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The Case for Plain Packaging: Law and Health

Associate Professor Tania Voon

Associate Dean (Research)

Melbourne Law School

The University of Melbourne

tania.voon@unimelb.edu.au



Outline

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Introduction to the Australian Case

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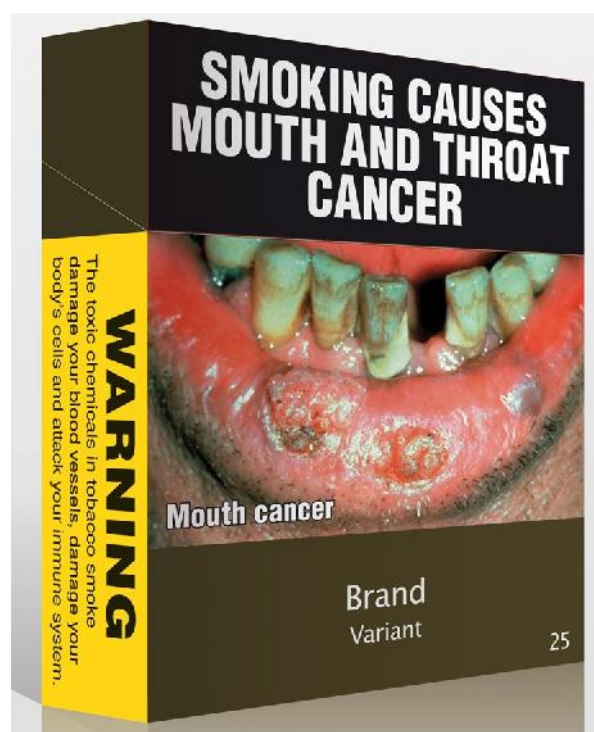
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Plain Packaging from 2012





Passage of Legislation

Date	Event
29 April 2010	<ul style="list-style-type: none">• Australian Government announces decision to implement plain packaging.
6 July 2011	<ul style="list-style-type: none">• Legislation introduced into Parliament.
21 Nov 2011	<ul style="list-style-type: none">• <i>Tobacco Plain Packaging Bill 2011</i> (Cth) passes Australian Parliament.
1 Dec 2011	<ul style="list-style-type: none">• Legislation receives Royal Assent: <i>Tobacco Plain Packaging Act 2011</i> (Cth)
1 Dec 2012	<ul style="list-style-type: none">• 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).



