Standardized or Plain Tobacco Packaging

Global Legal Challenges

There have been legal challenges against plain packaging legislation in Australia (before the domestic High Court, an International arbitration tribunal and the WTO), The United Kingdom, Ireland, France, and the European Union Court of Justice.

While some rulings remain pending, the tobacco industry has lost all its legal challenges to plain packaging legislation so far.

AUSTRALIA

On April 29, 2010, the Australian Government announced that it would introduce mandatory plain packaging of tobacco products as part of a comprehensive strategy to reduce smoking rates in Australia. The Tobacco Plain Packaging Act 2011 was passed by the Australian Parliament in November 2011 and received Royal Assent in December 2011. All tobacco products sold in Australia have been required to comply with the legislation since December 2012. Graphic health warnings are required on 75 percent of the front and 90 percent of the back of cigarette packages.

CONSTITUTIONAL CLAIM IN AUSTRALIA'S HIGH COURT

Claim: In December 2011, the four multinational tobacco companies (Philip Morris International, British American Tobacco, Japan Tobacco International, and Imperial Tobacco) brought challenges in the High Court under the Australian constitution. The basis of the claims were that the restriction on intellectual property rights constituted an acquisition of their property for which just terms had not been provided; and that the Act and Regulations gave Australia the use of, or control over, tobacco packaging in a manner that amounts to an acquisition of the companies' property.

Outcome: In October 2012, the High Court published its reasons for fully rejecting the challenge (6-1). Justice Crennan observed that what the tobacco industry (para 287) 'most strenuously objected to was the taking or extinguishment of the advertising or promotional functions of their registered trademarks or product get-up'.

"Although the Act regulated the plaintiffs' intellectual property rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Commonwealth or any other person. As a result, neither the Commonwealth nor any other person acquired any property."

Hayne and Bell JJ observed (para 181) that the requirements of the Act "are no different in kind from any legislation that requires labels that warn against the use or misuse of a product, or tell the reader who to call or what to do if there has been a dangerous use of a product. Legislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the TPP Act, effects no acquisition of property." Similarly, Kiefel J wrote that (para 316) "[m] any kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm', including medicines, poisonous substances and foods."

The transcripts of the hearings show that counsel for Japan Tobacco International (JTI) and Imperial Tobacco compare the cigarette packet to advertising billboards by saying that Australia "is acquiring our billboard, your Honour"; and "I own this packet and I will determine what message goes on it"… it is our "bonsai billboard".

PHILIP MORRIS ASIA INTERNATIONAL INVESTMENT ARBITRATION CLAIM

Background: On February 23, 2011, just 10 months after the Australian government announced its intention to proceed with plain packaging; Philip Morris (PM) moved ownership of 100 percent of the shares in PM Australia to PM Asia which is incorporated in Hong Kong. On June 27, 2011 PM Asia then issued a notice of claim under the Hong Kong / Australia Bilateral Investment Treaty (BIT) on the basis that it had a 'foreign investment' in Australia protected under that treaty.

Claim: PM Asia claimed that in adopted plain packaging legislation Australia had breached the BIT by:

i. expropriating their intellectual property, in particular the trademarks used on the tobacco packaging;
ii. not affording PM Asia fair and equitable treatment because it claimed there was no credible evidence that the measure would contribute to a reduction in smoking rates;

iii. Failing to observe international obligations in particular under the World Trade Organization (WTO) agreements.

Defense: Australia in its response, argued that "The plain packaging legislation forms part of a comprehensive government strategy to reduce smoking rates in Australia … The implementation of these measures is a legitimate exercise of the Australian Government's regulatory powers to protect the health of its citizens". It argued that the decision was based on a broad range of studies and reports that support the likely efficacy of the policy and was based on recommendations of the World Health Organization (WHO), the Framework Convention on Tobacco Control (FCTC) Secretariat and the guidelines to the FCTC.

Australia also raised a number of procedural objections to the claim including that there was no foreign investment, that the investment arose after the dispute materialized, and that there was an abuse of process. These objections were based on the fact that the ownership of PM Asia had only been moved to Hong Kong after the announcement of the government's intention to proceed with the measure.

