BIG TOBACCO RUNNING OUT OF PUFF, TRIES HUFF

http://www.bloomberg.com/news/2011-06-26/philip-morris-starts-legal-action-on-australian-tobacco-package-law-plans.html

Bloomberg - Philip Morris Claims Australia's Plain Cigarette Package Plan is Illegal

By Robert Fenner - Jun 27, 2011 6:21 AM GMT+0800

Philip Morris International Inc. (PM), the world's largest publicly traded tobacco company, said it has started legal action against the Australian government over plans to allow the sale of cigarettes only in plain packages. The company filed a notice of claim against the government saying the proposals violate terms of Australia's Bilateral Investment Treaty with Hong Kong, Philip Morris' Asian unit said in an e-mailed statement today. A copy of the court document wasn't immediately available. Australia, which has already banned the public display of tobacco products in retail outlets, plans to outlaw logos on cigarette packs and force them to be sold in plain dark olive packaging, carrying health warnings instead of company logos. Cigarette brand names will appear on the packages in the same size and style of printing. The legislation, if passed by parliament, will come into force on Jan. 1, 2012. "The forced removal of trademarks and other valuable intellectual property is a clear violation of the terms of the bilateral investment treaty between Australia and Hong Kong," Anne Edwards, a spokeswoman for Philip Morris Asia, said in the statement. "We believe we have a very strong legal case and will be seeking significant financial compensation for the damage to our business." The government raised tobacco taxes by 25 percent last year as it seeks to curb smoking, which is the nation's largest single preventable cause of death, according to Health Minister Nicola Roxon. "We don't believe that taking that action is in breach of any of our international obligations," Roxon told Sky News today. "We believe that we are able, and the Australian people I think would expect their government, to take action in the interests of public health." **To contact the reporter on this story: Robert Fenner in Melbourne at rfenner@bloomberg.net To contact the editor responsible for this story: Neil Denslow at ndenslow@bloomberg.net**

http://www.unctad.org/sections/dite/iia/docs/bits/hongkong_australia.pdf
Bilateral Agreement and TRIPS Article 8 herewith.

Article 8

Principles *http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm*

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.

Article 20

Other Requirements

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, 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. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

EXPOSURE DRAFT

Chapter 1 Preliminary
Part 3 Constitutional provisions

Section ^11

^11 Acquisition of property

(1) This Act does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms.

(2) In particular, if, apart from this section, this Act would result in such an acquisition of property because it would prevent the use of a trade mark on the packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark may be used on the packaging of tobacco products, or on a tobacco product, in accordance with any requirements prescribed in regulations made for the purposes of this subsection.

TRIPS/World Trade Organisation

- Article 20 provides that "the use of a trade mark in the course of trade shall not be unjustifiably encumbered by special requirements".
- So is their use is "unjustifiably encumbered"?

- Article 8 TRIPS provides that countries may take measures "necessary for public health" provided they are consistent with the rest of the agreement.

The Constitutional Argument

- There is no '**acquisition**' of property.
- 'The mere extinguishment or deprivation of rights in relation to property does not involve acquisition' Deane J, Tasmanian Dams case
- **All** cases support the proposition there is no acquisition eg

- Commonwealth v Tasmania (1983) 158 CLR 1
- Australian Tape Manufacturers Assn v Commonwealth (1993) 176 CLR 480
- Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155
- Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513
- Nintendo Co Ltd v Centronic Systems Pty Ltd (1994) 181 CLR 284
- Commonwealth v WMC Resources Ltd (1988) 194 CLR 1.

http://www.abc.net.au/am/content/2011/s3253997.htm

Tobacco giant ready to launch legal action against Govt

Alexandra Kirk reported this story on Monday, June 27, 2011 08:04:00

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TONY EASTLEY: The Federal Health Minister, Nicola Roxon says the Government is on "very strong legal ground" and can withstand a legal challenge to its plain packaging legislation from tobacco giant, Philip Morris.

Philip Morris says it will begin the process today - serving a "notice of claim" on the Government, which triggers a three-month negotiating period.

The cigarette manufacturer says if there's no resolution, the matter will then go to international arbitration, arguing the Government is breaching a bilateral investment treaty between Australia and Hong Kong, where Philip Morris's parent company is based.

It says if it wins the compensation bill it may run into billions.

The Federal Health Minister, Nicola Roxon spoke to Alexandra Kirk in Canberra.

NICOLA ROXON: We believe that we are on very strong legal ground. We are breaking new ground around the world. This is the first time any country has taken this step and of course our Government would take proper advice to ensure that we can do that.

ALEXANDRA KIRK: Did you take advice on this bilateral investment treaty that Australia has with **Hong Kong** which Philip Morris maintains your plain packaging legislation would breach?

NICOLA ROXON: Well, I'm not going to go through the details of all of our legal advice in the media. Suffice to say we are very confident that we are on strong ground and I do need to point out to the public that I think they would expect that their own government, Australians expect the Australian Government to be able to take action which are in the community's interests and in the interest of public health.

The World Health Organization recommends that states consider taking this action. We believe that it will be an effective part of our fight against tobacco and our determination to reduce the harm caused from smoking. But obviously big tobacco is going to fight this tooth and nail and we said from day one that we expected they would.

ALEXANDRA KIRK: And how much are you willing to spend defending your position? Presumably big tobacco has very deep pockets.

NICOLA ROXON: Well, they do because they make very large profits out of a lot of misery and death caused to thousands of Australians every year. So we already spend billions of dollars dealing with the harms caused from tobacco. Of course, we can't stop tobacco companies taking legal action. We'll defend our determination to protect public health and try to reduce the harms of smoking and ultimately I am confident that we are on very strong ground.

ALEXANDRA KIRK: Do health reasons though, which you cite, override a company's ability to use a brand to differentiate itself from its competitors?

NICOLA ROXON: Well, I believe that it is in the public interest for us to be able to take this step. Tobacco is unlike any other product, any other legal product in the world. We know so much about the harm it causes. We know that there is not a single safe cigarette or amount of smoking that can be done in a way which may not lead to very severe health outcomes.

So in those unusual circumstances, taking steps as we have already done in Australia to severely restrict advertising, has not been able to be challenged and similarly we think this next sensible, logical step will not be successfully challenged either.

ALEXANDRA KIRK: The notice of claim that Philip Morris is lodging today triggers a period of three months for negotiation. Will you negotiate with Philip Morris?

NICOLA ROXON: Well, I'm not going to make comments on a claim that has not even been provided to me. It is in the media and I'm happy to make general comments in the media and when these materials are served on us, we will deal with them appropriately.

TONY EASTLEY: The Federal Health Minister, Nicola Roxon speaking there with Alexandra Kirk in Canberra.

Relevant news: Thursday, 9 June 2011 / http://www.crikey.com.au/2011/06/09/factoids-and-legal-bollocks-in-war-against-plain-packaging/

Factoids and legal bollocks in war against plain packaging

by Simon Chapman

With the passage of the government's bill on plain packaging now assured by the support of the opposition, the Greens and all but one of the independents, an ever-desperate tobacco industry is now concentrating on the legal apocalypse that they say will descend on Australia through the courts.

These arguments are all a paper-thin house of cards, starting with the central problem that plain packaging will not extinguish brand identities. All brands will still carry brand names allowing smokers to clearly exercise their freedom of choice to select between the much-vaunted but mostly non-existent differences in brands. This is critical, because in the highly unlikely event of a ruling by the High Court in favour of the industry, all calculations of compensation will need to take account that branding differences have only been diminished, not extinguished.

