The High Court and the Marlboro Man: the plain packaging decision

October 18, 2012 11.22am AEDT

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The High Court decision is not a quirk of Antipodean constitutional law, as alleged by British American Tobacco.
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The High Court of Australia’s ruling on the plain packaging of tobacco products is one of the great constitutional cases of our age. The ruling will resonate throughout the world - as other countries will undoubtedly seek to emulate Australia’s plain packaging regime.

Having announced its ruling some weeks ago now, the court recently published the reasons for its decision on tobacco companies’ challenge to Australia’s regime for the plain packaging of tobacco products.

By a majority of six to one, the High Court of Australia rejected the arguments of the tobacco companies that there had been an acquisition of property under the Australian Constitution. The majority judges variously described the case of the tobacco companies as “delusive”, “synthetic”, “unreal”, and suffering “fatal” defects in logic and reasoning. The dissenting judgement was by Justice Heydon.

ABC: High Court upholds cigarette plain packaging. (Watch video)

Public health, consumer rights and warning labels

After listening to extensive arguments, the court closely considered the public health objectives of the Tobacco Plain Packaging Act 2011 and related regulations.

“Many kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm.” wrote Justice Kiefel, noting that labelling is required for medicines, poisonous substances as well as some food “to both protect and promote public health.”

Discussing the history of tobacco regulation in Australia, she summarised the cumulative impact of public health measures and suggested plain packaging was but the latest of a long line of tobacco control measures in Australia.

Noting the links between smoking tobacco and fatal diseases, Justice Crennan observed that the regime implemented international health law, “The objects of the Packaging Act are to improve public health and to give effect to certain obligations that Australia has as a party to the World Health Organization Framework Convention on Tobacco Control.”

“Legislative provisions requiring manufacturers or retailers to place on product packaging warnings to consumers of the dangers of incorrectly using or positively misusing a product are commonplace,” she insisted.

Justices Hayne and Bell observed, “Legislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the Plain Packaging Act, effect no acquisition of property.”

Even the dissenting judge, Justice Heydon described tobacco manufacturers as purveyors of “lies and death”.
Intellectual property and public policy

An important theme of the ruling was the nature and role of intellectual property law. The judgements stressed that intellectual property law is designed to serve public policy objectives - not merely the private interests of rights-holders.

Chief Justice French emphasised the public policy dimensions of intellectual property law, noting that trade mark legislation has “manifested from time to time a varying accommodation of commercial and the consuming public’s interests.”

In his swansong, retiring Justice Gummow commented that “trade mark legislation, in general, does not confer a ‘statutory monopoly’ in any crude sense.” The judge emphasised that the Trade Marks Act did not confer “a liberty to use registered trade marks free from restraints found in other statutes.”

Discussing the nature of modern trade mark law, Justice Crennan said that the aim of trade marks was not only to distinguish the products of one registered owner from another. She observed, “It became clear as argument advanced that what the plaintiffs most strenuously objected to was the taking or extinguishment of the advertising or promotional functions of their registered trade marks or product get-up, which functions were prohibited by the Packaging Act.”

Constitutional law and the acquisition of property

The majority of the High Court of Australia held that the plain packaging regime did not amount to an acquisition of property. This ruling is consistent with precedents on intellectual property and constitutional law, such as the Grain Pool case, the Nintendo case, and the Phonographic ruling.

In a judgement notable for its clarity and precision, Justices Hayne and Bell ruled, “The Plain Packaging Act is not a law by which the Commonwealth acquires any interest in property, however slight or insubstantial it may be.”

“The Plain Packaging Act is not a law with respect to the acquisition of property,” they concluded.

Justice Kiefel said, “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.”

Chief Justice French held that the arguments of the tobacco companies were fatally flawed.

In his dissent, Justice Heydon complained generally about the government encroaching upon the acquisition of property clause, “The flame of the Commonwealth’s hatred for that beneficial constitutional guarantee, s 51(xxi), may
flicker, but it will not die. That is why it is eternally important to ensure that that flame does not start a destructive blaze.”

The aftermath of the decision

The decision on plain packaging of tobacco products is undoubtedly one of the landmark rulings of the High Court of Australia - with its discussion of public health law, intellectual property law, and constitutional law. It is certainly not a quirk of Antipodean constitutional law, as alleged by British American Tobacco.

The High Court of Australia is a well-respected superior court – its precedent will be influential throughout the world. Indeed, the decision chimes with rulings by the Supreme Court of Canada and the South African Supreme Court on public health and tobacco control.

The ruling will reinforce Australia’s position with respect to international conflicts over the plain packaging of tobacco products - such as in the World Trade Organization and in investment tribunals.

The New Zealand plain truth movie. (Watch video)

The decision will also encourage other countries to join an “olive revolution”, and introduce plain packaging of tobacco products. After the ruling, Tariana Turia, New Zealand’s associate minister of health, said, “This is more than just a victory for the Australian government, I think it is a global victory.”

New Zealand, India, the United Kingdom, Uruguay, and Norway are particularly keen to follow Australia’s lead. And World Health Organization director-general Dr Margaret Chan said, “With so many countries lined up to ride on Australia’s coattails, what we hope to see is a domino effect for the good of public health.”

As a result of the High Court of Australia's ruling, Australia will no longer be “Marlboro Country”. This decision to deface the Marlboro box represents the future of tobacco control.

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