Outcome: In December 2015, the arbitration tribunal gave its decision, agreeing with Australia, that it had no jurisdiction to hear the claim. The claim was therefore struck out on a procedural point. The detailed ruling was published on May 16, 2016. The Tribunal health said that:

"…the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible"

This ruling means that there is no decision on the merits of the claim and so no determination from an arbitration tribunal as to whether plain packaging laws in principle breach the typical clauses that are common to many bilateral investment treaties. There is potential for a further investment treaty claim by one of the tobacco companies, challenging plain packaging in another jurisdiction.

The tribunal was constituted in Singapore and is therefore governed by Singapore's International Arbitration Act (Chapter 143A). Section 10 of that Act provides for a limited right of appeal in relation to arbitral tribunal rulings as to jurisdiction. It is possible PM may seek to appeal under Singapore law.

Australia is reported to have spent $50 million on its legal defense to the arbitration claims. The allocation of costs is reserved for a final award solely on the issue of costs following submissions.

WORLD TRADE ORGANIZATION DISPUTE

Background: The dispute arose out of complaints by Cuba, the Dominican Republic, Honduras, Indonesia and Ukraine that the plain packaging laws breach various articles of the WTO agreements. These countries requested consultations with Australia under WTO dispute procedures in 2013. A dispute settlement panel was composed in May 2014. The final oral hearing took place in October 2015 and final summary written submissions were made in December 2015.

There are more 3rd parties to this dispute that have made written and oral submissions to the panel than for any previous WTO dispute — some 34 plus the EU. It has been reported that EU and British American Tobacco (BAT) are providing support to the Dominican Republic, and Ukraine and Honduras respectively.

The On May 28, 2015, Ukraine suspended their dispute in order to negotiate a mutually agreed solution with Australia.

Dispute: The complaining countries argue that Australia's law breaches the WTO's General Agreement on Tariffs and Trade (GATT), Agreement on Technical Barriers to Trade (TBT Agreement) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), in that they are discriminatory, more trade restrictive than necessary, and unjustifiably infringe upon trademark rights.

Australia argues that its laws are a sound, well-considered measure designed to achieve a legitimate objective, the protection of public health.

For a more detailed consideration of the issues under dispute there are a number of analyses available including: Andrew Mitchell and Tania Voon, *Face Off: Assessing wto Challenges to Australia's Scheme for Plain Tobacco Packaging*, Public Law Review (2011)

Outcome: The panel expects to make its ruling in the second half of 2016. If a party appeals the panel's findings, the matter will be considered by the WTO's Appellate Body. Under Article 17.5 of the Dispute Settlement Understanding, the period from notification of a decision to appeal to the circulation of the Appellate Body's report should not exceed 90 days however, this time scale is often not met.

UNITED KINGDOM

Background: The United Kingdom (UK) adopted standardized packaging legislation in March 2015 with an implementation date of May 20, 2016. The legislation only applies to cigarettes and hand-rolled-tobacco, but otherwise is very similar to the Australian legislation. In May and June 2015, all four major tobacco companies (along with a German tipping paper manufacturer) brought legal challenges in the UK High Court against the regulations.

Claim: The main grounds of challenge were that the UK government had failed to follow proper due process in deciding to adopt the legislation; that it was incompatible with European Union (EU) law (including the EU treaties, the Tobacco Products Directive (TPD), and the Community Trademark Regulation); and that the legislation amounted to a deprivation of the property in their trademarks which breached the European Convention on Human Rights (ECHR). Because the main grounds were under EU and ECHR law, the outcome had the potential to impact on all other EU countries considering plain packaging.

Outcome: Justice Green dismissed the claims on all grounds giving a detailed ruling on May 19, 2016. In coming to his decision Justice Green undertook a detailed analysis of the evidence put forward by the tobacco companies in support of their claims. This same evidence has been used by the industry to oppose plain packaging in many other countries. The judge said:

"I have applied the sorts of methodological standards that are world-wide norms and … the Claimants' evidence is largely: not peer reviewed; frequently not tendered with a statement of truth or declaration that complies with the CPR [Court Procedural Rules for England and Wales]; almost universally prepared without any reference to the internal documentation or data of the tobacco companies themselves; either ignores or airily dismisses the worldwide research and literature base which contradicts evidence tendered by the tobacco industry; and, is frequently unverifiable." [Para 23, page 18]

In addition, on the issue of deprivation of the claimant's property, the judge said that:

"First, the trademarks (of whatever description) remain unequivocally the property of the Claimants…Second, when measured against the function attributed to trademarks in EU law they (and especially the word marks) can still perform this role both in terms of a right to prevent unauthorized use and, more broadly, as an identifier of origin…Third, the curtailment of the use of the trademarks does not result in the Claimants being unable to conduct their business...