Given that some 30-40 nations now have appropriated massive sections of packs with graphic warnings and that not a cent has been claimed or awarded in brand damage anywhere in the world for this egregious assault on brand identity, the prospects of any claim for huge compensation even in the unlikely event of a favourable ruling are vanishingly small. The companies would need to demonstrate with precision that sales losses arose from losing colours, logos and different pack shapes, not brand names.

Given that consumption is falling every year, this task would be like unraveling gossamer while wearing boxing gloves.

Few of those megaphoning this legal Armageddon appear to have even read the draft Bill itself. Section 11 makes it clear that plain packaging won't apply if it were to be determined (by a court) that its operation would result in an acquisition of property otherwise than on just terms. So in the unlikely event that the High Court says there is an acquisition of property (more on this below), the legislation would revert to a fallback position in the regulations under which "the trade mark may be used on the packaging of tobacco products, or on a tobacco product, in accordance with any requirements prescribed in the regulations".

In other words, the bill has been drafted with a get-out-of-jail-free card under which plain packaging will not proceed if the court said it was an unjust acquisition. So massive damages or compensation will simply not arise.

Moreover, Monash University's Prof Mark Davison has explained "As for the Constitutional argument that the legislation acquires property on other than just terms, Professor Craven, a noted Constitutional expert, has since observed on Radio National's Background Briefing that the tobacco industry's prospects of success are about the same as a three-legged horse has of winning the Melbourne Cup. The reason for his view is simply explained. The extinction of rights or the reduction of rights is not relevant. The government or a third party must acquire

property as a consequence of the legislation.

"The government does not wish to use the tobacco trade marks. Nor does it want third parties to do so. It does not desire to or intend to acquire any property. The proposition that prohibitions on the use of property do not constitute an acquisition of property was confirmed by the High Court as recently as 2009. In that case, the High Court held that the government was entitled to extinguish property rights in licences of farmers to take bore water."

But the industry and its errand boys, such as those at the Institute of Public Affairs, nonetheless know that the threat of a massive legal penalty will get them headlines. A big number is required and the number that has been selected is $3 billion … per year. So where did this satisfyingly large number come from? It started circulating in May 2010 and has been repeated countless times since by frothing shock-jocks and some who should have known better.

Step forward Tim Wilson, the director of intellectual property and the Free Trade Unit and the IPA. Wilson sent a submission to Senator Steve Fielding's inquiry into plain packaging where we can examine his prowess with the numbers.

At page four in his executive summary he says plain packs would lead to a court order to award the tobacco industry between $378 million and $3027 million per year. Table 2 (page 13) in his submission shows two lines of numbers for the total value of tobacco sales in Australia in 2006: one for the value including excise tax (which goes to the government) and one for the sales value ex-tax (in other words the returns to manufacturers and retailers combined). By taking the trouble to differentiate the two, Wilson must know that no court would order the return of the tobacco tax component to the companies: it's the ex-tax value that fuels such a pipe-dream.

Wilson then calculates the ex-tax value on two assumptions: a 10% and a 30% fall in sales each year that might follow the introduction of plain packs. He calculates these two figures at $378 million and $1.135 billion. So where does the $3 billion factoid come from? Are you ready for this? The tax-included sales value of a 30% fall is $3.027 billion.

So how reasonable are Wilson's assumptions that plain packs will cause a fall of a minimum 10% through to 30% a year? Between 1999 and 2003 the average annual fall in total dutied cigarettes was just 2.6%. The most sales have *ever* fallen in one year was just shy of 10% in 1999 after the combined impact of a change in the way cigarettes were taxed (from weight to per stick) and a big boost to the national quit campaign by health minister Michael Wooldridge.

Most analysts of the likely impact of plain packaging believe that its main impact will be on children over the next generations. Just as no Australian aged under 19 today has ever seen a local tobacco ad or tobacco sponsored sporting event, no child growing up after 2010 will ever see carcinogenic tobacco products packaged in carefully market researched attractive boxes. Smoking rates by kids today are the lowest ever recorded. Plain packs are expected to continue that downward momentum, starving the industry of new generations of new smokers as older smokers quit and die early. Plain packs will probably not influence long-term, older smokers much.

Wilson's $3 billion number is thus based on a projected decline, which is so far off the planet of declines ever recorded, that it is dreamland stuff. Worse, it appears to be a willful selection of the tax-included biggest number he could sight in his own table. To the delight of the industry, it has now become a virulent factoid with Google showing more than 7000 hits for "plain packs cigarettes" and "$3 billion". Tim, you are a true contributor to informed public debate.

**Simon Chapman is professor of public health at the University of Sydney.*

http://www.abc.net.au/unleashed/56666.html

15 April 2011

Plain packaging bill to extinguish some tobacco trade marks

145 Comments

Mark Davison

Tim Wilson's piece on the plain packaging legislation basically repeats the claims that have previously been made by him. Last year, I gave a detailed response to Tim's claims about the Constitution and international treaties. A webcast of that response can be seen here.

As for the Constitutional argument that the legislation acquires property on other than just terms, Professor Craven, a noted Constitutional expert, has since observed on Radio National's Background Briefing that the tobacco industry's prospects of success are about the same as a three legged horse has of winning the Melbourne Cup. The reason for his view is simply explained. The extinction of rights or the reduction of rights is not relevant. The government or a third party must acquire property as a consequence of the legislation. The government does not

wish to use the tobacco trade marks. Nor does it want third parties to do so. It does not desire to or intend to acquire any property. The proposition that prohibitions on the use of property do not constitute an acquisition of property was confirmed by the High Court as recently as 2009. In that case, the High Court held that the government was entitled to extinguish property rights in licences of farmers to take bore water.

It is true that the government has now worded the legislation so that even if a three legged horse does win the Melbourne Cup, it can still impose very significant restrictions on tobacco packaging. If you had a lawyer, you would expect them to give you an excellent fallback position, even in the event of the worst of all possible outcomes. It would not mean that the lawyer considers your position to be even marginally weak. It most certainly does not mean 'oops', as Tim inaccurately states.

Just by the way, the tobacco industry's argument is that what the government will acquire is more effective health warnings although that's not an acquisition of property. The interesting point is that tobacco's complaint is that the measures will work to reduce smoking. This honesty is welcome.

As for the international law claims, Tim continues to refer to one short e-mail from one staff member of IP Australia. He chooses not to refer to IP Australia's official statement describing Tim's interpretation of the e-mail as 'misleading and incorrect'.

What he also does not tell us is that major global tobacco companies held a meeting in 1994 at a cost of about US$650,000 to discuss this very issue. Due to discovery of the documents in the course of tobacco litigation in the US, we know that a presentation to that meeting revealed the carefully considered legal advice that TRIPS provided 'little joy' to the tobacco industry. See the overhead slides here.

Since then, there have been further developments that have further eroded the tobacco industry's already untenable claims. First, there has been considerable jurisprudence at the WTO concerning the capacity of member nations to take independent regulatory action in respect of public health measures. See the webcast referred to above. Second, the guidelines to the Framework Convention on Tobacco Control which has over 170 signatories have now recommended the adoption of plain packaging.