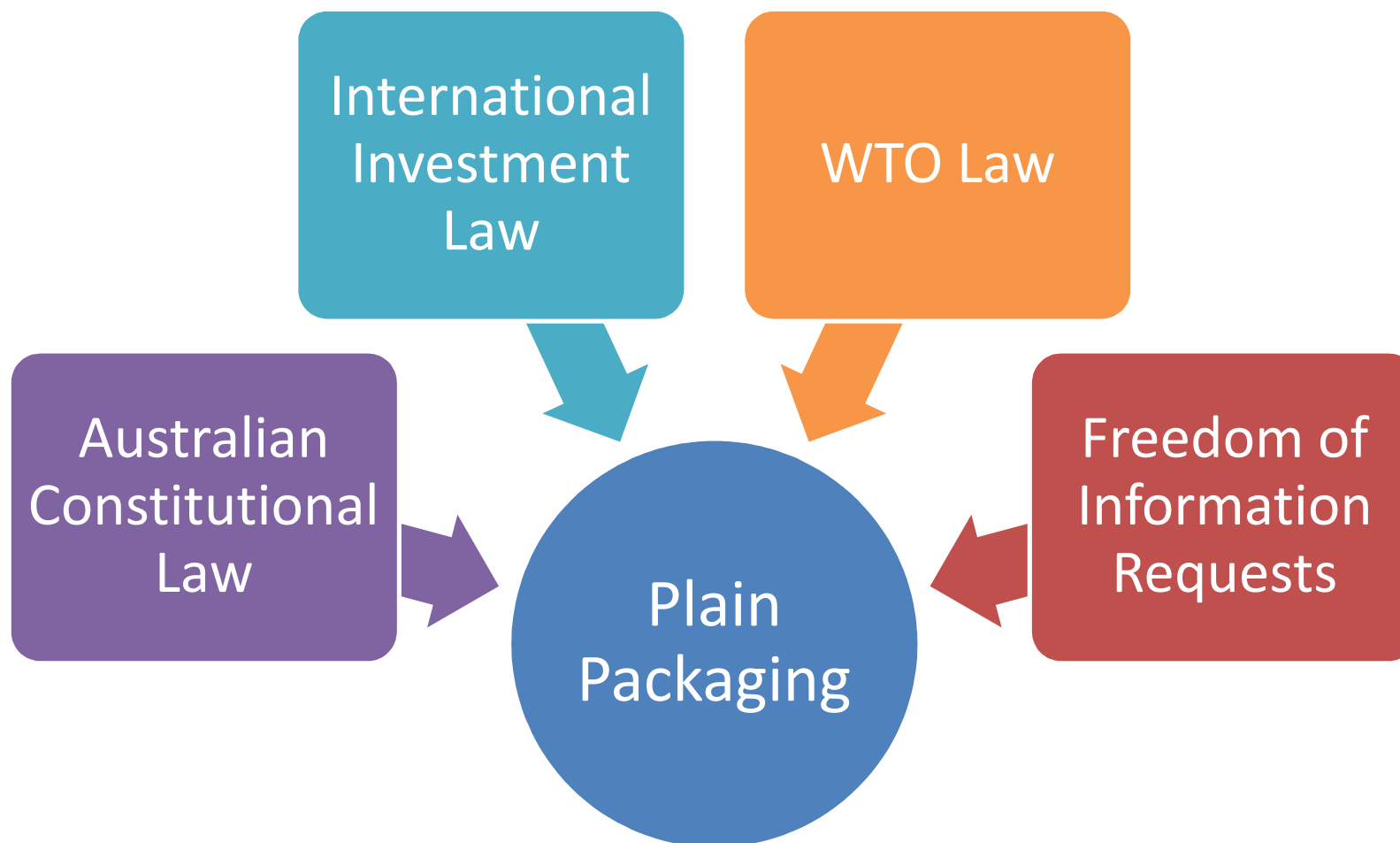
Health Evidence

- 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).





Big Tobacco's Legal Challenges



Australian Constitutional Law



Constitutional Challenge

Date	Event
1 Dec 2011	<ul style="list-style-type: none">• Legislation receives Royal Assent.• British American Tobacco issues writ.
6 Dec 2011	<ul style="list-style-type: none">• Imperial Tobacco issues writ.
15 Dec 2011	<ul style="list-style-type: none">• Japan Tobacco issues writ.
20 Dec 2011	<ul style="list-style-type: none">• Philip Morris issues writ.
15 Aug 2012	<ul style="list-style-type: none">• High Court of Australia announces decision in favour of the Australian government.
5 Oct 2012	<ul style="list-style-type: none">• High Court issues reasons for decision (6:1).



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

No. 30808

AUSTRALIA
and
HONG KONG (UNDER AN ENTRUSTMENT
OF AUTHORITY FROM THE GOVERNMENT
OF THE UNITED KINGDOM)

Agreement for the promotion and protection of investments.
Signed at Hong Kong on 15 September 1993

Authentic texts: English and Chinese.

Registered by Australia on 8 March 1994.

AUSTRALIE
et
HONG-KONG (EN VERTU D'UNE DÉLÉGATION
DE POUVOIRS
DU GOUVERNEMENT DU ROYAUME-UNI)

Accord relatif à l'encouragement et à la protection des inves-
tissements. Signé à Hong-Kong le 15 septembre 1993

Textes authentiques : anglais et chinois.

Enregistré par l'Australie le 8 mars 1994.