Fourth, the interference was unequivocally in the public interest". And that:

"There are no cases where compensation has been paid for the curtailment of an activity which is unequivocally contrary to the public interest. In my judgment the facts of the case are exceptional such that even if this were a case of absolute expropriation no compensation would be payable. [Para 811, page 324]

Japan Tobacco International (JTI) and BAT have said they intend to appeal the decision to the Court of Appeal. Issues regarding the interpretation of EU law could be referred to the Court of Justice of the European Union (CJEU). The ECHR property claim can ultimately be appealed to the European Court of Human Rights. If that occurs these appeals may not be resolved for up to two years but the initial High Court ruling was a strong and detailed judgment and so gives a good indication of the ultimate outcome.

FRANCE

Background: Legislation providing powers adopted by the Assemblée Nationale (Law n°2016-41) came into force on January 26, 2016 and was upheld as being compliant with the constitution by the Constitutional Council on January 21, 2016. The detailed decree and Ministerial Order were published on March 22, 2016 and came into force May 20, 2016. As with the UK, the legislation applies to cigarettes and hand-rolled-tobacco.

JTI launched an action on April 29, 2016 at the level of the Conseil d'Etat (the highest administrative court) alleging that the laws are in breach of the French constitution.

Similar actions were launched by Imperial Tobacco on May 10, 2016 and by the Confédération Nationale des Buralistes de France (the National Organization for Tobacco Retailers in France) on May 19, 2016, who argue that the regulation regarding plain packaging prevent them from identifying the product and prevent them from exerting their professional activities as tobacco retailers.

The French government has to prepare its defense by June 29, 2016.

IRELAND

Background: Legislation for plain packaging on all tobacco products was adopted on March 10, 2015 and was due to set into effect on May 20, 2016. Plain packaging was delayed however, due to a delay in the establishment of a national government. JTI has issued proceedings challenging the Irish legislation. Following a hearing, JTI confirmed that its claim was based solely on the ground that the law is incompatible with the European Union Tobacco Products Directive (TPD) (see below). The proceedings were delayed pending the outcome of the Court of Justice of the European Union ruling on the tobacco companies' challenge to the TPD. In addition, JTI explicitly stated that it reserves its position in relation to all other potential grounds pending the outcome of the UK ruling (see above). In addition Ireland has a constitution which protects property rights with no limitation period; therefore a constitutional challenge may be bought at some stage whatever the outcomes of the other cases.

EUROPEAN UNION TOBACCO PRODUCTS DIRECTIVE 2014/40/EU (TPD)

Background: The EU has adopted the Tobacco Products Directive (TPD) which entered into force on May 19, 2014. The aim of the TPD is to provide a harmonized regulatory environment for tobacco products across the EU to assist the free movement of those goods. In doing so it takes a high standard of public health. The TPD regulates emissions, prohibits tobacco flavoring in cigarettes and hand-rolled-tobacco, provides for 65 percent graphic health warnings on the front and back of packaging as well as other packaging and labelling provisions, regulates e-cigarettes including their packaging and advertising, and provides for measures to combat the illicit market.

The TPD also includes, at Article 24(2), a provision that states member states may adopt further measures in relation to the standardization of tobacco packaging.

Claim: PM and BAT brought a challenge to the validity of the whole of the TPD which was referred to the Court of Justice of the European Union (CJEU). One aspect of the challenge included a question on the interpretation of Article 24(2), the clause permitting member states to adopt standardized packaging, on the basis that the clause was not sufficiently harmonizing. The tobacco companies claimed the clause should be struck down.

Outcome: On May 4, 2016, the CJEU published its ruling declaring that the TPD was valid in full. In addition, it confirmed that the directive is not intended to harmonize all aspects of the labelling and packaging of tobacco products so Member States are free to maintain or introduce further requirements in relation to aspects of tobacco packaging that were not otherwise harmonized by the Directive.