Litigation and case law, Trade, Updates
Australia, Plain packaging

The last remaining challenge to Australia’s tobacco plain packaging laws was dismissed on 9 June 2020. The World Trade Organization’s (WTO) Appellate Body (AB) found that plain packaging was not more trade restrictive than necessary to achieve its public health objectives, and that it does not violate any international trademark obligations. This decision concludes the decade-long litigation against Australia’s plain packaging laws, with no remaining challenges and no further appeal possible. It also makes clear that other countries may adopt plain packaging laws consistently with both their World Health Organization Framework Convention on Tobacco Control (WHO FCTC) and WTO obligations.

This initial overview summarises what legal and public health practitioners need to know about the AB decision based on our reading of the decision at this stage. A more detailed guide will be coming in due course, and more information is available in our press release.
Appeal from a previous decision in favour of Australia

The AB’s decision upholds a 2018 WTO panel decision which rejected a challenge under WTO law against Australia’s plain packaging laws, brought by Cuba, the Dominican Republic, Honduras, and Indonesia.

Honduras and the Dominican Republic’s subsequent appeal of the panel decision has now also been decided in Australia’s favour. The AB’s decision resolves the last of three legal challenges to Australia’s plain packaging laws, which were introduced in 2011 and have been in force since 2012. The laws require all packs to be sold in standardized, drab, dark brown packages with no images, colours, or other promotional features, other than required manufacturer information, a plain-text brand and variant name. Related laws require packs to display a large graphic health warning covering 75% of the front and 90% of the back of the pack.

What were the issues on appeal?

The complainants before the initial WTO panel brought ten claims based on various issues of intellectual property law, and on whether the measure was unnecessarily trade restrictive. The panel dismissed all of these claims.

On appeal, Honduras and the Dominican Republic challenged three conclusions from the panel’s decision:

- that plain packaging was no more trade restrictive than necessary to achieve a public health objective under article 2.2 of the Agreement on Technical Barriers to Trade (TBT)
- that plain packaging did not affect the rights of trademark holders under article 16.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
- that plain packaging did not ‘unjustifiably encumbered by special requirements’ the ‘use of trademarks in the course of trade’ under article 20 of TRIPS

The appellants also claimed that the panel had not made an ‘objective assessment of the facts’ under article 11 of the Dispute Settlement Understanding.

Panel’s consideration of the evidence not challengeable on appeal under article 11 of the Dispute Settlement Understanding

The appellants challenged the panel’s consideration of the evidence, in particular its evidentiary findings on whether plain packaging contributed to its public health objectives. The AB rejected this challenge. It confirmed the panel’s main findings of fact, as well as its overall conclusion that plain
packaging made a meaningful contribution to public health.

At several points, the AB criticised the appellants for attempting to relitigate evidence that was decided at the panel stage. The AB’s jurisdiction is limited to questions of law – it may not entertain appeals on findings of fact or look at new evidence at the appeal stage. However, the AB can find that a panel failed to meet its duty to make an objective assessment of the facts under article 11 of the Dispute Settlement Understanding (DSU). This is a high threshold. It is not enough that a panel could have decided an issue another way or made an error – the error must have been so egregious that it calls into question the good faith of the panel. The AB found that the standard set by DSU article 11 was clearly not met here.

The AB found that the totality of the evidence supported the panel’s conclusions that plain packaging was apt to, and did contribute to, its public health objective. In particular, it found that the panel did not err:

- in relying on the pre-implementation evidence base supporting plain packaging and giving it significant weight
- in finding that branding on packs was designed to appeal to consumers and that plain packaging was apt to address this kind of appeal
- in finding that the post-implementation evidence on ‘proximal and distal’ outcomes, such as quit attempts or consumers’ perceptions of tobacco packs, supported the conclusion that the measure had contributed to its public health objective
- in its conclusion that prevalence declines had accelerated since the introduction of plain packaging

The AB also rejected the ‘vast majority’ of challenges to the panel’s analysis of smoking behaviours. It did find two errors – one in the panel’s econometric analyses relating to cigarette consumption, and another relating to whether the panel should have relied on a particular type of statistical analysis without raising this with the parties first. However, it concluded these errors were not material and had not affected the panel’s overall conclusion that plain packaging was apt to, and did, make a meaningful contribution to its public health objectives. It noted that findings it had upheld on accelerations in declines in smoking prevalence, the pre-implementation literature base, the post-implementation data on proximal outcomes such as reduced appeal of packs, and the post-implementation data on distal outcomes such as quit attempts, all supported the conclusion that plain packaging contributed to public health.

