

# National Sovereignty in a Time of Globalisation

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Acknowledgements

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- Dr Margaret Chan, Director-General, World Health Organization

## Introduction

Thank you for inviting to me to speak at this very timely conference, and congratulations to the Harvard School of Public Health for its ongoing role in improving health and the World Health Organisation, and Margaret in particular, for WHO's renewed efforts in tackling tobacco.

I speak to you at a time of unparalleled global investment and transnational trade. Australia has embraced these changes and we have enjoyed the benefits. We were one of the few developed countries in the world to endure the global financial crisis without plunging into recession, and our economy continues to grow today, based in large part on international trade.

But, our global era also presents challenges if multinationals use their global strength and presence to stymie the legitimate decisions of governments. I think we ought see it as a reminder, however, that we also – Government, NGOs and public health advocates – need to work across national boundaries to combine our strength.

These conferences of course provide far greater opportunities for Governments, scientists and advocates to learn from each other, and coordinate public health action to address truly global challenges.

And, if ever there were a global challenge, tobacco control is one of them.

With almost six million people dying every year from tobacco related illness around the world, most of them in low- and middle-income countries, it is imperative we recognise tobacco use as one the leading global public health challenges for our generation.

Just last year World Health Organization Director-General Dr Margaret Chan described tobacco use as 'the world's number one preventable killer' – and I couldn't agree more.

I have said it many times before, but it never loses its power: tobacco is the only legal product sold in Australia which, when exactly as intended by the manufacturer, kills half of all people who use it.

Today I am, here to talk about Australia's experience in implementing tobacco control measures – and in particular, our world first policy all tobacco products to be sold in plain packaging.

I've some examples to show you the packs because I'm told, to the outside world, "plain" is not a good description given the prominence, also legislated, of very large and very graphic health warnings.

[ Screen 2: Display several of the graphic warnings ]

Since 1 December last year it has been mandatory for every cigarette and tobacco product sold in Australia to be packaged like this. Legislation passed by our Parliament and upheld in the High Court requires our packs to look like this – drab brown, big graphic warnings, standard place, font and size to write the brand name.

As you can see, in Australia cigarette packs are no longer alluring, enticing or colourful. Rather than being a mobile billboards that a smoker pulls in and out of his pocket or purse many times a day, they are now very tightly regulated drab and confronting pack.

Gone are the colours, the fonts, the text and the feel of a box, which were once all geared to making people want to smoke, now they only remind people of the horrific health risks they face from using this deadly product.

The glamour is gone from smoking. Subtle methods of appealing to customers or new smokers are gone. And, in Australia, it is gone for good.

Why did we do this?

We know marketing works. The research clearly shows us this.

We acted on that research that found tobacco industry branding and packaging design can mislead about the harmful effects of the product, reduce the effectiveness of graphic health warnings on tobacco products, and increase the appeal of tobacco to young people. There are more than 24 different studies from around the world supporting plain packaging on these grounds.

After decades of tighter regulations, more evidence of harm and cost to the community from tobacco related disease the Labor Government I was part of, felt no choice but to act.

And act we did. We took on a challenge we knew would be a fight, but one we also knew was worth having. We also knew from previous steps taken in Australia that we would receive very strong public backing.

But to reach this point was not simple.

To take this decision was not easy.

And I want to emphasise this point today because it is something we can all be part of – strong research, good public advocacy, the support of doctors, active NGOs like the cancer council using the media – all of this gave our Government vital support to take a bold step. In my view, all of this gave us social permission to act – and to withstand the howls of objections that inevitably came from the tobacco industry.

This is important – because I do not and could not advocate plain packaging as a step that governments should be asked to take cold – we have a long history of tightening regulation in Australia, and very active partners and researchers ready and able to help us in this fight. They were crucial – they laid the fertile ground for us to act on, and were there to back us up when under pressure.

Predictably, big tobacco accused us of everything from killing personal freedoms by introducing a Nanny State, to alleging we would bring forward plain packaging for alcohol, soft drinks, fast food – even handbags were at risk!

[Screen 3: tobacco ads – nanny, plain pack cola]

Interestingly, other businesses ran a million miles from the tobacco companies – there were no joint press conferences, no business community support and only the odd academic that even spoke out against this. Even they were the academics and commentators linked one way or another – usually via funding – to the tobacco companies. This distancing even went to the extent of the pharmaceutical lobby group, Medicines Australia, and several large multinational pharmaceutical companies explicitly and publically distancing themselves from a US lobby group it was a member of campaigning against plain packaging.

Every time the tobacco industry criticised our move to introduce plain packs – public health group hit the airwaves to support us. The next time the doctors supported us. State governments praised us (very rare in Australia I can tell you!). The best own goal was kicked by the tobacco companies when they were so outrageous that even our political opposition got shamed into supporting us – not because they wildly wanted to, but because the tobacco companies were so strident and so disliked, they felt they had to. This was even after the Opposition had received large donations from the industry, something my party banned years ago.