Tim refers to Article 20 and Article 8 of the TRIPS agreement but manages to obfuscate the issue. If these measures are necessary for public health, they will be justifiably imposed within the meaning of Article 20.

The issue boils down to whether there is evidence that the measures are necessary for public health. The tobacco industry has always challenged the suggestion that there is evidence of any facts justifying any regulation of its industry. In 1994, its executives swore on oath before Congress that they did not believe that nicotine is addictive. Tobacco companies have denied that there is any evidence that smoking causes cancer, any evidence that it causes heart disease, any evidence that passive smoking is harmful and any evidence that bans on advertising would lower smoking rates. Now, they question the evidence that the packaging that they spend so much

money and time on developing attracts non-smokers and continues to attract existing smokers.

Here's the problem for Tim and the organisations that he may or may not represent. The Internet and the academic literature are swarming with evidence directly from the internal documents of marketing departments of tobacco companies of their use of packaging to attract and retain smokers, especially 'young adults'. In addition, there are numerous studies, dating back to at least 1995, showing that plain packaging will have a negative effect on uptake of smoking. The WTO and the scientific world will assess the evidence from a neutral, disinterested perspective.

As for declarations of qualifications and interests: I am a Professor in the Faculty of Law at Monash University, specialising in intellectual property. Further details are available on my website. I am a member of the Expert Advisory Group referred to in the Consultation Paper. I have spoken to employees of the Cancer Council Victoria about this issue. No financial benefit has been offered, promised or provided to me. I have been given some nice sandwiches at meetings and I have now accepted assurances that the orange juice was fresh.

Professor Mark Davison teaches law at Monash University and is the author of several major works relating to intellectual property and competition law.

Agreement

between the Government of Hong Kong
and the Government of Australia
for the Promotion and Protection of Investments

AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of Hong Kong, having been duly authorised to conclude this agreement by the sovereign government which is responsible for its foreign affairs, and the Government of Australia (hereinafter referred to as the "Contracting Parties");

Desiring to create favourable conditions for greater investment by investors of one Contracting Party in the area of the other;

Considering that investment relations should be promoted and economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for equality, mutual benefit, non-discrimination and mutual confidence;

Recognising that the encouragement and reciprocal protection under agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both areas;

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement

(a) "area":

(i) in respect of Hong Kong includes Hong Kong Island, Kowloon and the New Territories;

(ii) in respect of Australia includes the territorial sea, maritime zone or continental shelf where it exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law;

(b) "companies" means:

(i) in respect of Hong Kong : corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in its area or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by physical persons who have the right of abode in its area, regardless of whether or not the entities referred to in this sub-paragraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(ii) in respect of Australia : corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in any part of its area or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by a physical person who is an investor of Australia under its law, regardless of whether or not the entities referred to in this sub-paragraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(c) "forces" means:

(i) in respect of Hong Kong : the armed forces of the sovereign government which is responsible for its foreign affairs;

(ii) in respect of Australia : the defence forces of the Commonwealth of Australia;

(d) "freely convertible currency" means a fully and freely convertible currency as identified by the International Monetary Fund or a currency that is widely traded in international foreign exchange markets;

(e) "investment" means every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time, and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock, bonds and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having an economic value;

(iv) intellectual property rights including rights with respect to copyright, patents,. trademarks, trade names, industrial designs, trade secrets, know-how and goodwill;

(v) business concessions, licences and other rights conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources and to manufacture, use and sell products.

A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement. For the purposes of this Agreement, a physical person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in the company or the investment. Any question arising out of this Agreement concerning the control of a company or an investment shall be resolved to the satisfaction of the Contracting Parties;

(f) "investors" means:

(i) in respect of Hong Kong:

(A) physical persons who have the right of abode in its area; and

(B) companies as defined in paragraph (1)(b)(i) of this Article; and

(ii) in respect of Australia:

(A) physical persons possessing Australian citizenship or who are permanently residing in Australia in accordance with its law; and

(B) companies as defined in paragraph (1)(b)(ii) of this Article;

(g) "returns" means the amounts yielded by or derived from an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

ARTICLE 2

Promotion and Protection of Investment and Returns

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area, and, subject to its right to exercise powers conferred by its laws and investment policies, shall admit such investments.

(2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party. This Agreement shall not prevent an investor of one Contracting Party from taking advantage of the provisions of any law or policy of the other Contracting Party which are more favourable than the provisions of this Agreement.

ARTICLE 3

Treatment of Investments

(1) Neither Contracting Party shall in its area subject investments or returns of. investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any other State.

(2) Neither Contracting Party shall in its area subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments,

including in connection with intellectual property rights, and the raising of funds, the purchase and sale of foreign exchange, and transfers under Article 8 of this Agreement, to treatment less favourable than that which it accords to investors of any other State.

(3) Subject to its laws applicable from time to time, each Contracting Party shall permit investors of the other Contracting Party who have made investments in the first Contracting Party's area to employ within its area, key technical and managerial personnel of their choice, and permit physical persons who are investors of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its area for the purpose of engaging in activities related to investments. Such personnel employed from abroad shall be entitled to transfer abroad, subject to the provisions of Article 8 of this Agreement, unspent earnings and other remuneration in connection with investments.

ARTICLE 4

Transparency of Laws

Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect investments in its area by investors of the other Contracting Party, make such laws and policies public and readily accessible.

ARTICLE 5

Compensation for Losses

(1) Investors of one Contracting Party whose investments in the area of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, riot or other similar events in the area of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to investors of any other State. Resulting payments shall be made in a freely convertible currency.

(2) Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the area of the other Contracting Party resulting from:

(a) requisitioning of their property by its forces or authorities, or

(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or reasonable compensation. Resulting payments shall be made in a freely convertible currency.

ARTICLE 6

Expropriation

(1) Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except under due process of law, for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, and against compensation. Such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors. Compensation shall include interest at a normal commercial rate from the date the measures were taken until the date of payment, shall be made without undue delay, be effectively realisable, freely transferable and payable in either the original currency of the investment or, if requested by the investor, in any other freely convertible currency. The investor affected shall have a right, under the law of the Contracting Party making the deprivation, to prompt review by a judicial or other independent authority of that Party, of the investor's case and of the valuation of the investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its area, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee compensation referred to in paragraph (1) in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

ARTICLE 7

Exceptions

The provisions in this Agreement relative to the grant of treatment not less favourable than that accorded to investors of any other State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(a) any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or

(b) any international agreement or arrangement relating wholly or mainly to taxation.

ARTICLE 8

Transfer of Investments and Returns

(1) Subject to its laws and policies, each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the right to transfer abroad their investments and returns.

(2) Transfers of currency including payments in compensation for losses in accordance with Article 5 of this Agreement shall be permitted without undue delay in any freely convertible currency. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer.

(3) A Contracting Party may protect the rights of creditors, or ensure the satisfaction of judgements in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

ARTICLE 9

Consultations between Contracting Parties

The Contracting Party shall consult at the request of either of them on matters concerning the interpretation or application of this Agreement.

ARTICLE 10

Settlement of Investment Disputes

A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.

ARTICLE 11

Disputes between the Contracting Parties

(1) If any dispute arises between the Contracting Parties relating to the interpretation or application of this Agreement, the Contracting Parties shall in the first place try to settle it by negotiation.

