

**Simon Chapman PhD FASSA**  
**Professor of Public Health**  
**University of Sydney**

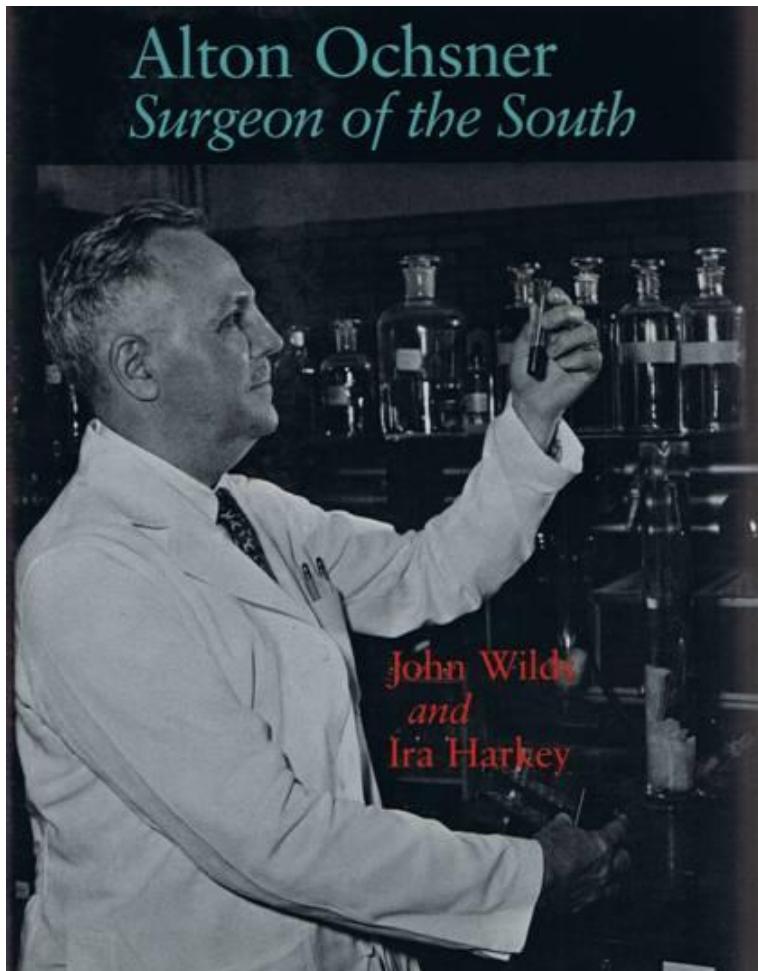
- “**When is Simon Chapman the academic, intellectual, self appointed chief wowser of the nanny state gunna leave us alone?**” 30 July 2008