[Screen 4: Abbott eye cartoon]

I say all this to make explicit that governments cannot be asked to act alone. I believe you could do tobacco control a disservice if you thought it was only about lobbying Government. Sure, that is vital, but we all play a role in building a climate that enables this change.

We thought plain packaging would face a very hostile response from Big Tobacco – one that would go well beyond the usual industry huffing and puffing about previous tobacco control measures. And we were right!

The scale and intensity of Big Tobacco's attack laid bare its fear both of the effect of plain packaging on consumers, and the example that Australia would set for other nations by successfully implementing it.

Before we even got to the legal battles, we had to contend with ‘astro turfing’ – or the establishment of fake ‘grass roots’ movement masquerading as small business owners – as well as massive advertising campaigns, intense political lobbying, cash donations to our political opponents, and a barrage of freedom of information requests to tie up government time and resources. This is a truly international strategy, with similar campaigns in both New Zealand and the UK coinciding with plain packaging consultations in those countries. Given the decision last week of New Zealand to go ahead and be the second country to take this step – it clearly wasn’t successful there either.

While the Big Tobacco campaign included all the bells and whistles they could afford, we more than compensated by loudly and vigorously holding them to account for their exaggerations and distortions.

And it worked. Standing up to them worked.

Ultimately, the millions of dollars poured into these devious campaigns did nothing to sway public opinion away from its solid support for plain packaging – and if anything, simply served to emphasise Big Tobacco’s long-term lack of credibility. Even smokers hit the radios and TV to support us. One of the most effective messages was being able to – honestly – say that I’d never met a smoker who hoped their children would smoke.

While big tobacco invested heavily in the doomed PR war, their long-game was always focussed on using legal avenues to overturn the plain packaging legislation, or frighten the Government into delay or inaction. They played this card very hard, that taxpayers could not afford this legal fight.

This cartoon captured the very clear nature of these threats.

[Screen 5 legal threat cartoon]

In late 2011, immediately following the passage of our legislation through Parliament, 4 companies commenced legal action:

British American, Philip Morris, Imperial, and Japan Tobacco commenced litigation in the High Court of Australia challenging the constitutional validity of the legislation.

The heart of their argument was that plain packaging contravened the Australian Constitution, by acquiring property other than on just terms – a matter prohibited in our Constitution. The tobacco companies claimed our legislation amounted to an acquisition of their intellectual property without ‘just terms’ and that the legislation was, on that basis, invalid.

Following three days of argument – the sheer length of time devoted to it being quite unusual – in August 2012, by a 6:1 majority, the High Court rejected the constitutional challenges and upheld the legislation’s validity.

Like many court decisions, this was a lengthy one – with different judgements written by multiple judges. But I think it is worth quoting a paragraph from a joint judgement of Justices Hayne and Bell that goes to the core of the decision, and I believe has relevance to other countries with similar constitutions, such as the takings clause in the US constitution. The judges said in their reasoning –

Though variously expressed, the tobacco companies submitted that the TPP Act gives the Commonwealth the use of, or control over, tobacco packaging because the Commonwealth or the TPP Act ... required certain things to be done or not done on the packaging. But the requirements of the TPP Act are no different in kind from any legislation that requires labels that warn against the use or misuse of a product, or tell the reader who to call or what to do if there has been a dangerous use of a product. Legislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the TPP Act, effects no acquisition of property.

Or, as another Justice put it:

The central statutory object of the Packaging Act is to dissuade persons from using tobacco products. If that object were to be effective, the plaintiffs' businesses may be harmed, but the Commonwealth does not thereby acquire something in the nature of property itself. [para 372 per Kiefel J]

This fundamental finding that no property has been taken will doubtless be influential, hopefully even decisive, in the trade arguments that are still yet to come in other forums.

There was a lovely moment in the hearing where Counsel for the tobacco companies argued that such a law could drastically damage any other products as well, searching for innocent comparisons, when the judge interrupted to ask if a better comparison might be to Ratsack (a household poison used to kill rodents) ?

This particularly struck a chord for me – the tobacco companies desperately trying to compare or align their killer product with any other innocent old product like chocolate or handbags, and a judge pulling them up asking whether the more appropriate comparison might be a poison! Couldn't have put it better myself.

Then, to cap off a big win, the Court ordered the tobacco company to pay our legal costs!

So, despite British American Tobacco's statement prior to the High Court litigation that I, as the then Attorney-General, would 'waste millions of taxpayer's dollars on legal fees defending plain packaging', it's now clear the money spent on the defence of the laws was justified.

Actually, I don't believe they ever thought they would win – they were hoping the threat of litigation would scare us off passing or implementing the law in the first place.

It felt great that day to be able to say that "Governments can stand up to Big Tobacco and win", that the fight for the health of their citizens was a just one.

As important as that decision is, our win in the High Court is not the end of legal action against plain packaging.