(2) If the Contracting Parties fail to reach a settlement of the dispute by negotiation within 6 months of one Contracting Party seeking in writing such negotiation, it may be referred by them to such person or body as they may agree on or, at the request of either Contracting Party, shall be submitted for decision to a tribunal of three arbitrators which shall be constituted in the following manner:

(a) within thirty days after receipt of a request for arbitration, each Contracting Party shall appoint one arbitrator. A national of a State which can be regarded as neutral in relation to the dispute, who shall act as President of the tribunal, shall be appointed as the third arbitrator by agreement between the two arbitrators, within sixty days of the appointment of the second. In case any arbitrator appointed as provided for in this Article shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator;

(b) if within the time limits specified above any appointment has not been made, either Contracting Party may request the President of the International Court of Justice, in a personal and individual capacity, to make the necessary appointment within thirty days. If the President is a national of a State which cannot be regarded as neutral in relation to the dispute, or is unable to act, the Vice-President or the next most senior Member who is not disqualified on such a ground shall make the appointment.

(3) Except as hereinafter provided in this Article or as otherwise agreed by the Contracting Parties, the tribunal shall determine the limits of its jurisdiction and establish its own procedure. At the direction of the tribunal, or at the request of either of the Contracting Parties, a conference to determine the precise issues to be arbitrated and the specific procedures to be followed shall be held not later than thirty days after the tribunal is fully constituted.

(4) Except as otherwise agreed by the Contracting Parties or prescribed by the tribunal, each Contracting Party shall submit a memorandum within forty five days after the tribunal is fully constituted. Replies shall be due sixty days later. The tribunal shall hold a hearing at the request of either Contracting Party, or at its discretion, within thirty days after replies are due.

(5) The tribunal shall give a written decision stating its legal basis and shall, when possible, do so within thirty days after completion of the hearing or, if no hearing is held, after the date both replies are submitted. The tribunal may render an award on the default of a Contracting Party. The decision shall be taken by a majority vote.

(6) The Contracting Parties may submit requests for clarification of the decision within fifteen days after it is received and such clarification shall be issued within fifteen days of such request.

(7) The decision of the tribunal shall be final and binding on the Contracting Parties.

(8) Each Contracting Party shall bear the costs of the arbitrator appointed by it. The other costs of the tribunal shall be shared equally by the Contracting Parties including any expenses incurred by the President or Vice-President or Member of the International Court of Justice in

implementing the procedures in paragraph 2(b) of this Article. The tribunal may decide, however, that a higher proportion of costs shall be borne by one of the Contracting Parties.

ARTICLE 12

Subrogation

(1) If a Contracting Party or an agency of a Contracting Party makes a payment to an investor of that Contracting Party under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment, the other Contracting Party shall recognise the transfer of any right or title in respect of such investment. The subrogated right or claim shall not be greater than the original right or claim of the investor.

(2) Where a Contracting Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Contracting Party making the payment, pursue those rights and claims against the other Contracting Party.

(3) A Contracting Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, in any proceeding involving a dispute relating to an investment, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

ARTICLE 13

Application of the Agreement

(1) A company duly organised under the law of a Contracting Party shall not be treated as an investor of the other Contracting party, but any investments in that company by investors of that other Contracting Party shall be protected by this Agreement.

(2) This Agreement shall not apply to a company organised under the law of a non-Contracting Party within the meaning of paragraph (b) of Article 1 where the provisions of an investment promotion and protection agreement with that non-Contracting Party have already been invoked in respect of the same matter.

(3) This Agreement shall not apply to a physical person who is an investor of a Contracting Party where the provisions of an investment promotion and protection agreement between the other Contracting Party and a non-Contracting party of which that person is a citizen have already been invoked in respect of the same matter.

ARTICLE 14

Entry into Force and Duration and Termination

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

(2) This Agreement shall remain in force for a period of fifteen years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph (3) of this Article.

(3) Either Contracting Party may terminate this Agreement at any time after it has been in force for fifteen years by giving one year's written notice to the other Contracting Party.

(4) Notwithstanding termination of this Agreement pursuant to paragraph (3) of this Article, the Agreement shall continue to be effective for a second and final period of fifteen years from the date of its termination in respect of investments made before the date of termination of this Agreement.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in two originals at Hong Kong on the 15th day of September, One thousand nine hundred and ninety-three, in the Chinese, and English languages, both texts being equally authoritative.