**Steve Price**

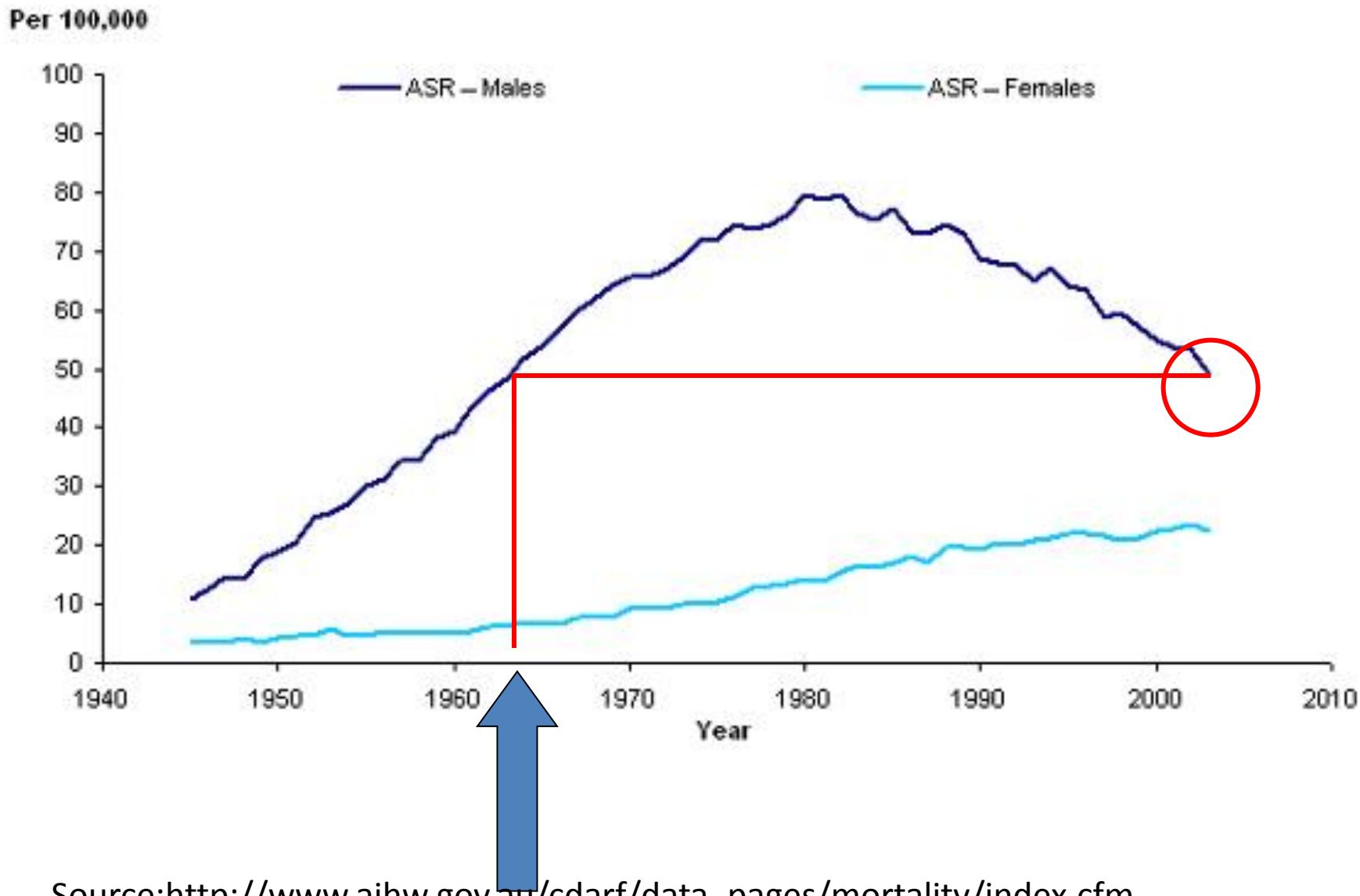
# Lung cancer: a rare disease just 75 years ago

