1. Introduction

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Plain packaging of cigarettes and other tobacco products represents a crucial focal point for industry, government, and public health across the world today. Tobacco poses a serious and widespread threat to health in developed and developing countries alike, and the question of how best to deal with that threat in the face of millions of addicted individuals and a long-entrenched industry raises a host of legal issues. This volume offers a detailed exploration of some of these issues from a number of perspectives, providing a rich case study not only of the challenges of tobacco control regulation but also of health regulation more generally.

Plain packaging – whereby a government requires tobacco products to be sold in packets of a specified colour and without graphic logos – constitutes a particularly pertinent case for investigation, especially in the light of the groundbreaking WHO Framework Convention on Tobacco Control1 (‘WHO FCTC’). Tobacco use is one of the key risk factors associated with non-communicable diseases (‘NCDs’) such as cardiovascular diseases, cancers, chronic respiratory diseases, and diabetes (other common risk factors being alcohol abuse, unhealthy diet, and physical inactivity). NCDs cause 60 per cent of all deaths in the world, with 80 per cent of deaths due to NCDs occurring in low- and middle-income countries.2 The World Health Organization (‘WHO’) and other United Nations (‘UN’) bodies are increasingly recognising NCDs as a problem requiring urgent attention. The international community more broadly recognised the serious and growing global impact of NCDs at the 2011 High-Level Meeting of the UN General Assembly, which adopted a Political Declaration describing the global burden and threat of NCDs as

1 Opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).
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‘one of the major challenges for development in the twenty-first century’.³ In that context, the General Assembly committed to take actions to accelerate implementation by States parties of the WHO FCTC, ‘recognizing the full range of measures, including measures to reduce consumption’.⁴

Australia is set to become the first country in the world to implement a scheme for the plain packaging of tobacco products. However, Australia is not the first country to consider such a scheme, nor is it likely to be the last to implement one. This volume therefore takes Australia as a primary example of how governments may choose to impose plain packaging requirements, and how the community and affected industry are likely to respond, while taking note of related developments and proposals across the globe.

In Chapter 2, Kate Lannan provides an overview of the international legal context for plain packaging measures of the kind being introduced in Australia, focusing on the WHO FCTC. Lannan explains the specific relevance to plain packaging of binding obligations in Articles 11 and 13 of that treaty, as well as guidelines adopted by the parties to implement those provisions. As one of the 174 parties to the WHO FCTC, Australia is obliged under Article 11 to implement effective measures with respect to packaging and labelling, and under Article 13 to undertake a comprehensive ban on tobacco advertising, promotion and sponsorship.

Chapter 3 proceeds from the foundations explained by Lannan to illustrate the specific circumstances of the plain packaging scheme being introduced in Australia. Jonathan Liberman, Michelle Scollo, Becky Freeman and Simon Chapman detail the legislative background to the scheme and the initial responses of the tobacco industry, within the broader social, historical and legal context of tobacco control in Australia. This chapter reiterates the growing practical significance of the WHO FCTC, not only in Australia but globally.

The industry responses to plain packaging are, of course, exemplified in the formal legal actions threatened (and now brought) against Australia both domestically and internationally. In Chapter 4, Simon Evans and Jason Bosland offer a detailed legal analysis of a constitutional challenge to Australia’s plain packaging legislation in Australia’s highest court. In the course of that analysis, the authors explain important aspects of tobacco companies’ intellectual property (‘IP’) interests in relation to ciga-

⁴ Ibid [43(c)].
rette packets, particularly trademarks. Evans and Bosland conclude that the legislation ‘appears likely to survive a constitutional challenge brought on the ground that it effects an uncompensated acquisition of property in the tobacco companies’ trademarks or their packaging’. An important basis for this conclusion is that the introduction of plain packaging in Australia does not entail an acquisition involving ‘direct and proprietary benefits to the Commonwealth or third parties’ as required on current authorities regarding the interpretation of s 51(xxxi) of the Australian Constitution. As explained further below, we now await a definitive ruling by the High Court of Australia on this question.

Chapter 5 continues the analysis of IP issues, concentrating on international treaties concerning IP rather than domestic IP regulation. In this chapter, Mark Davison provides an in-depth explanation for his conclusion that plain packaging as adopted in Australia is consistent with both the Paris Convention for the Protection of Industrial Property5 administered by the World Intellectual Property Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights6 (‘TRIPS Agreement’) of the World Trade Organization (‘WTO’). Contrary suggestions have been made by some WTO Members within the WTO’s TRIPS Council7 and in the context of the investment disputes discussed further below. Davison bases his conclusion in particular on the premise that neither of these conventions requires governments to confer on trademark owners a positive right to use their registered trademarks.