Investment Challenge

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

The Arbitrators



**Professor Donald
McRae**
appointed by Australia



**Professor Dr Karl-Heinz
Böckstiegel**
(Presiding Arbitrator)
appointed by the
Secretary-General of
the Permanent Court
of Arbitration



**Professor Gabrielle
Kaufmann-Kohler**
appointed by Philip
Morris Asia

WTO Law: The TRIPS Agreement



WTO Challenge

Date	Event
1 Dec 2011	<ul style="list-style-type: none">• Legislation receives Royal Assent.
13 March 2012	<ul style="list-style-type: none">• Ukraine requests consultations with Australia.
4 April 2012	<ul style="list-style-type: none">• Honduras requests consultations with Australia.
18 July 2012	<ul style="list-style-type: none">• Dominican Republic requests consultations with Australia.
14 August 2012	<ul style="list-style-type: none">• Ukraine requests Panel.



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.

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 16

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.



TRIPS Art 17

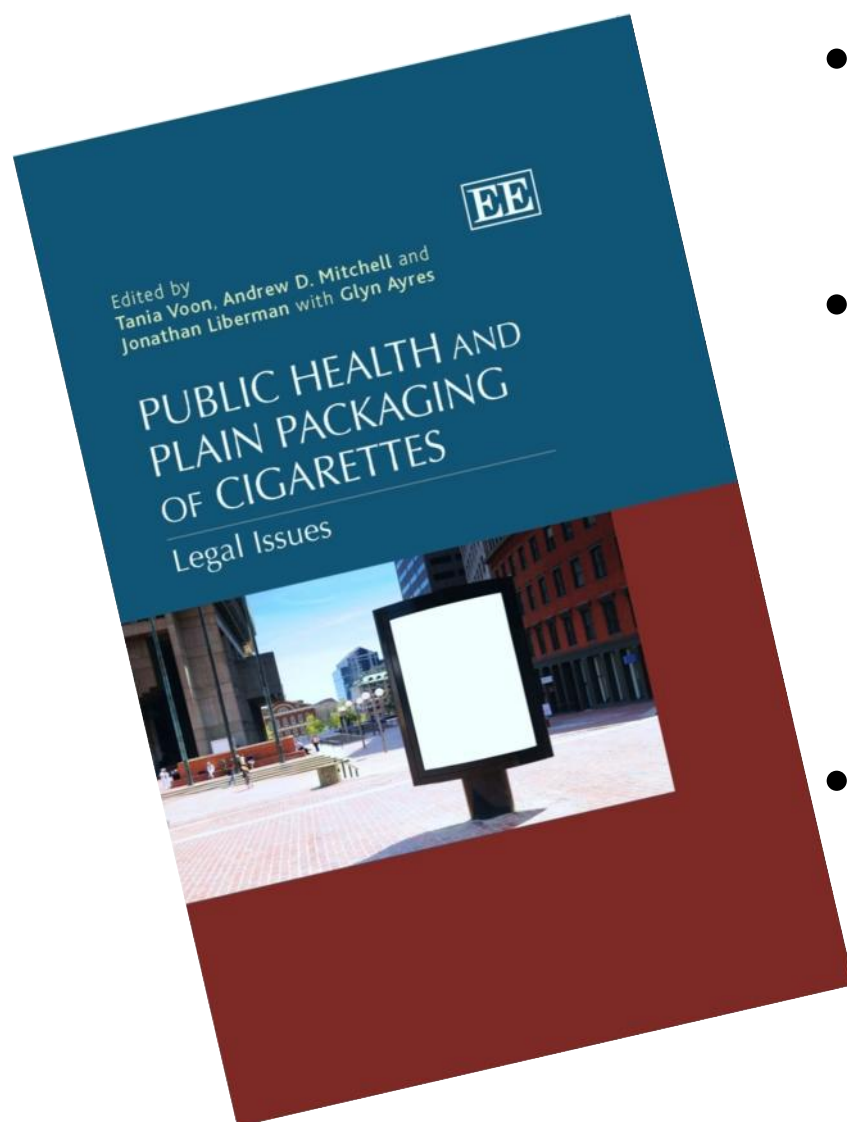
Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.



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.

...



- *Public Health & Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012)
- '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>
- '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>