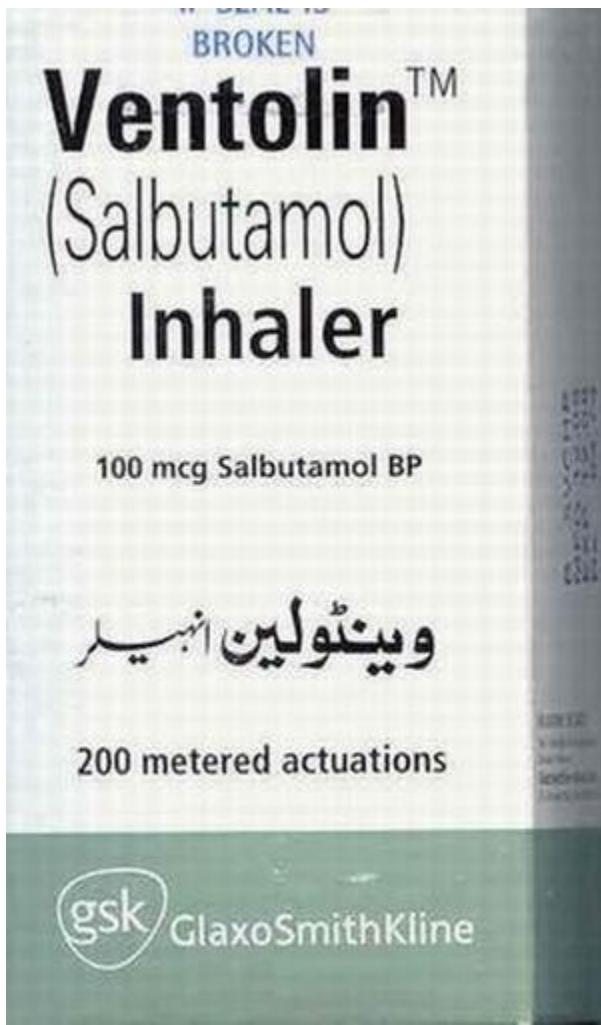
## Today leading cause of cancer death



- **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



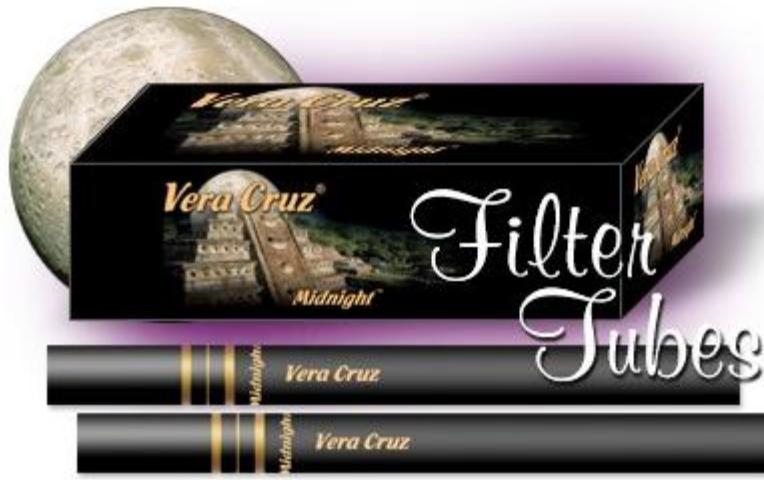


- All tobacco advertising banned by laws 1976-1992
- Industry totally candid about packaging = advertising





# The cigarette itself



20 CLASS "A" NATURAL TOBACCO CIGARETTES



DISPENSER\_001



DISPENSER\_002



DISPENSER\_003



DISPENSER\_004



DISPENSER\_005



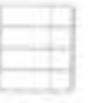
DISPENSER\_006



DISPENSER\_007



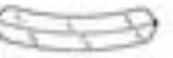
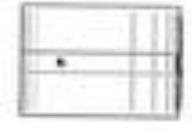
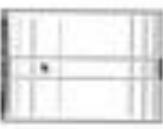
DISPENSER\_008



DISPENSER\_009



DISPENSER\_010



DISPENSER\_011



DISPENSER\_012



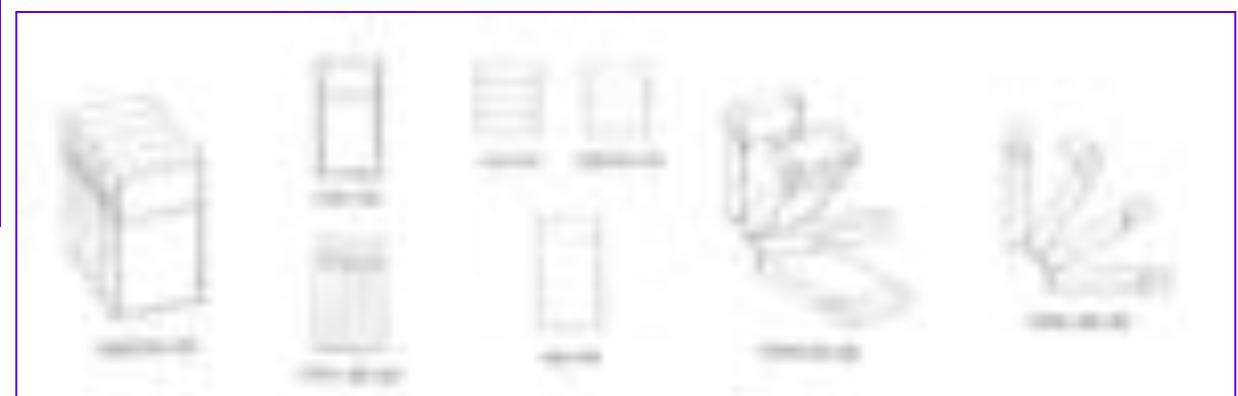
DISPENSER\_013



DISPENSER\_014



DISPENSER\_015



“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)