For the Government of
Hong Kong

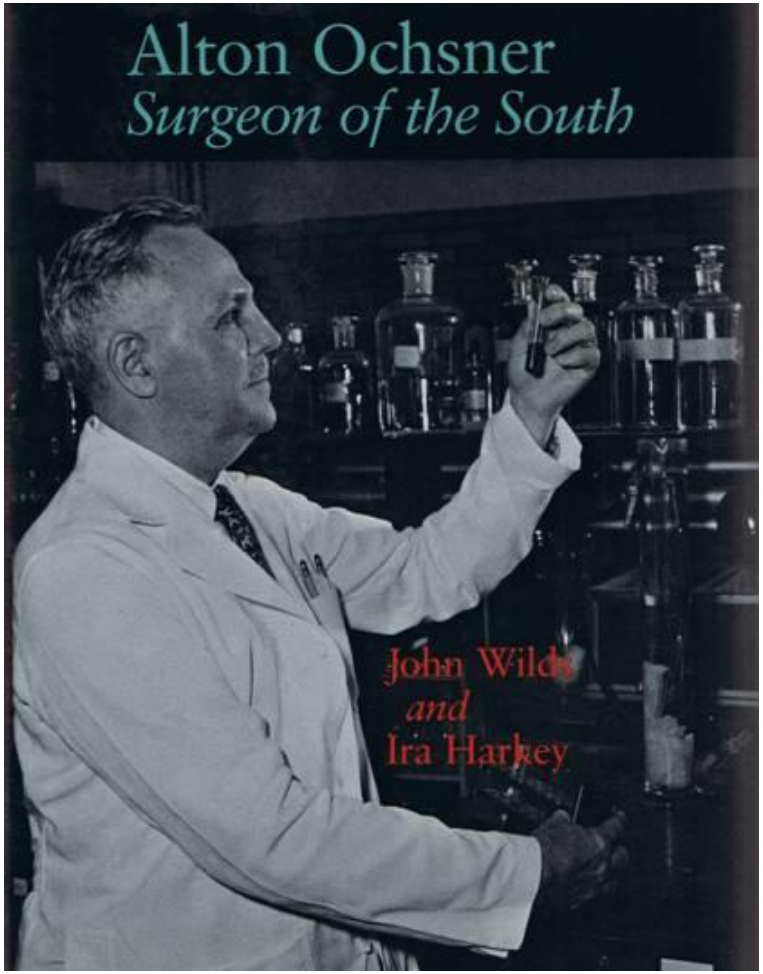
For the Government of
Australia

Simon Chapman PhD FASSA
Professor of Public Health
University of Sydney

Steve Price

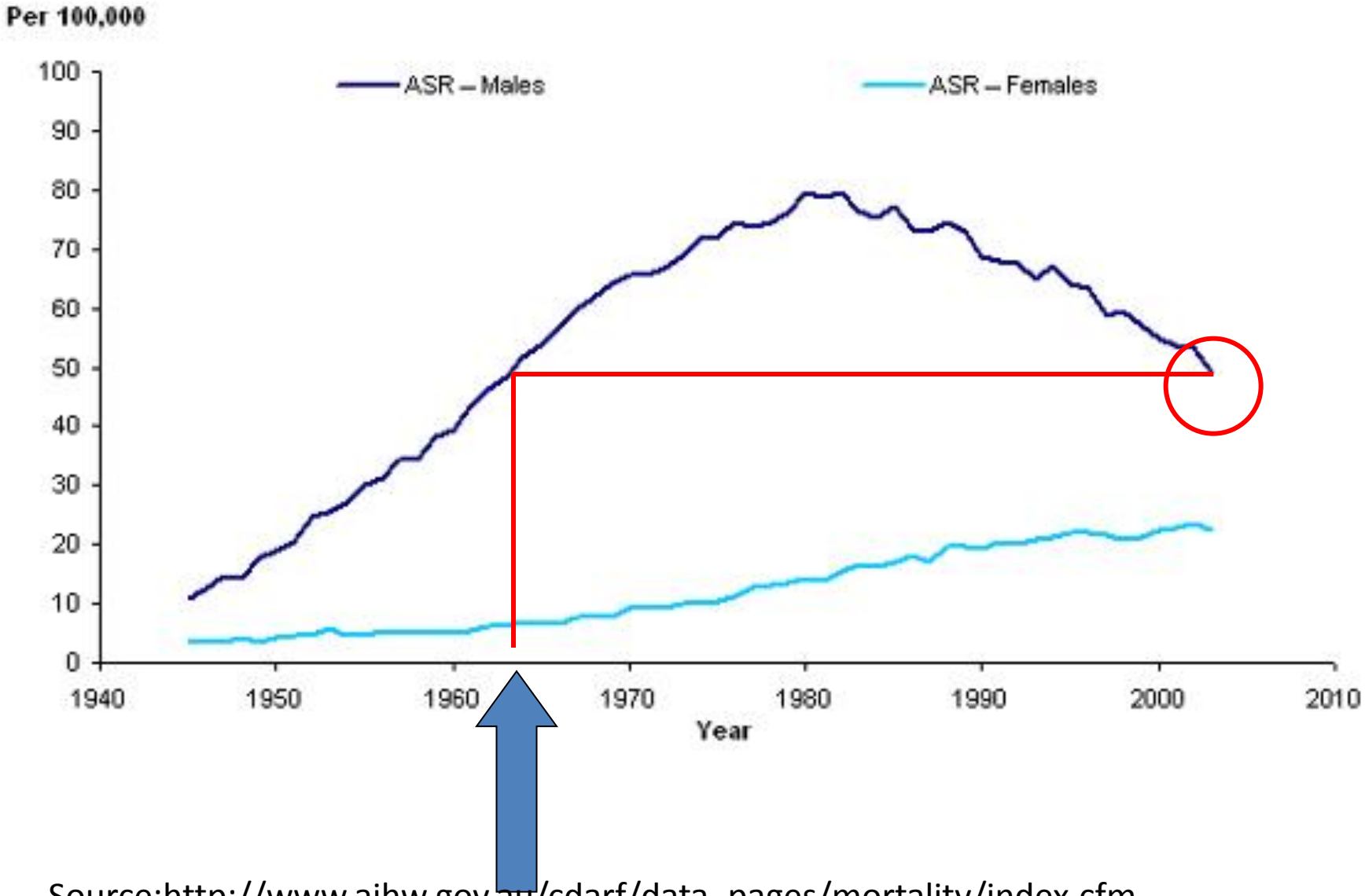
- **"When is Simon Chapman the academic, intellectual, self appointed chief wowser of the nanny state gunna leave us alone?"** 30 July 2008

Lung cancer: a rare disease just 75 years ago
Today leading cause of cancer death

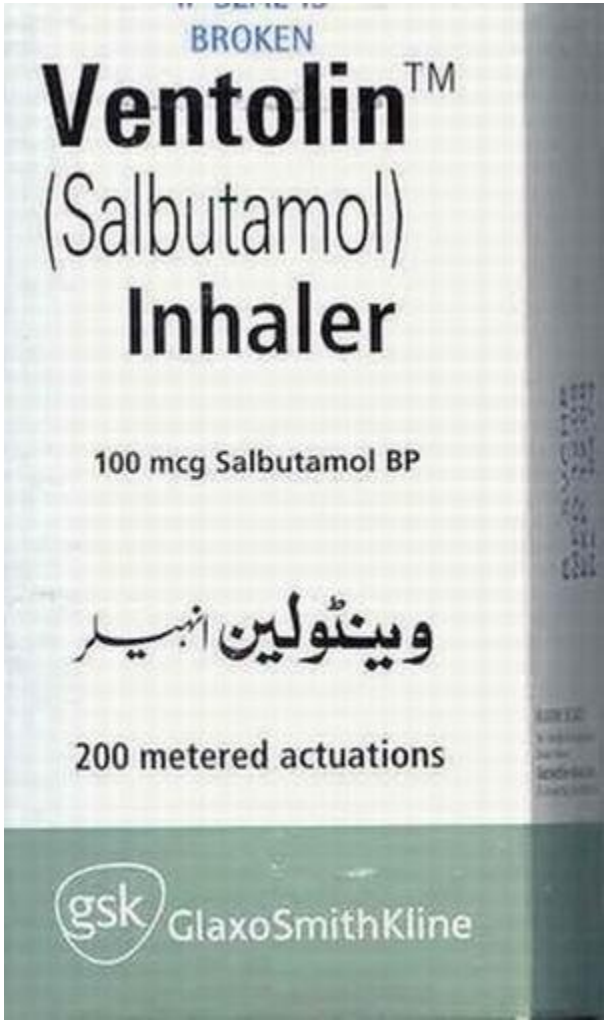


- **1919: Washington University medical student Alton Ochsner is summoned to observe lung cancer surgery--something, he is told, he may never see again. He doesn't see another case for 17 years.**
- **He then sees 8 in six months--all smokers who had picked up the habit in WW I.**
- **Today: the leading cause of cancer death**

Male lung cancer rates per 100,000 today as low as they were in 1963



Source:http://www.aihw.gov.au/cdarf/data_pages/mortality/index.cfm


BROKEN
Ventolin™
(Salbutamol)
Inhaler
100 mcg Salbutamol BP
وینٹولین انہیلر
200 metered actuations
gsk GlaxoSmithKline

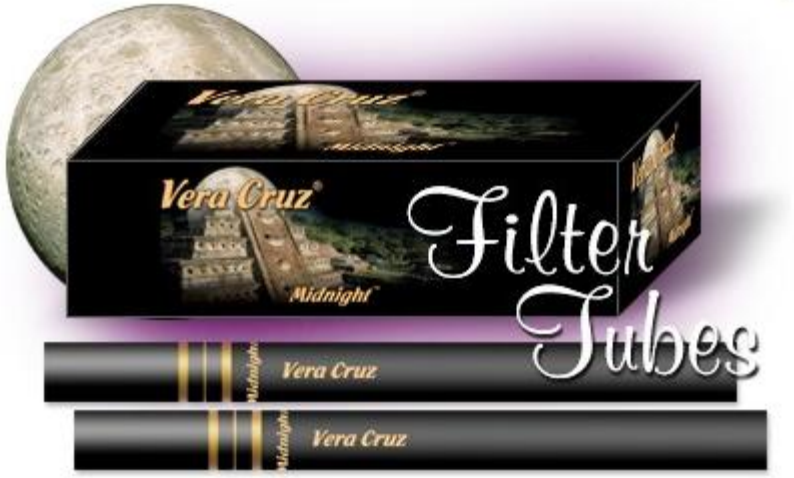
NDC 0004-0810-95
Roche
TAMIFLU®
(oseltamivir phosphate)
for Oral Suspension
12 mg/mL
Each mL contains
12 mg oseltamivir base
after constitution.
℞ only.
25 mL after constitution

