CIGARETTES WILL KILL YOU: the High Court of Australia & plain packaging of tobacco products

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Tobacco, says the World Health Organization (WHO), is "the only legal consumer product that kills when used exactly as intended by the manufacturer."

With a view to discouraging smoking and giving effect to the WHO Framework Convention on Tobacco Control, the Australian Parliament passed the Tobacco Plain Packaging Act 2011 (Cth), in November of that year. The legislation was supported by all the major political parties.

Labor Attorney-General Nicola Roxon argued, "Plain packaging means that the glamour is gone from smoking and cigarettes are now exposed for what they are: killer products that destroy thousands of Australian families."

The leader of the Coalition Opposition, Tony Abbott, acknowledged, "This is an important health measure. It's important to get smoking rates down further." The Greens also supported the measure, and called for the Future Fund (an independently-managed fund into which the Australian government deposits its budget surplus to meet future superannuation liabilities) to end its tobacco investments.

On December 1, 2012, Australia became the first country in the world to require that tobacco products be sold in olive-colored plain packaging. Australia's Tobacco Plain Packaging Act 2011 (Cth) regulates the retail packaging and appearance of tobacco products, requiring plain, olive-colored packaging emblazoned with public health warnings and graphic images of smoking-related diseases. The aim is to improve public health by discouraging people from smoking or using tobacco products.

Following the law's enactment, a number of tobacco companies (led by British American Tobacco and Japan Tobacco International) challenged the legislation. This article provides an eyewitness account of oral arguments made in the High Court of Australia in the plain packaging case; and an analysis of the ensuing decision which found in favor of the Australian government (also referred to as the Commonwealth).

ORAL ARGUMENT

British American Tobacco and Japan Tobacco International brought legal action against the Australian government in the High Court of Australia, claiming that the Act amounts to an acquisition of property on less than just terms under the Australian Constitution. Phillip Morris Ltd and Imperial Tobacco joined the case, and supported their fellow tobacco companies.

The Commonwealth was supported in its defense by the governments of the Australian Capital Territory, the Northern Territory, and Queensland. The Cancer Council Australia made written submissions, but was not given leave to intervene.

The High Court of Australia heard arguments over three days from April 17 to 19, 2012. The various parties enlisted battalions of lawyers, the proceedings received intense media attention, and the public galleries were packed.

TOBACCO COMPANIES' ARGUMENTS

Tobacco companies struggled with their argument that the introduction of the plain packaging of tobacco products amounted to an acquisition of property on less than just terms.

There was much discussion as to whether the Commonwealth had indeed effected an "acquisition" of the tobacco trademarks. Japan Tobacco International's barrister argued, "The Commonwealth law by its terms arrogates the power to substitute any message the Commonwealth chooses on what we say is our billboard."

The tobacco companies argued for a broad view of property under the Australian Constitution, and claimed to hold various forms of intellectual property (IP) in relation to tobacco packaging, including trademarks, patents, designs, copyright and protection against passing-off.

Their barristers said the IP rights of tobacco companies had been extinguished, or at least severely impaired. One said, "On our analysis, everything has been taken."

There was much debate about the semiotics of tobacco packaging and clear festishization of the tobacco pack. The judges were invited to closely inspect the packaging of tobacco products and there was a discussion of the use of words, colors, emblems, badges and logos typically associated with cigarette boxes – with references to examples such as Camel cigarettes.

However, the judges questioned the analogies drawn between property cases, dealing with land, and IP cases on the acquisition of property. Justice Gummow asked, "Are any of these cases about intangibles? A lot of the American cases are about land, are they not?" It was surprising that there was relatively little discussion about past Australian precedents on IP and constitutional law, such as the Grain Pool case (*Grain Pool of WA v Commonwealth [2000], HCA14*), the Blank Tapes case *(Australian Tape Manufacturers Association Ltd v Commonwealth ("Blank Tapes Levy case") [1993] HCA 10)*, the Nintendo case *(Nintendo Co Ltd v Centronics Systems Pty Ltd and others [1994], HCA27)*, and the recent Phonographic ruling *(Phonographic Performance Company of Australia Limited v Commonwealth of Australia [2012] HCA 8)*.