# 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

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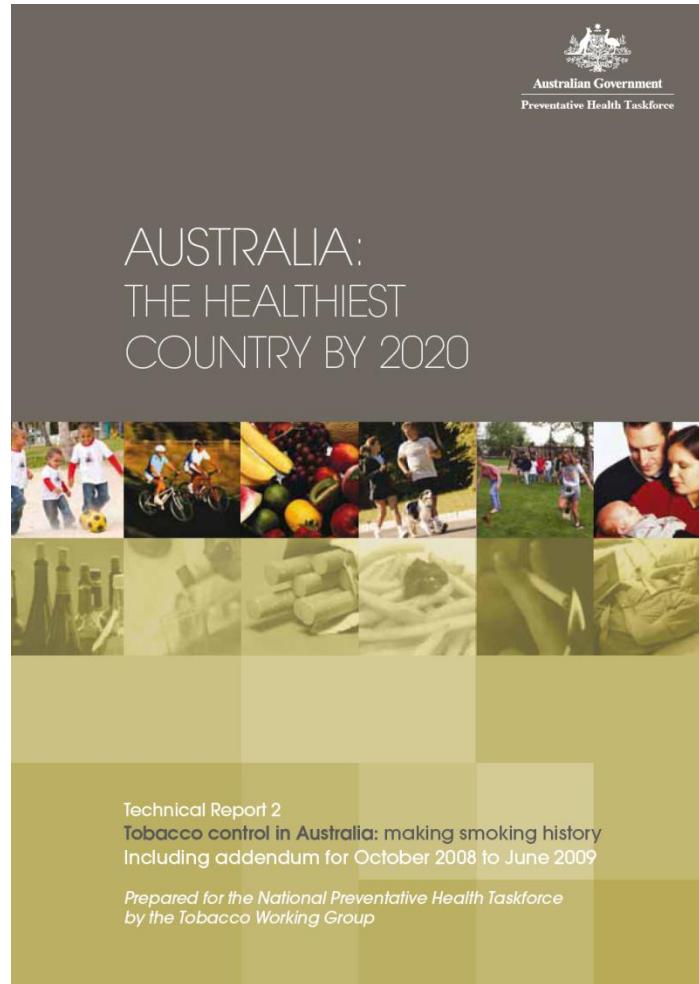
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#### ABSTRACT