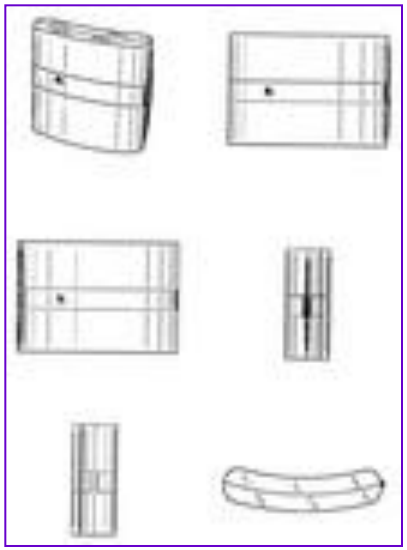
Valium
(Diazepam)
10
Roche

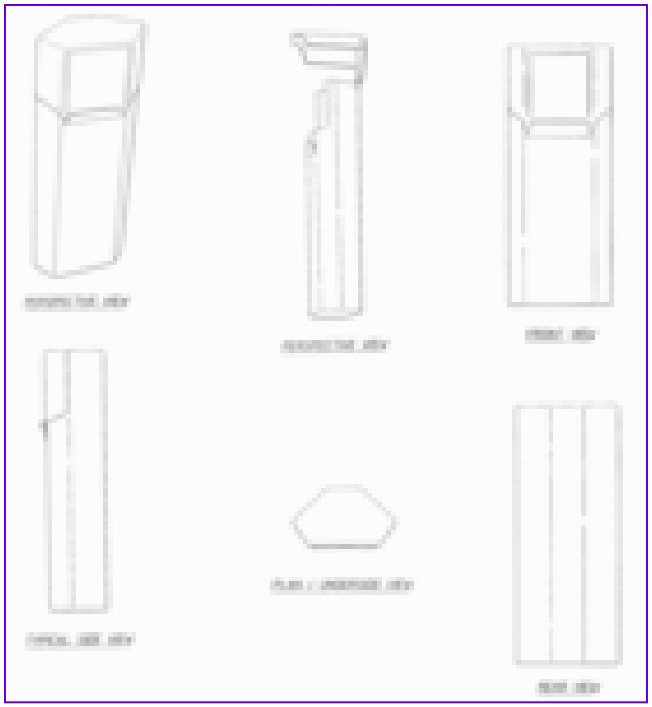
- **All tobacco advertising banned by laws 1976-1992**
- **Industry totally candid about packaging = advertising**

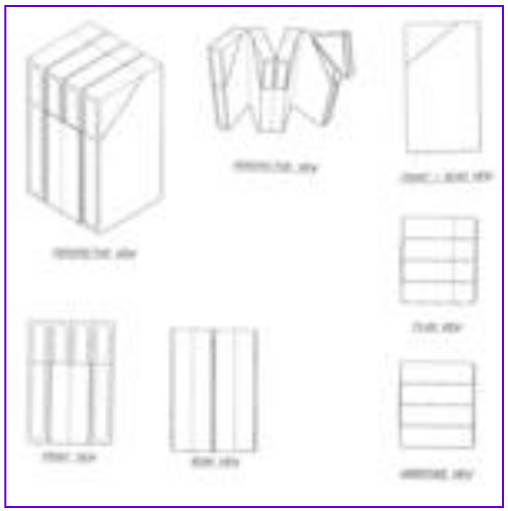
AVERTISSEMENT
LA CIGARETTE CAUSE DES MALADIES DE LA BOUCHE
La fumée de cigarette cause le cancer buccal, des maladies de gencives et la perte de dents.
Santé Canada
superslims

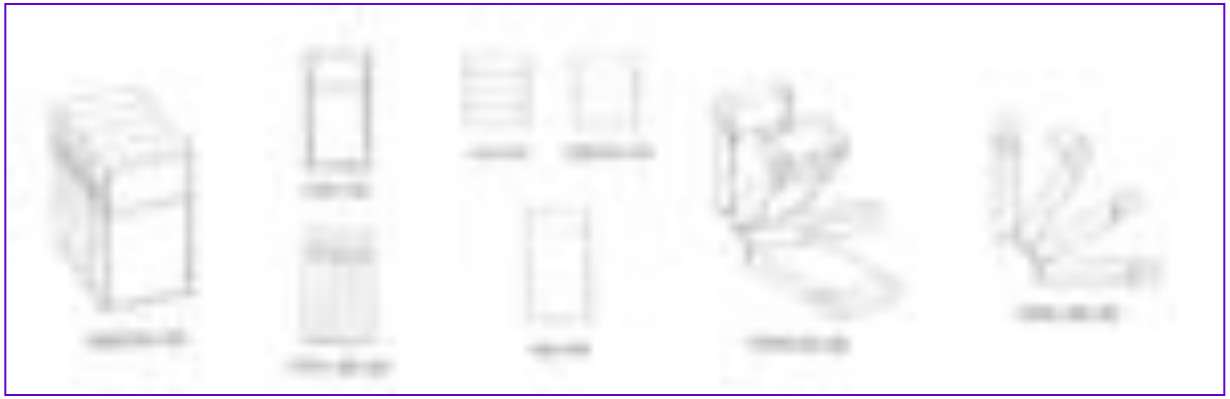
The cigarette itself











"The proof is that when we offered them Marlboro at half price – in generic brown boxes – only 21% were interested, even though we assured them that each package was fresh, had been sealed at the factory, and was identical (except for the different packaging) to what they normally bought at their local tobacconist or cigarette machine."

Forbes, February 9, 1987

"The product itself . . . is very interesting, because in the cigarette business there is very little to distinguish … because we all use the same kind of tobacco. . . But it's very difficult for people to discriminate, blind tested. Put it in a package and put a name on it, and it has a lot of product characteristics."

Donald Brown, President, Imperial Tobacco (Canadian subsidiary of BAT), 1989, trial testimony.

John Luik, long-time industry consultant

"one must give credit to the fact that the focus on plain packaging represents a new and more strategically sophisticated appreciation on the part of the anti-tobacco lobby of both how the industry is structured and how it earns its money. The lobby has realized that cigarettes are in many ways a commodity product that achieves its distinctiveness not so much through functional differences but through brand identity, an identity that is represented in the product's packaging. …If one wishes to attack the industry at its most vulnerable point, there is no better place than to destroy the value of its brands through eliminating their distinctive packaging."

- Tobacco Report June 2011

Chocolate
Frog
Which one would
your kids pick?

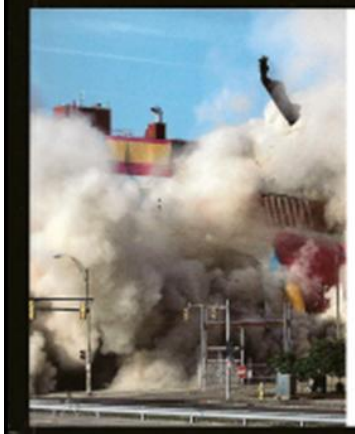
"In our opinion, [after taxation] the other two regulatory environment changes that concern the industry the most are homogenous packaging and below-the-counter sales. Both would significantly restrict the industry's ability to promote their products."