In Chapter 6, Andrew Mitchell and I examine additional aspects of potential claims of WTO violation associated with plain packaging, identifying how jurisprudence concerning other WTO agreements may affect interpretation of the relevant TRIPS provisions, and assessing Australia’s scheme under the WTO’s Agreement on Technical Barriers to Trade8 (‘TBT Agreement’). At the time of writing, no WTO Member has launched a dispute under the WTO dispute settlement system by formally requesting

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Public health and plain packaging of cigarettes consultations with Australia regarding plain packaging. However, as detailed in Chapter 6, some Members have posed queries or expressed concerns regarding plain packaging within the TBT committee, and some submissions to the Australian government as part of its public consultation process have also argued that plain packaging may violate WTO laws including the TRIPS Agreement and the TBT Agreement. Like Davison, we conclude that claims of WTO violation are unlikely to succeed.

Mitchell and I also examine, in Chapter 7, the relationship between plain packaging and international investment law, taking as a focal point Australia’s obligations under the Hong Kong–Australia Bilateral Investment Treaty, pursuant to which Philip Morris Asia Limited (‘PMA’) gave notice of a claim regarding plain packaging in June 2011. We consider possibilities for future modification or interpretation of this and similar treaties, while highlighting difficulties with substantive aspects of challenges to plain packaging pursuant to obligations such as those concerning expropriation, which are broadly comparable to the constitutional question of acquisition mentioned above.

The exploration of current developments in investment law continues in Chapter 8, where Benn McGrady draws on the ongoing investment arbitration launched in 2010 by Philip Morris Products (Switzerland) against Uruguay – in connection with regulations concerning health warnings and other aspects of tobacco packaging – to assess the kinds of issues that may arise in evaluating plain tobacco packaging under any given bilateral investment treaty. McGrady identifies certain preliminary matters that must be established for tobacco-related claims to succeed under international investment law, including whether the mere registration of a trademark in a particular country gives rise to an investment in that country. He also considers the extent to which an arbitral decision in the case against Uruguay would shed light on likely reasoning and outcomes in investment challenges against plain packaging or other forms of tobacco regulation, with the answer differing according to the invest-

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9 See, most recently, WTO, News Item: Members Discuss 54 Technical Barriers, China’s Final Review and Streamlined Work (10–11 November 2011).
ment obligation at issue. Rulings on expropriation, for example, may be expected to be more uniform than those on fair and equitable treatment.

In Chapter 9, Thomas Faunce suggests that plain packaging schemes such as that being adopted in Australia would benefit from being embedded in a broader regulatory framework that includes: (i) exclusion from investor–state dispute settlement claims of the kind examined in Chapters 7 and 8; and (ii) US-style legislative mechanisms requiring tobacco companies to submit regularly to government numerous items of information and documentation concerning their products and their health effects, and enabling the imposition of severe penalties for providing false information.

Alberto Alemanno and Enrico Bonadio offer a comprehensive analysis in Chapter 10 of the status of plain packaging under the law of the European Union. They explain the legal and political issues that would arise if plain tobacco packaging were introduced as part of EU-wide law or by individual Member States, both of which are being contemplated. In particular, Alemanno and Bonadio assess the compatibility of plain packaging with the principle of proportionality under EU law, fundamental rights in the EU, and the EU trademark regime. The authors conclude that, although the EU would have competence to introduce mandatory plain packaging across the Union, and plain packaging is likely to comply with fundamental rights and trademark law in the EU, some uncertainty exists as to how EU courts would assess plain packaging under the proportionality principle.

Most chapters in this volume were finalised in September 2011. In the short time that has elapsed since then, developments regarding plain tobacco packaging and other tobacco control measures in both the Australian and international contexts have been rapid. As regards plain packaging in Australia specifically, the legislation establishing the scheme has now been enacted. The Tobacco Plain Packaging Bill 2011 (Cth) was passed by the House of Representatives on 24 August 2011, by the Senate with amendments on 10 November 2011, and again by the House of Representatives including the Senate amendments on 21 November 2011. The legislation received royal assent on 1 December 2011 to become the Tobacco Plain Packaging Act 2011 (Cth)14 (‘Act’). As a result of the Senate amendments, the dates for compliance have been extended by approximately six months, with prohibitions on the manufacture or