Tobacco companies wanted to draw a distinction between graphic health warnings and "excessive regulation" (plain packaging). Justice Kiefel responded, "the degree of regulation may be extremely restrictive and yet there be no acquisition."

British American Tobacco argued tobacco companies should receive compensation for public health advertisements. "The fact that it is an improving message or a good message may be socially desirable and if it is then the Commonwealth should pay for it," they argued.

As a witness to the proceedings and an expert in IP, the arguments of the tobacco companies about acquisition of property often seemed synthetic and unreal to me.

THE COMMONWEALTH'S POSITION

The Commonwealth government mounted a strong defense of the legality and constitutionality of the plain packaging of tobacco products. Their submissions explained the measures were "directed to informing, redressing and reducing harm to the public health that is caused by use of the tobacco products."

The Solicitor-General for the Commonwealth, Stephen Gageler, argued the law was "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."

He observed, "the product information required to be placed on these products differs only in intensity from product information that is routinely mandated to accompany therapeutic goods, industrial chemicals, poisons and other products injurious to the public health." He commented, "the mandatory graphic health warnings are the skull and crossbones for a digital age, nothing more."

The Solicitor-General said that "to suggest that the tobacco packages become little billboards for government advertising is wrong." He denied the government was engaged in advertising, or derived any such benefit, and contended that a regulatory norm of conduct was not an acquisition of property.

The government stressed that the sale and packaging of cigarettes had long been regulated in Australia, and that plain packaging was but the latest step in this process.

The Solicitor-General argued that the statutory rights of IP are often varied and modified, adding that a trademark "must at least be subject to a subsequent prohibition on use to prevent harm to the public or to public health." Indeed, Article 8 of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) recognizes that "members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition."

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The Solicitor-General also argued that the concept of just terms raised larger questions of fairness and justice under the constitution.

The Commonwealth maintained that it would be incongruous to compensate the tobacco companies, stating that "for the Australian nation representing the Australian community to be required to compensate tobacco companies for the loss resulting from no longer being able to continue in the harmful use of their property goes beyond the requirements of any reasonable notion of fairness."

THE HIGH COURT OF AUSTRALIA RULING

Having announced its ruling in August 2012, the High Court of Australia published the reasons for its decision on the tobacco companies' challenge to Australia's regime for the plain packaging of tobacco products in October 2012.

By a majority of six to one, the High Court rejected the tobacco companies' arguments that there had been an acquisition of property under the Australian Constitution. The majority judges variously described the case of the tobacco companies as "delusive," "synthetic," "unreal," and suffering "fatal" defects in logic and reasoning. The dissenting judgment was by Justice Heydon.

PUBLIC HEALTH, CONSUMER RIGHTS AND WARNING LABELS

After listening to extensive arguments, the court closely considered the public health objectives of the Tobacco Plain Packaging Act 2011 and related regulations.

"Many kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm," wrote Justice Kiefel, noting that labeling is required for medicines and poisonous substances as well as some foods "to both protect and promote public health."

Discussing the history of tobacco regulation in Australia, she summarized the cumulative impact of public health measures and suggested plain packaging was but the latest in a long line of tobacco control measures in Australia.

Noting the links between smoking tobacco and fatal diseases, Justice Crennan observed that the regime implemented international health law: "The objects of the Packaging Act are to improve public health and to give effect to certain obligations that Australia has as a party to the WHO Framework Convention on Tobacco Control."

"Legislative provisions requiring manufacturers or retailers to place on product packaging warnings to consumers of the dangers of incorrectly using or positively misusing a product are commonplace," she insisted.

Justices Hayne and Bell observed, "Legislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the Plain Packaging Act, effect no acquisition of property."

Even the dissenting judge, Justice Heydon described tobacco manufacturers as purveyors of "lies and death."

INTELLECTUAL PROPERTY AND PUBLIC POLICY

An important theme of the ruling concerned the nature and role of IP law. The judgments stressed that IP law is designed to serve public policy objectives – not merely the private interests of rights holders.

Chief Justice French emphasized the public policy dimensions of IP law, noting that trademark legislation has "manifested from time to time a varying accommodation of commercial and the consuming public's interests."

