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# Plain Tobacco Packaging: The Legal Issues

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## Outline

- Background
- The WHO FCTC
- Australian Constitutional Law
- International Investment Law
- WTO Law

# Background

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## Graphic Warnings in Australia since 2006


Front






Brand Name


Back



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## Plain Packaging from 2012

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## Passage of Legislation

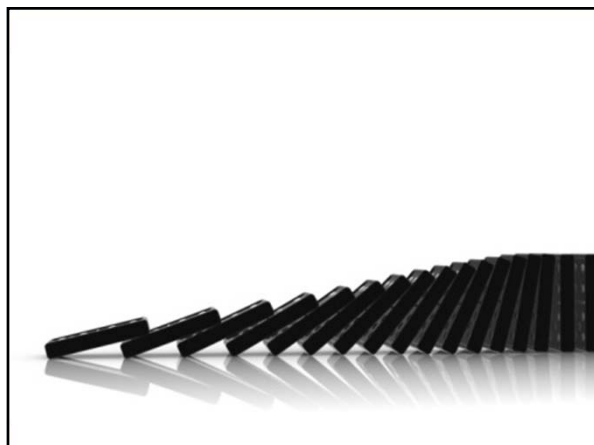
| Date          | Event  |
|---------------|--|
| 29 April 2010 | Australian Government announces decision to implement plain packaging.           |
| 6 July 2011   | Legislation introduced into Parliament.  |
| 21 Nov 2011   | <i>Tobacco Plain Packaging Bill 2011</i> (Cth) passes Australian Parliament.     |
| 1 Dec 2011    | Legislation receives Royal Assent: <i>Tobacco Plain Packaging Act 2011</i> (Cth) |
| 1 Dec 2012    | Full compliance required.  |

**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**

- Australian Government, *Consultation Paper: Tobacco Plain Packaging Bill 2011 – Exposure Draft* (7 April 2011) 6.
- Cancer Council Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (2011).
- US Department of Health & Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012) 530-535.
- Public Health Research Consortium, UK, *Plain Tobacco Packaging: A Systematic Review* (2012).



**The WHO FCTC**

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## WHO FCTC Guidelines

Parties to the WHO FCTC 'should consider adopting ... plain packaging'

Guidelines for implementation of Article 11 of the WHO FCTC

Guidelines for the implementation of Article 13 of the WHO FCTC


See also Statement of the WHO at the WTO TRIPS Council (7 June 2011)

# Australian Constitutional Law

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## Constitutional Challenge

| Date        | Event   |
|-------------|---|
| 1 Dec 2011  | <ul style="list-style-type: none"> <li>Legislation receives Royal Assent.</li> <li>British American Tobacco issues writ.</li> </ul> |
| 6 Dec 2011  | <ul style="list-style-type: none"> <li>Imperial Tobacco issues writ.</li> </ul>   |
| 15 Dec 2011 | <ul style="list-style-type: none"> <li>Japan Tobacco issues writ.</li> </ul>  |
| 20 Dec 2011 | <ul style="list-style-type: none"> <li>Philip Morris issues writ.</li> </ul>  |

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## 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

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## Investment Challenge

| Date          | Event   |
|---------------|---|
| 29 April 2010 | <ul style="list-style-type: none"> <li>Australian Government announces decision to implement plain packaging.</li> </ul>  |
| 23 Feb 2011   | <ul style="list-style-type: none"> <li><b>Philip Morris Asia Limited (PMA) purchases Philip Morris (Australia) Limited.</b></li> </ul>                                    |
| 27 June 2011  | <ul style="list-style-type: none"> <li>PMA issues Notice of Claim.</li> </ul>   |
| 21 Nov 2011   | <ul style="list-style-type: none"> <li><i>Tobacco Plain Packaging Bill 2011</i> (Cth) passes Australian Parliament.</li> <li>PMA issues Notice of Arbitration.</li> </ul> |
| 21 Dec 2011   | <ul style="list-style-type: none"> <li>Australian Government submits response.</li> </ul>   |

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## 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
  - the legitimate expectations of investors

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## Fair and Equitable Treatment

- Relevant considerations:
  - Reasonableness
  - Consistency
  - Non-discrimination
  - Transparency
  - Due process
  - Legitimate expectations

WTO Law

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## WTO Challenge

| Date          | Event  |
|---------------|--|
| 1 Dec 2011    | • Legislation receives Royal Assent.                     |
| 15 March 2012 | • <b>Ukraine</b> requests consultations with Australia.  |
| 10 April 2012 | • <b>Honduras</b> requests consultations with Australia. |

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## 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.

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## 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 17

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.

...

### TRIPS Art 7

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

### TRIPS Art 8(1)

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.


### Doha Declaration on TRIPS and Public Health

'We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health ...'

### GATT Art XX(b)

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: ...

(b) necessary to protect human, animal or plant life or health; ...

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### TBT Art 2.2

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

## Further Reading

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- Tania Voon, Andrew Mitchell & Jonathan Liberman with Glyn Ayres (eds), *Public Health & Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, forthcoming September 2012)
- Tania Voon & Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14(3) *Journal of International Economic Law* 515.  
<http://ssrn.com/abstract=1906560>
- Tania Voon & Andrew Mitchell, 'Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging' (2011) 22(3) *Public Law Review* 218.  
<http://ssrn.com/abstract=1995015>