

Australia v Tobacco Brands

Tobacco Plain Packaging Act 2011 - an Act to
discourage the use of tobacco products

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**SMOKING CAUSES
BLINDNESS**



Brand
Variant

25

WARNING
The toxic chemicals in tobacco smoke
damage your blood vessels, damage your
body's cells and attack your immune system.

**SMOKING CAUSES
MOUTH AND THROAT
CANCER**



Mouth cancer

Brand
Variant

25

WARNING
The toxic chemicals in tobacco smoke
damage your blood vessels, damage your
body's cells and attack your immune system.

**DON'T LET
CHILDREN BREATHE
YOUR SMOKE**



Brand
Variant

25

WARNING
The toxic chemicals in tobacco smoke
damage your blood vessels, damage your
body's cells and attack your immune system.





Do you really like living in a Nanny State?

If you're one of the 1.5 million adult Australians who choose to smoke, you're no doubt aware of the associated health risks. The current packaging makes that abundantly clear. Now the government wants to remove all branding and increase the graphic health warning to cover most of the front of your pack. It's clear the government doesn't believe you can make your own decisions about what you should and should not do. And while rules are necessary in a modern society, there has to be a limit. If you think Plain Packaging Legislation is regulation gone too far, do something about it. Go to NoNannyState.com.au, your local tobacco retailer or speak to your Member of Parliament on (02) 62 777 111.

**STOP
PLAIN
PACKAGING
LEGISLATION**

Authorised by W. Merrett, Imperial Tobacco Australia Ltd, 4-8 Inglewood Place, Baulkham Hills NSW 2153.

Immediate background to the 2011 measures

- WHO Framework Convention on Tobacco Control 2003 which is silent on plain packaging mandates
 - 2008 Draft Guidelines published under the FCTC suggest that ‘parties should consider adopting’ plain packaging measures
- 2009 Australian Government Preventative Health Taskforce – ‘Making Smoking History’ report
 - *We propose something that has not yet been tried anywhere in the world, but which would cost the taxpayer nothing and offers the prospect of shattering the image of cigarettes as an ordinary consumer item. If we act quickly, Australia can overtake the British Government and become the first country in the world to mandate that cigarettes be sold in plain packaging. There is good evidence that this would have a profound effect on young image conscious teenagers.*

The pillars of the TPPA measures

1. Prescriptive plain packaging mandate for tobacco products which permits two word marks and prohibits logos or other trade dress
2. Provisions which maintain the existing trade mark registrations for, and allow new registrations of, logos or other trade dress on tobacco products
3. A “we won’t pay the tobacco companies a cent” provision: if the measures comprise an acquisition of property not on just terms, a Plan B regime will apply that will allow tobacco logos or trade dress to the extent necessary to avoid the takings clause

The challenges so far

1. Australia-Hong Kong Bilateral Investment Treaty
 - Phillip Morris (HK) initiates an arbitration to remedy loss arising from deprivation of their investments or arising from their investments being subjected to measures having an effect equivalent to deprivation
2. Australian Constitution
 - British American Tobacco initiates an action claiming that the measures represent an acquisition of property not on just terms and the ‘Plan B’ provision is offensive to rule of law/separation of powers doctrines
3. TRIPS
 - Ukraine and Honduras initiate WTO action challenging the TRIPS-compliance of the measures

The major issues

1. Is a denial to the owner of the lawful right to use its registered trade mark, while also allowing that owner to action infringing third parties and maintain in perpetuity the registered mark, an:
 - expropriation for investment treaty purposes?
 - acquisition of property for the takings clause?
 - a denial of TRIPS minimum standards of protection for trade marks generally?
2. Is TRIPS art 20 (proscribing unjustifiable encumbrances on the use of trade marks) violated?
3. Can TRIPS art 8 (permitting measures necessary for public health) be relied upon?

Other issues

- The posture of the US under the US-Australia FTA?
 - A non-violation complaint arises where the application of a measure which in itself does not violate a minimum standard, nevertheless causes the nullification or impairment of a benefit that a party reasonably expects should arise from the FTA
- Well-known marks protection?
 - Maintenance provisions of the TPPA do not preserve the special rights of famous tobacco marks (required by TRIPS art 16.3) which may lose their fame in Australia as a consequence of the measures