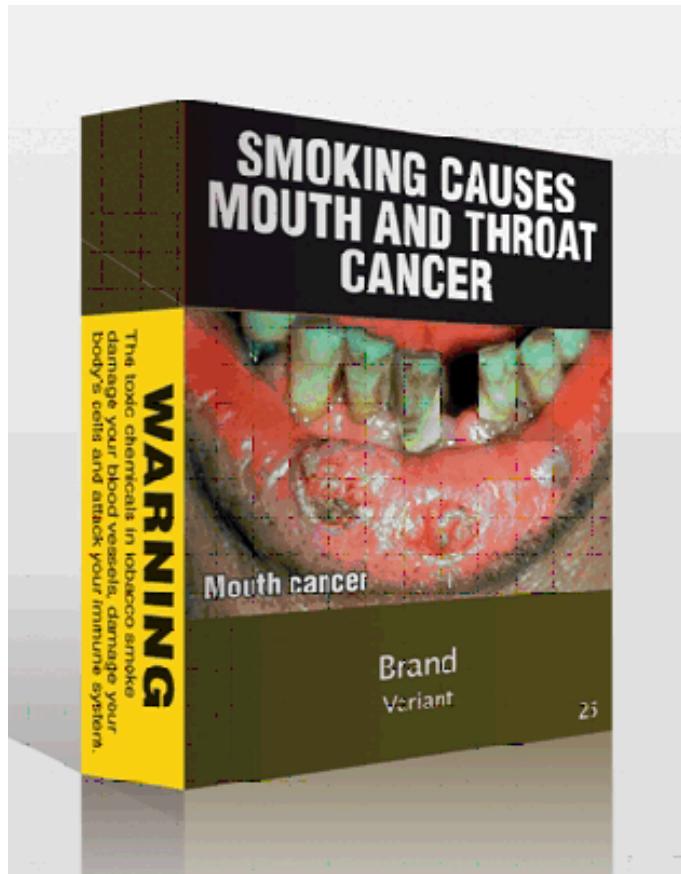
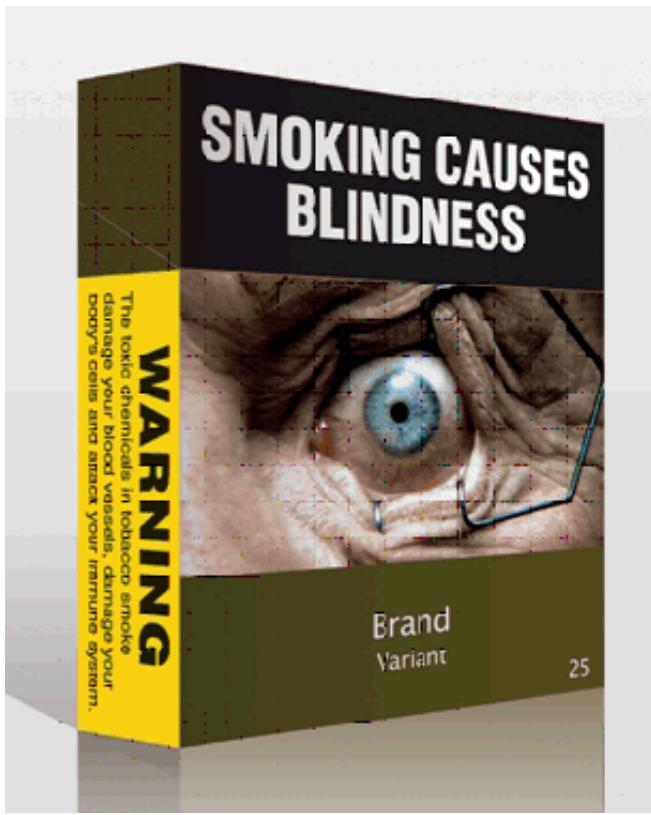
**Aims** The Framework Convention on Tobacco Control (FCTC) requires nations that have ratified the convention to ban all tobacco advertising and promotion. In the face of these restrictions, tobacco packaging has become the key promotional vehicle for the tobacco industry to interest smokers and potential 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

F. M. CORNFORD

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MICROCOSMO-  
GRAPHIA  
ACADEMICA

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BEING A GUIDE  
FOR THE YOUNG  
ACADEMIC  
POLITICIAN

BOWES & BOWES  
LONDON

- “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

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### **^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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Bligh

Wednesday, August 18, 2010

Green protectionist folly

Labor, business, environmental alliance needs no new trade barriers

Undoing the GST - Jun 8th, 2011

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

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6:53 PM 6/13/2011

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

|                    | <b>Products</b>       | <b>Expenditure</b> | <b>10%</b> | <b>30%</b> |
|--------------------|-----------------------|--------------------|------------|------------|
| Films <sup>1</sup> | Inc. tax              | \$1,193            | \$119      | \$357      |
|                    | Exc. tax <sup>2</sup> | \$1,084            | \$108      | \$325      |
| Tobacco            | Inc. tax              | \$10,091           | \$1,009    | \$3,027    |
|                    | Exc. tax <sup>3</sup> | \$ 3,784           | \$378      | \$1,135    |

**Notes:** <sup>1</sup> Based on Australia-wide data, SA-specific data not available

<sup>2</sup> Based on excluding the GST equivalent to 10 per cent

<sup>3</sup> 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](http://www.tobaccoinaustralia.org.au/downloads/chapters/Ch2_Consumption.pdf), and Australia Visual Software Distributors Association, 2008, "Statistics" at <http://www.avspa.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: restrict 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 retreaded 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 remotely kills half its users