In his swansong, retiring Justice Gummow commented that "trademark legislation, in general, does not confer a 'statutory monopoly' in any crude sense." The judge emphasized that the Trade Marks Act did not confer "a liberty to use registered trademarks free from restraints found in other statutes."

Discussing the nature of modern trademark law, Justice Crennan said that the aim of trademarks was not only to distinguish the products of one registered owner from another. "It became clear," she observed, "as argument advanced that what the plaintiffs most strenuously objected to was the taking or extinguishment of the advertising or promotional functions of their registered trademarks or product get-up, which functions were prohibited by the Packaging Act."

CONSTITUTIONAL LAW AND THE ACQUISITION OF PROPERTY

The majority of the High Court held that the plain packaging regime did not amount to an acquisition of property. This ruling is consistent with precedents on IP and constitutional law, such as the Grain Pool case, the Nintendo case, and the Phonographic ruling.

In a judgment notable for its clarity and precision, Justices Hayne and Bell ruled, "The Plain Packaging Act is not a law by which the Commonwealth acquires any interest in property, however slight or insubstantial it may be. The Plain Packaging Act is not a law with respect to the acquisition of property."

Justice Kiefel said, "The central statutory object of the Packaging Act is to dissuade persons from using tobacco products. If that object were to be effective, the plaintiffs' businesses may be harmed, but the Commonwealth does not thereby acquire something in the nature of property itself."

Photos: Packaging designs © Commonwealth of Australia. Health warning images used with the permission of the Australian Government.

Chief Justice French held that the arguments of the tobacco companies were fatally flawed.

In his dissent, Justice Heydon complained generally about the government encroaching upon the acquisition of property clause, "The flame of the Commonwealth's hatred for that beneficial constitutional guarantee, s 51(xxxi), may flicker, but it will not die. That is why it is eternally important to ensure that that flame does not start a destructive blaze."

THE AFTERMATH OF THE DECISION

The decision on plain packaging of tobacco products is undoubtedly one of the landmark rulings of the High Court of Australia, with its discussion of public health law, IP law, and constitutional law. It is certainly not a quirk of Antipodean constitutional law as alleged by British American Tobacco.

The High Court of Australia is a well-respected superior court – its precedent will be influential throughout the world. Indeed, the decision chimes with rulings by the Supreme Court of Canada and the South African Supreme Court on public health and tobacco control.

The ruling will reinforce Australia's position with respect to international conflicts over the plain packaging of tobacco products, such as in the World Trade Organization (WTO) and in investment tribunals.

The decision may also encourage other countries to join an "Olive Revolution," and introduce standard olive-colored, plain packaging with large health warnings for tobacco products.

The WHO welcomed the landmark ruling and called upon the "rest of the world to follow Australia's tough stance on tobacco marketing" which is fully in line with the WHO Framework Convention on Tobacco Control. The Director-General of the WHO, Dr Margaret Chan, said that the ruling would encourage other countries to implement tobacco control measures, such as the plain packaging of tobacco products, noting,"with Australia's victory, public health enters a brave new world of tobacco control. Plain packaging is a highly effective way to counter industry's ruthless marketing tactics. It is also fully in line with the WHO Framework Convention on Tobacco Control. The lawsuits filed by Big Tobacco look like the death throes of a desperate industry. With so many countries lined up to ride on Australia's coattails, what we hope to see is a domino effect for the good of public health. The case is being watched closely by several other countries who are considering similar measures to help fight tobacco."

Dr. Chan implored other countries to take steps to reduce demand for and supply of tobacco products under the WHO Framework Convention for Tobacco Control. India, New Zealand, Norway, the United Kingdom and Uruguay are particularly keen to follow Australia's lead.

The High Court of Australia ruling has strengthened Australia's position in international law. Ukraine has sought to challenge Australia's plain packaging regime under the TRIPS Agreement through the WTO dispute settlement procedures (see Dispute DS434). Philip Morris has also sought to challenge Australia's plain packaging regime under an investment treaty between Hong Kong (SAR) and Australia. There has also been much discussion as to whether tobacco control measures will be affected by the Trans-Pacific Partnership, currently under negotiation. ◆