In a separate opinion, one member of the AB noted that he did not think it was necessary to consider the appellant’s arguments on the evidence in such detail in order to resolve the case, since the challenged aspects would not have changed the overall outcome. The member also disagreed that the panel had made an error by relying on its own analysis without raising it with the parties first, considering that such analysis fell within the discretion of the panel. The member agreed with the
overall conclusions of the AB, but would not have made the findings of error.

**Plain packaging is no more trade restrictive than necessary to achieve its public health objective under article 2.2 of the Agreement on Technical Barriers to Trade**

On TBT article 2.2, the AB confirmed the panel’s finding that plain packaging is no more trade restrictive than necessary to achieve its public health objectives.

Having rejected the challenge to the panel’s assessment of the evidence, it upheld the finding that plain packaging was apt to, and did contribute to, its public health objectives. It found that the panel did not err in how it defined trade restrictiveness. Finally, it upheld the panel’s finding that the alternative measures suggested by the complainants (tax and raising the minimum legal purchasing age) would have been equally trade restrictive and therefore not a less trade-restrictive alternative to plain packaging, although it considered that the two measures could make an equivalent contribution to reducing tobacco use and exposure to tobacco smoke.

Combined with the unchallenged finding of the panel that tobacco use and exposure to tobacco smoke was a grave risk to health, this meant that the panel’s overall finding upholding plain packaging under TBT article 2.2 stood.

**Trademark rights under TRIPS article 16.1 do not grant a right to use the trademark in marketing**

The AB rejected the idea that there is a right to use a trademark. It confirmed the panel’s finding that TRIPS article 16.1 only protected a negative right to prevent infringement of a trademark. It also agreed with the panel that the consequence of a trademark being a negative right is that there is no right to use it for the purposes of keeping the trademark distinctive.

The AB’s finding on this question is shared by many other courts and dispute settlement systems, including the decisions of the Philip Morris v Uruguay investment tribunal and the appellate or constitutional courts of the United Kingdom, France, and Uganda.

**Plain packaging not an unjustifiable encumbrance under TRIPS article 20**

On TRIPS article 20, the AB upheld the panel’s finding that plain packaging did not ‘unjustifiably encumber’ the ‘use of trademarks in the course of trade’ by ‘special requirements’. It confirmed that plain packaging is not ‘unjustifiable’, because the contribution that plain packaging makes to public
health justifies the resulting restrictions on trademarks.

The AB also confirms the panel’s test for deciding whether or not a measure is ‘unjustifiable’, which involves considering the following factors:

- the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function
- the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard
- whether these reasons provide sufficient support for the resulting encumbrance

Importantly, the AB decision states that the panel’s test provides WTO members with more regulatory autonomy than the test of whether a measure is ‘necessary’ for public health in the TBT and General Agreement on Tariffs and Trade, and it does not necessarily require an assessment of alternative measures a respondent state could have taken.

The AB also confirmed the panel’s approach to public health under TRIPS article 20:

- Public health was relevant to whether or not a measure was an ‘unjustifiable’ encumbrance
- The objective clause of TRIPS, which recognises that WTO member states may adopt measures to protect public health and nutrition, should guide interpretation of article 20
- The panel did not err in citing the WHO FCTC implementation guidelines to support its assessment of the public health evidence in favour of plain packaging
- The panel did not err in relying on the Doha Declaration on TRIPS and Public Health in interpreting the TRIPS Agreement

**Final legal challenge to Australia’s plain packaging laws**

The decision was the final legal challenge against Australia’s plain packaging laws. All of the challenges have now been decided in favour of Australia and no further legal challenge to these laws is possible. Courts in the United Kingdom, France, and Norway have also dismissed challenges to plain packaging laws of those countries. Sixteen countries have now implemented plain packaging laws.