- Morgan Stanley Research (2007)

www.tobaccojournal.com G 12419

TOBACCO JOURNAL INTERNATIONAL

4/2008



Plain packaging
can kill
your business

The Goal? To standardise the appearance of all cigarette packages thus greatly reducing the status signalling role and consumer appeal of the product and prevent undermining of health warnings

Addiction, 2008

Addiction

REVIEW

doi:10.1111/j.1360-0443.2008.02145.x

The case for the plain packaging of tobacco products

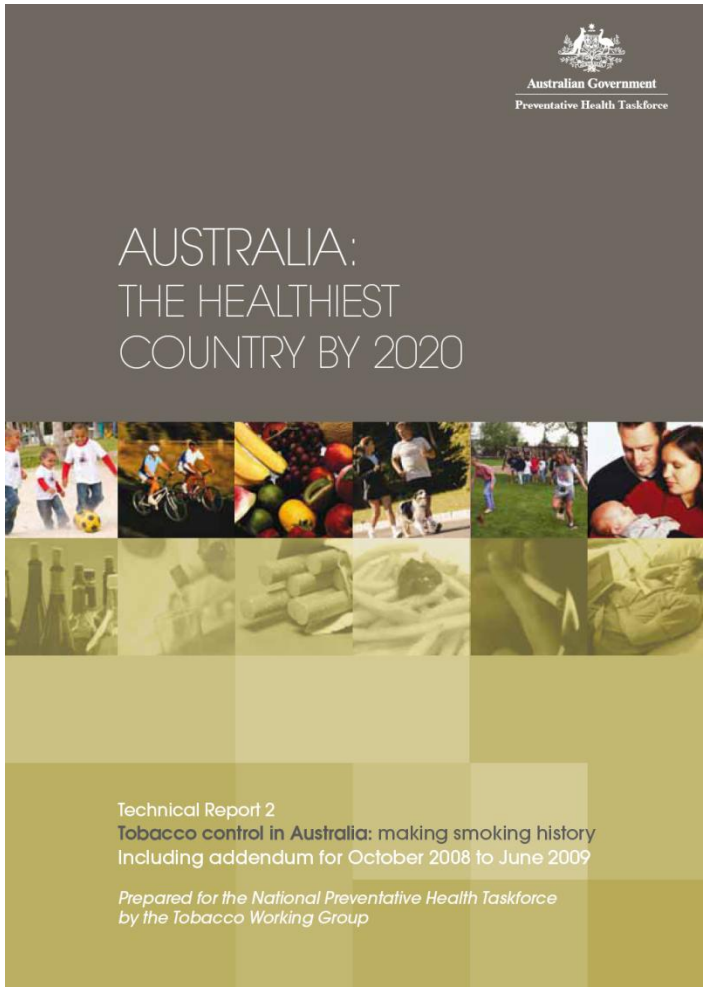
Becky Freeman[1], Simon Chapman[1] & Matthew Rimmer[2]

School of Public Health, University of Sydney, Australia[1] and Australian Centre for Intellectual Property in Agriculture, Australian National University College of Law, Australia[2]

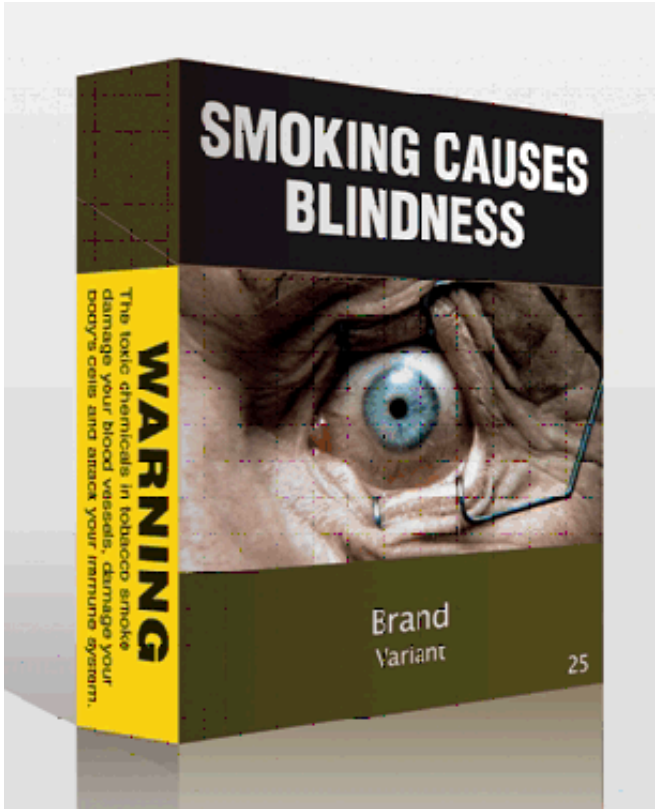
ABSTRACT

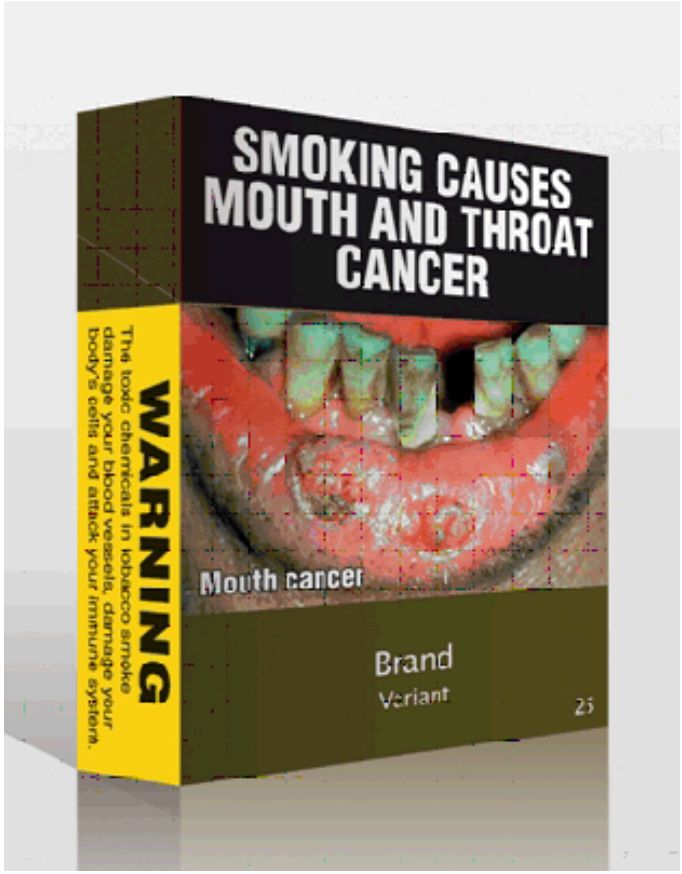
Aims The Framework Convention on Tobacco Control (FCTC) requires nations that have ratified the convention to ban all tobacco advertising and promotion. In the face of these restrictions, tobacco packaging has become the key promotional vehicle for the tobacco industry to interest smokers and potential smokers in tobacco products. This paper reviews available research into the probable impact of mandatory plain packaging and internal tobacco industry statements about the importance of packs as promotional vehicles. It critiques legal objections raised by the industry about plain packaging violating laws and international trade agreements. **Methods** Searches for available evidence were conducted within the internal tobacco industry documents through the online document archives; tobacco industry trade publications; research literature through the Medline and Business Source Premier databases; and grey literature including government documents, research reports and non-governmental organization papers via the Google internet search engine. **Results** Plain packaging of all tobacco products would remove a key remaining means for the industry to promote its products to billions of the world's smokers and future smokers. Governments have required large surface areas of tobacco packs to be used exclusively for health warnings without legal impediment or need to compensate tobacco companies. **Conclusions** Requiring plain packaging is consistent with the intention to ban all tobacco promotions. There is no impediment in the FCTC to interpreting tobacco advertising and promotion to include tobacco packs.