Firstly, Philip Morris Asia, which is based in Hong Kong, has brought a dispute under a 30-year-old bilateral treaty with Hong Kong – the Australia – Hong Kong Agreement for the Promotion and Protection of Investments.

This is the first investor-State dispute that Australia has faced. Philip Morris Asia asserts that Australia's plain packaging legislation contravenes various investor protections under the Agreement and seeks compensation.

Interestingly, Philip Morris Asia only obtained control of Philip Morris Australia after the Australian Government announced its intention to introduce plain packaging. Jurisdictional issues, arguments about forum shopping and many others will be central to this case. Even free trade zealots would take pause that a 30 year old agreement could potentially be manipulated in this way.

Australia's tobacco plain packaging legislation has also been challenged in the World Trade Organization. The Ukraine, Honduras and the Dominican Republic have each requested the establishment of a WTO dispute settlement panel. These countries assert that the legislation is inconsistent with Australia's WTO obligations.

The high level of interest shown by other WTO Members in the matter has been demonstrated by the record number of 35 Members which joined the dispute brought by Ukraine as third parties.

Of course it is disappointing countries have decided to take action in the WTO – particularly as it is agreed members of the WTO have the right to take measures necessary to protect public health. Surely this is a clear case in that area – but only time will tell.

On one level the challenge is predictable, on another it is odd – these countries barely have a trading relationship with Australia. Again, it seems the companies are more worried about the precedent our law might set for others, or that simple threats of WTO action might dissuade other countries from acting.

Given the difficult national decision making process I've mentioned already, this international angle does add further complexity. It demands another layer of understanding to comply with international legal norms and be ready to withstand national and international legal scrutiny.

The most interesting question in my mind, is how far the broader free trade movement, and the business world, will be prepared to let tobacco companies use trade laws that were mostly designed for quite different purposes.

IF trade trumps health, or the WTO trumps the WHO is there a risk to the growing global consensus on trade?

It will be interesting as this plays out because it has the potential to create some unlikely allies.

It goes without saying, that the Australian the Government will vigorously defend its tobacco plain packaging legislation in all these forums and is confident of its legal position.

### Implementation

Three months has not quite passed since it became mandatory for retailers to sell tobacco in Australia only in plain packs.

Of course, Big Tobacco couldn't resist the temptation to play some last mind games as 1 December approached. We saw one company proudly declare on its packaging that, "It's what inside that counts." A bizarre tagline for a product like tobacco if I ever saw one!

Of course, we all know that what's inside is death and disease.

In the lead-up we saw one company provide free tin packets, in the obvious hope consumers would continue to re-use it.

[Screen 6 tin pack]

Other companies attempted to introduce watermarks on individual cigarettes, or to use alphanumeric codes on cigarettes like "AUS" supposedly to denote 'Made in Australia' and "NYC" to convey a New York City cool.

Clearly there are a lot of marketers lawyers and others putting considerable time into finding creative ways to test the boundaries or strength of our laws, something that will no doubt help other countries in the future to predict the sorts of problems they should address if they go down this path.

The tobacco industry worked hard from the beginning to engage small retailers in their campaign. Initially, this strategy was damaged dramatically by the uncovering of dodgy research and the exposure of a front organisation fully funded by manufacturers, not retailers at all. But we saw again at implementation a refusal of some companies to take back non-compliant stock – even with known phase in times. Sensibly the Government worked with retailers to manage this problem – our fight has never been with them and it was important to keep it that way.

It is too early to draw conclusions – but despite these early tricks, there are already anecdotal signs of success. We are now regularly hearing from smokers who report they no longer enjoy smoking, or even that they think the taste of tobacco appears to have changed for the worse. Shop assistant chat about people asking for the packs "without Bryan on them" or have friends complain if they put the packs on the table at dinner. All this can only be good news.

As the months and years pass, researchers such as yourselves will start to tell us a clearer story. I suspect the most interesting unfolding story will be any trends amongst young or new smokers, more so than in those that have already been smoking for years.

### Conclusion

I am convinced that a nation's right to protect the health of its citizens and its ability to comply with international legal norms are not incompatible aims.

Australia has exercised national sovereignty for the fundamental purpose of protecting the health of the Australian population. Its democratically elected government sought advice, looked at the research, listened to the community, introduced a policy and passed a law in the Parliament. The highest court in the country upheld our right to do so.

It will be a bold decision for any international body to say such action is not within a country's rights. A government has no greater responsibility than the health and safety of a country's population.

In discharging this responsibility, the Australian Government is meeting the challenge from Big Tobacco, and the outcome will be generations of Australians growing up without tobacco addiction and disease. If we get called a few names or dragged through a few courts to make this point, well, so be it.

[Screen 6 – Mary Poppins/ nanny state cartoon]

It is in all our interests to ensure that nations wanting to take such action to protect public health, are entitled to continue to do so in our increasingly globalised world.

Thanks for having me at your conference.