

Australia: Big Tobacco Crashes At First Legal Hurdle On Plain Packaging

by SimonChapman - Monday, August 20, 2012

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AsianScientist (Aug. 20, 2012) - On August 15, Australia's High Court dismissed the plain tobacco packaging [case](#) brought against the Australian government by the world's largest tobacco companies. The companies had challenged the government's [new law](#) – due to be fully implemented from December 1 this year.

Reasons for the decision will be published soon. But it is thought that the Court may have released its decision in advance of the detailed reasons because this Friday, British American Tobacco Australasia is due in another court on a related matter. That involves the company's efforts to obtain documents dating back to the Keating government (1991-1996) under freedom of information laws. The High Court may have considered that the company's interest in these documents might now be judged a fool's errand and are giving it a chance to reconsider.

Fighting on

Like the mortally wounded [Black Knight](#) fighting on in Monty Python and the Holy Grail, Big Tobacco will now be hoping that, despite losing its right arm and buckets of blood (just flesh wounds), two other cases will see off the scourge of plain packs against all the odds.

Three governments, [Ukraine](#), the [Dominican Republic](#) and [Honduras](#) have filed complaints with the [World Trade Organization](#) against the Australian government's law. None of these nations have any significant trade of any sort with Australia, let alone in tobacco products.

For all Big Tobacco's bluster and its success in whistling up sternly worded submissions from a variety of US-based trade associations, it is telling that these three puppets are the heaviest hitters it could convince to run its case with the WTO. China, the United States and Indonesia are all big tobacco manufacturers with major strategic ties to Australia.

But Indonesia and the United States are two countries conspicuous among basket-case nations (such as Somalia, Zimbabwe and Malawi) absent from the [175 countries](#) that are party to the [WHO Framework Convention on Tobacco Control](#). They might have been expected to complain about the precedent that Australia has set. But instead, Big Tobacco's best team are global minnows. [Specialists](#) in global trade law give the challenges little prospect of success.

A third case is being brought by Philip Morris Asia (based in Hong Kong) via a [bilateral trade agreement](#) between Australia and Hong Kong signed in 1993. The timeline of this case is fascinating.

On April 29, 2010, the Australian government announced its intention to introduce plain packaging. At

the time Philip Morris tobacco products in Australia were manufactured by Philip Morris Australia. On 23 February 2011, Philip Morris Asia purchased Philip Morris Australia and on 27 June, 2011 – a full 14 months after knowing the government intended to introduce plain packs – Philip Morris Asia served its notice of claim to the Australian government.

Imagine someone considering purchasing a property and learning 14 months before the sale that the property would be badly affected by a new freeway being built nearby. Then imagine them going ahead and purchasing the property and then taking the government to court for compensation over damage to their investment. Philip Morris Asia's case would seem to have the same prospects, quite apart from all the arguments against the idea that a trade treaty should be able to override any government's sovereignty in public health matters.

What to expect

So what can we expect locally from Big Tobacco? First, we will see dramatic price falls in the retail price of tobacco. Many will think “these [famous name brand] cigarettes are costing me \$3 to \$4 a pack more than cheap unknown brands in exactly the same packaging except for the small brand name. They taste pretty much the same as cheap brands, so why should I pay out all the extra?”

Tobacco companies today chase the “value market” because they know that total sales volume is steady and the margins on high-end brands is where they profit most. A leaked BATA internal staff development DVD from 2001 explains how the company then needed to sell five packs of budget brands to get the same profit from one premium brand pack. Plain packaging strips the industry of this vital source of revenue while gutting its ability to distract smokers from thinking about what they are buying.

Australia is a tiny market for Big Tobacco, and it may well be willing to treat us in the way as when supermarkets place drastically reduced “loss leader” items on special to get customers into the store. The industry will be so desperate to demonstrate to watching nations that plain packs “don't work” that it might even be prepared to wear local losses for a year or so.

But the Australian government can simply raise tobacco tax overnight as often as it needs to effectively maintain a floor price for cigarettes that will deter smokers from buying more than they could have afforded previously.

Second, stand by for lots of “independent” reports by tame academics from obscure universities or corporate consultancies, purporting to demonstrate that the new packaging has not affected smoking. The rhetoric will oxygenate ignorant community assumptions that plain packaging was somehow going to dramatically cut smoking across the community overnight. The reality of the historical fall in smoking over the last 40 years is that annual declines have been fractions of 1 percent, driven by the combined effects of all policies and programs.

Plain packaging may amplify this downward trend, but no one expects it to dramatically increase it among adults who consume [98.2 percent](#) of all tobacco sold. The main goal of plain packaging has always been to deglamorize smoking [among children](#).

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The last significant vestiges of local tobacco advertising ended in 1992. So anyone aged 20 today, has grown up never exposed to domestic tobacco advertising. Today's smoking rates by youth are the lowest ever recorded. Plain packaging is designed to turbo-charge that decline and make smoking history for future generations. Quick and dirty Big Tobacco surveys months after its introduction will never capture that effect.

Simon Chapman does not work for, consult to, own shares in or receive funding from any company or organization that would benefit from this article, and has no relevant affiliations.

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