Preventative Health Task Force Report 2009



The Australian cigarette pack from 2012

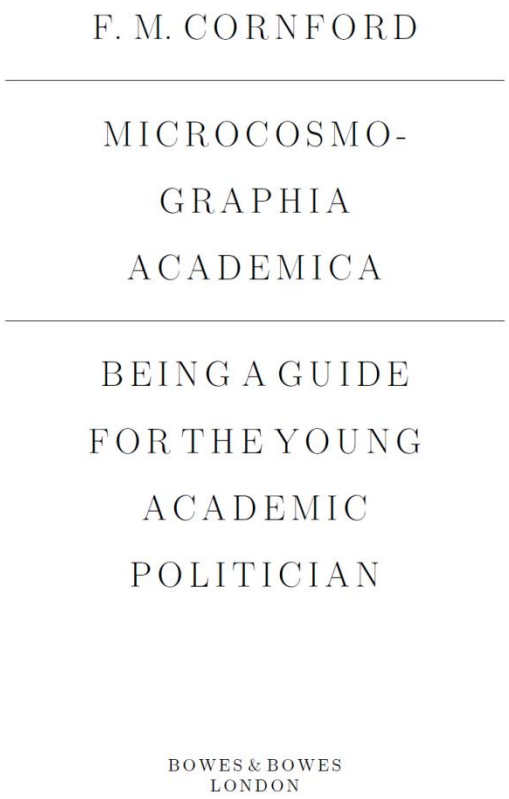




Tonight: consider 4 arguments

- “No evidence” of effectiveness
- Sky will fall in with High Court damages
- TRIPS/WTO will stop it
- Slippery slope .. where will it end?

The Principle of the Dangerous Precedent



- **"Every public action which is not customary either is wrong, or if it is right it is a dangerous precedent. It follows that nothing should ever be done for the first time."**

Microcosmographia Academica (1908)

The Principle of the Dangerous Precedent

Other firsts

- **Seat belts**
- **RBT**
- **Advertising bans**
- **Vaccination**
- **Lead free petrol**
- **...hundreds more examples**
- **See: Hemminway D. While we were sleeping**

Ross Gittins

- Great argument: it's never been done before, therefore you shouldn't do it. **This is the poor little stupid Australia argument.** We should always merely follow the lead of other countries because we're not smart enough to dream up anything good ourselves.. **But if the idea's so unlikely to. . work, why are the global giants fighting so hard to stop it?**

Humungous High Court damages?

EXPOSURE DRAFT

Chapter 1 Preliminary
Part 3 Constitutional provisions

Section ^11

^11 Acquisition of property

(1) This Act does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms.

(2) In particular, if, apart from this section, this Act would result in such an acquisition of property because it would prevent the use of a trade mark on the packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark may be used on the packaging of tobacco products, or on a tobacco product, in accordance with any requirements prescribed in regulations made for the purposes of this subsection.

The Constitutional Argument

- There is no '**acquisition**' of property.
- 'The mere extinguishment or deprivation of rights in relation to property does not involve acquisition' Deane J, Tasmanian Dams case
- **All** cases support the proposition there is no acquisition eg

- Commonwealth v Tasmania (1983) 158 CLR 1
- Australian Tape Manufacturers Assn v Commonwealth (1993) 176 CLR 480
- Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155
- Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513
- Nintendo Co Ltd v Centronic Systems Pty Ltd (1994) 181 CLR 284
- Commonwealth v WMC Resources Ltd (1988) 194 CLR 1.

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Undoing the GST - Jun 8th, 2011

An article in today's The Age about the introduction of floor prices for alcohol

KEEP IN TOUCH

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Done

6:53 PM
6/13/2011

Table 2 | Indicative compensation range for trade mark loss by product per year, AUD$m

Products		Expenditure	10%	30%
Films[1]	Inc. tax	$1,193	$119	$357
	Exc. tax[2]	$1,084	$108	$325
Tobacco	Inc. tax	$10,091	$1,009	$3,027
	Exc. tax[3]	$ 3,784	$378	$1,135

Notes:
[1] Based on Australia-wide data, SA-specific data not available
[2] Based on excluding the GST equivalent to 10 per cent
[3] Based on excluding Federal government excise and GST at 62.5 per cent of the final price

Source: IPA calculations, based on 2006 data from Scollo, M.M. & Winstanley, M.H. (Eds), 2008, "Tobacco in Australia: Facts and Issues", Chapter 2, Third Edition, Cancer Council Victoria, Melbourne, Australia, at http://www.tobaccoinaustralia.org.au/downloads/chapters/Ch2_Consumption.pdf, and Australia Visual Software Distributors Association, 2008, "Statistics" at http://www.avsda.com.au/statistics.asp?format=dvd

Between 1999 and 2003 the average annual fall in total dutied cigarettes was just 2.6%.
The most sales have *ever* fallen in one year was just shy of 10% in 1999

TRIPS/World Trade Organisation

- The right given to a trademark owner under TRIPS is to prevent other people from using that trade mark.
- The plain packaging legislation does not permit other people to use the trade marks of the tobacco industry, so it does not contravene that right.

TRIPS/World Trade Organisation

- Article 20 provides that “the use of a trade mark in the course of trade shall not be unjustifiably encumbered by special requirements”.
- So is their use is “unjustifiably encumbered”?

- Article 8 TRIPS provides that countries may take measures “necessary for public health” provided they are consistent with the rest of the agreement.

Brazil re-treaded tyres case

- Brazil: restict sales of retreaded tyres.
- Retreaded tyres do not last as long as new tyres. Consequently, there will be more waste tyres if retreaded tyres are permitted to be sold.
- Disposal of short-life retreaded tyres: collect rain water. Mosquitoes breed in rain water that accumulates in waste tyres and mosquitoes spread a lot of disease in Brazil.
- The WTO said Brazil could impose restrictions on retreated tyres as it was necessary for human health to do so, provided the measures were not discriminatory in trade.
- Unfortunately for Brazil, its measures were only aimed at imported tyres from Europe and so the measure was not consistent with the WTO agreement.
- But if the measure had been aimed at all retreaded tyres, it would have been allowed by the WTO.
- The plain packaging legislation is aimed at all cigarettes: it does not discriminate between cigarettes that are imported or made in Australia.
- As for the evidence, 17% of Australians smoke. The evidence that half of them will die from doing so is no longer contested, even by the tobacco companies.

- Could the liquor industry sue Islamic nations?
- Could the asbestos industry sue governments?
- Could the gun lobby sue governments?

Slippery slope

- Advertising bans began in 1976 – 35 years ago!
- The slope is not very slippery
- No other product <u>remotely</u> kills half its users