roger Quarles of the Burley Tobacco Growers Cooperative Association Inc; Clyde N. Wayne Jr of Tobacco Associates Inc; and Monique Muggli of the Campaign for Tobacco-Free Kids. Although trade officials and members of trade committees have had access to the texts, the texts have not been made available to politicians, civil society, or the wider public.

There has also been concern that big tobacco is trying to use the TPP as a trojan horse to attack tobacco control measures. In a revealing submission to the USA trade representative, Philip Morris expressed concern about "government-sponsored initiatives that would effectively cancel or expropriate valuable trademark rights". The company supported "the inclusion of a comprehensive 'TRIPs-plus' intellectual property chapter that includes a high standard of protection for trademarks and patents".

In particular, Philip Morris objected to Australia's regime of plain packaging of tobacco products: "The consequences of the introduction of plain packaging in Australia are far-reaching and should be examined in the broader context of US–Australia trade relations and in the upcoming TPP negotiations". The company also made objections to the Smoking (Control of Advertisements and Sale of Tobacco) Act 2010 (Singapore).

There has been concern about the Intellectual Property Chapter of the Trans-Pacific Partnership, the draft text of which was leaked in 2011. The leaked version lacks appropriate safeguards with

respect to public health—particularly with regard to tobacco control measures contemplated under the FCTC. There is a need for the TPP to instead support a development agenda which allows for countries to take measures to address public health concerns, such as tobacco control.

There has also been controversy over the Investment Chapter of the TPP. Philip Morris has previously used state-investor dispute resolution measures to challenge public health measures—such as graphic health warnings in Uruguay and plain packaging in Australia. In its trade policy, the Australian government has disavowed the inclusion of state-investor dispute resolution clauses in any future free trade agreements—including the TPP. However, a number of countries, industry groups, and trade officials have demanded the inclusion of an Investment Chapter. Such advocacy for investment clauses is weak and unconvincing. The abuse of investment clauses by tobacco companies is not unusual or exceptional. It is commonplace. The involvement of Philip Morris in the TPP highlights this problem.

There is also a need to ensure that the Chapter on Technical Barriers to Trade does not impinge upon legitimate health measures—such as graphic health warnings and the plain packaging of tobacco products.

The USA trade representative Ron Kirk has been, disturbingly, equivocal on the question of tobacco control under the TPP. A statement published on its proposal on tobacco control on the trade representative's website notes that the Obama administration sought input from 'health advocates, farmers, industry stakeholders, and others' on tobacco and the TPP. The USA trade representative observes: "The [Obama] administration also considered the increasing effort both in the USA and around the world over the past several years to regulate tobacco products." Particular reference is made to the Family Smoking Prevention and Tobacco Control Act 2009 (US).

While not making the draft proposal publicly available, the USA trade representative has published a limited summary, emphasising that the draft proposal has three elements. First, the proposal 'would explicitly recognise the unique status of tobacco products from a health and regulatory perspective'. Second, 'the proposal would make tobacco products (like other products) subject to tariff phase-outs, thus avoiding putting U.S. tobacco products at a competitive disadvantage and avoiding a precedent for excluding tobacco or other products from

future US tariff negotiations'. Third, the proposal would 'include language in the "general exceptions" chapter that allows health authorities in TPP governments to adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health'.

Focusing upon the USA, the USA trade representative comments: "This language will create a safe harbour for Food and Drug Administration (FDA) tobacco regulation, providing greater certainty that the provisions in the TPP will not be used in a manner that would prevent FDA from taking the sorts of incremental regulatory actions that are necessary to effectively implement the Tobacco Control Act, while retaining important trade disciplines (national treatment, compensation for expropriations, and transparency) on tobacco measures".

This proposal seems rather parochial, modelled upon USA domestic law and political exigencies. There is a failure to acknowledge or recognise the primacy of international law on tobacco control. Conspicuously, the summary of the proposed text on the TPP fails to mention the FCTC and its accompanying guidelines. This omission is regrettable and lamentable. There is a need to ensure that the TPP does not in any way affect the comprehensive range of tobacco control measures contemplated by the FCTC—such as the plain packaging of tobacco products. Furthermore, there is also a need to ensure that any future tobacco control initiatives under the FCTC—or by any enterprising governments—are not stymied by the TPP.

Discussing tobacco control and the TPP, Senior USA Congressman Henry Waxman emphasised: "In my view, it is essential to safeguard countries' sovereign authority to take the most appropriate and most feasible action to protect the health of their citizens".

More analysis is available at <http://blogs.bmj.com/tc/>.

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