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12 A few chapters were completed in July 2011, August 2011, or October 2011.
14 No 148 of 2011.
packaging of non-compliant tobacco products applying from 1 October 2012, and on the retail sale of those products from 1 December 2012.\(^{15}\)

In conjunction with this primary legislation, the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth)\(^{16}\) was also enacted and the *Tobacco Plain Packaging Regulations 2011* (Cth) issued.\(^{17}\) The regulations cover only the retail packaging and appearance of cigarettes, with requirements for other tobacco products to follow.\(^{18}\) They prescribe numerous aspects of cigarettes and cigarette packaging, including the outer surface colour as Pantone 448C, the inner surface as white, the font for brand and company names as Lucida Sans no larger than 14 points, and the colour for these names as Pantone Cool Gray 2C.\(^{19}\) The regulations also provide an indefinite exemption for the Act from the operation of the *Trans-Tasman Mutual Recognition Act 1997* (Cth),\(^{20}\) a step required to ensure consistency with certain WTO requirements as foreshadowed in Chapter 6.

On 21 November 2011, the day of final passage of the Act through the House of Representatives, further to its notice of claim as discussed in Chapter 6, PMA issued a notice of arbitration concerning the legislation under the Arbitration Rules of the United Nations Commission on International Trade Law 2010.\(^{21}\) PMA seeks suspension of the Act and compensation for losses incurred as a result of its enactment, including loss of revenue and profit, costs of complying with the legislation, and loss of the value of intellectual property and goodwill.\(^{22}\) As indicated in the notice of arbitration and Australia’s response, the three arbitrators hearing the claim include Professor Donald McRae (appointed by Australia) and Professor Gabrielle Kaufmann-Kohler (appointed by PMA).\(^{23}\)


\(^{16}\) No 149 of 2011 (assented to 1 December 2011).

\(^{17}\) Select Legislative Instrument 2011 No 263 of 7 December 2011.

\(^{18}\) Reg 1.1.6.

\(^{19}\) Regs 2.2.1(2), 2.2.1(3), 2.3.4(1).

\(^{20}\) Reg 1.1.5.


\(^{22}\) Ibid [8.1]–[8.5].

\(^{23}\) Ibid [9.3]; Australia’s Response, above n 15, [64].
Australia has raised certain jurisdictional objections to the arbitration, including on the basis (as underscored in Chapter 7 of this volume) that PMA made its investment in Australia on 23 February 2011, ‘some 10 months after the governmental announcement in relation to plain packaging and after a dispute had already arisen in relation to plain packaging’.24 According to Australia, the bilateral treaty ‘does not confer jurisdiction on an arbitral tribunal to determine pre-existing disputes that have been re-packaged as BIT claims many months after the relevant governmental measure has been announced’.25 Australia also contends that the arbitral tribunal lacks jurisdiction to hear claims under other treaties such as the WTO agreements (in particular the TRIPS Agreement) and the Paris Convention.26 This jurisdictional point is linked to a substantive argument that the so-called umbrella clause in the Hong Kong–Australia Bilateral Investment Treaty ‘only covers commitments that a host State has entered into with respect to specific investments’, and not multilateral treaties of this kind.27

Shortly after the launch of the investment claim, tobacco companies began challenging the Act in the High Court of Australia: British American Tobacco Australasia Limited and affiliates on 1 December 2011,28 Imperial Tobacco Australia Limited and affiliate on 6 December 2011,29 JT International SA (that is, Japan Tobacco) on 15 December 2011,30 and Philip Morris Limited on 20 December 2011.31 As anticipated in Chapter 4, the claims focus on s 51(xxxi) of the Australian Constitution, alleging that the Act purports to acquire the plaintiffs’ intellectual property otherwise than on just terms. Additional claims are made in connection with the validity of the Act’s ‘fall-back’ provisions (specifically section 15), which provides for alternative restrictions on the use of trademarks on tobacco

24 Australia’s Response, above n 15, [30].
25 Ibid [7(a)].
26 Ibid [33]–[35].
27 Ibid [57]–[58].
29 Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Limited v Commonwealth of Australia, Writ of Summons (filed 6 December 2011, High Court of Australia, Sydney Registry).
31 Philip Morris Limited v Commonwealth of Australia, Writ of Summons (filed 20 December 2011, High Court of Australia, Melbourne Registry).
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packaging to the extent that the primary provisions are contrary to s 51(xxxi). The plaintiffs claim declaratory relief concerning the applicability and validity of the Act.

At the multilateral level, three Panel Reports have been circulated in recent months that shed light on WTO Members’ obligations under the TBT Agreement, which could affect plain packaging: US – Clove Cigarettes, finding the US ban on flavoured cigarettes including clove cigarettes justified under TBT Article 2.2 but inconsistent with TBT Article 2.1 due to the exemption for menthol; US – Tuna II (Mexico), which concerns US regulations concerning ‘dolphin-safe’ labels for tuna products; and US – COOL, which concerns US regulations regarding country of origin labelling for certain meat products. The findings in these cases were mixed and extensive, but the United States was found to have breached a number of its TBT obligations. At the time of writing, the period for either party to appeal these Panel Reports has not yet elapsed. These three decisions evince a willingness, as predicted in Chapter 6, to have regard to previous WTO case law on other WTO agreements when interpreting analogous TBT provisions, while emphasising that this earlier jurisprudence cannot be automatically transposed to the TBT context without adjustment. They also emphasise the significance of the

32 Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WTO Doc WT/DS406/R (circulated 2 September 2011) (‘US – Clove Cigarettes’).
33 This dispute is mentioned briefly in Chapters 6 and 8 in this volume.
34 Panel Report, US – Clove Cigarettes, [8.1(b)], [8.1(c)].
37 See Article 16.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995) annex 2 (providing for adoption by the Dispute Settlement Body by reverse consensus within 60 days of circulation unless a party appeals). The date for appeal has been extended to 20 January 2012 for US – Clove Cigarettes and US – Tuna II (Mexico): WTO, United States – Measures Affecting the Production and Sale of Clove Cigarettes: Joint Request by Indonesia and the United States for a Decision by the DSB, WTO Doc WT/DS406/5 (16 September 2011); WTO, United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Joint Request by Mexico and the United States for a Decision by the DSB, WTO Doc WT/DS381/9 (1 November 2011).
38 See, eg, Panel Report, US – Clove Cigarettes, [2.4], [2.25], [2.26], [7.289];
purpose of a technical regulation in assessing its consistency with the TBT Agreement, noting Members’ rights to adopt measures for health and other non-trade objectives, while scrutinising the extent to which the challenged measures actually contribute to the declared objectives.39

As regards public health measures, the Panel’s decision in US – Clove Cigarettes shows some encouraging signs from the perspective of tobacco control. The Panel recognised as ‘legitimate’ the ‘declared . . . public health objective’ of the US measure, namely ‘the reduction of youth smoking’.40 The Panel also had regard to the preamble to the TBT Agreement, which acknowledges that ‘no country should be prevented from taking measures necessary . . . for the protection of human . . . life or health . . . at the level it considers appropriate’.41 The Panel drew on WTO jurisprudence on Article XX(b) of the WTO’s General Agreement on Tariffs and Trade 1994,42 which provides an exception to GATT disciplines for measures necessary to protect human health.43 The Panel also took note of relevant implementing guidelines adopted by the parties to the WHO FCTC.44 Although the exemption for menthol cigarettes was found WTO-inconsistent, this conclusion can be reconciled with health objectives on the basis that, according to evidence reviewed by the Panel, the menthol exemption did not contribute to those objectives.45 As the Panel explained, ‘the United States has adopted a technical regulation in order to attain the legitimate objective of reducing youth smoking, but at the same time


40 Panel Report, US – Clove Cigarettes, [7.116].


43 Panel Report, US – Clove Cigarettes, [7.368]–[7.369].

44 Panel Report, US – Clove Cigarettes, [7.414], [7.427] (referring to Partial guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control (Regulation of the contents of tobacco products and Regulation of tobacco product disclosure), FCTC/COP4(10) (20 November 2010)).

limited the product scope of that technical regulation in order to minimize, or even to eliminate, the potential costs it may incur while triggering costs to producers of like products of other Members’.46

Attacks on plain packaging and other tobacco regulation are taking place in countries and international fora around the globe. WHO Director-General Margaret Chan has decried tobacco companies’ ‘harassment’ of governments and governmental bodies including those in Australia, Norway, and the United States.47 The various national, sub-national and international claims brought and threatened provide an opportunity for the relevant courts and tribunals to increase the clarity and predictability of laws related to intellectual property, labelling, trade, investment and health, as well as foundational principles of constitutional law. However, the fascinating legal issues arising from plain packaging and similar measures should not be allowed to obscure the underlying motives of the industries involved, the interests of individuals affected by their products, and the broader social costs of tobacco consumption.

46 Panel Report, US – Clove Cigarettes, [7.290].