

Obtain legal advice

The tobacco industry has a long track record of using legal challenges to prevent or delay governments' tobacco control measures. Countries that were early adopters of plain packaging laws have faced legal challenges in domestic and regional courts, in international investment arbitration tribunals and under the World Trade Organisation dispute settlement procedures. **All the legal challenges decided, as of the end of 2016, have upheld the legality of plain packaging of tobacco products.**

The key message is that if plain packaging of tobacco products is adopted using appropriate domestic constitutional, administrative and legislative arrangements then there is no inherent reason why plain packaging should be found unlawful. However, this toolkit can only provide generalized legal information taking into account the academic literature and the results of legal challenges that have already been decided across different jurisdictions. To protect the policy in the face of legal challenge it is important to undertake the appropriate processes and sound legal drafting. The procedural steps and drafting advice set out in this toolkit should provide a good grounding for the administrative processes and legislative drafting needed to secure a robust plain packaging law.

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Constitutional requirements and the priority given to different rights and obligations in national legal jurisprudence vary from country to country. Therefore it is important that a country specific legal analysis (by internal government lawyers and/or through an opinion from external lawyers) is undertaken on the legal issues raised by plain packaging. Given the possibility of legal challenge and the likely threats and allegations that will be made by the industry if the measure is proposed, it is a sensible precaution to have ready answers to the legal issues that will be raised.

1. Key legal issues

The tobacco industry continues to aggressively assert that plain packaging is unlawful in countries considering the policy, even though industry legal challenges have all so far been defeated in Australia, France, the UK and the European Union. There are similar broad themes to the legal arguments used by the industry across jurisdictions. They are that plain packaging:

- Is an expropriation/deprivation of property;
- Is an unreasonable, dis-proportionate or unnecessary measure, because it is not justified by the evidence;
- Is adopted without due process or in an arbitrary manner;
- Breaches rights to freedom of expression and to run a business
- Is incompatible with intellectual property laws and the 'right to use' a trademark
- Breaches international obligations under World Trade Organisation rules and investment treaties.

These issues may arise out of domestic laws or constitutions, regional obligations or international law. More explanation of these issues is set in the [Reference Section K: LEGAL ISSUES AND CASE SUMMARIES](#).

2. Legal challenges

There have been a number of legal challenges to plain packaging laws already decided and some that are ongoing (at the end of 2016, the time of writing). All the challenges that have been determined have resulting in the claims being dismissed. More details about these cases are given in the [Reference Section K: LEGAL ISSUES AND CASE SUMMARIES](#).

■ AUSTRALIA

- Constitutional challenge in the High Court of Australia – **dismissed** August 2012
- International investment arbitration claim – **dismissed** December 2015
- Complaint before the WTO dispute panel – *proceedings concluded but ruling due in May 2017*

■ UNITED KINGDOM

- Claim in the High Court of England and Wales – **dismissed** in May 2016 [ruling upheld by Court of Appeal in December 2016]

■ FRANCE

- 1 referral to the Conseil Constitutionale and 6 challenges in the Conseil d’Etat (the highest administrative court – **dismissed** January 2016 and December 2017)

■ IRELAND

- Challenge in the High Court – **struck out** November 2016

■ EUROPEAN UNION

- Challenge to the EU Tobacco Products Directive in the EU Court of Justice – **dismissed** in May 2016

3. Highlights from key judgments

These rulings express legal principles and decisions that will be of value to lawyers in other jurisdictions that may have to defend plain packaging in their own countries. The judgments also contain clear and concise passages that will help policy makers and civil society organizations to provide information about the policy or promote its implementation. These are explored in more detail in the [Reference Section K: LEGAL ISSUES AND CASE SUMMARIES](#) but here are some highlights:

- Plain packaging requirements “are no different in kind from any legislation that requires labels that warn against the use or misuse of a product.”¹
- “[The tobacco companies’] body of expert evidence does not accord with internationally recognised best practice.”²
- “In my judgment the qualitative evidence relied upon by the [Government] is cogent, substantial and overwhelmingly one-directional in its conclusion”³
- “[WTO] TRIPS and the FCTC can be read together without any risk of them colliding or being mutually inconsistent”⁴
- Trademarks provide “a right of use that exists vis-à-vis other persons, an exclusive right, but a relative one. It is not an absolute right to use that can be asserted against the State.”⁶
- “Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed”⁵

1. JTI SA v Commonwealth of Australia; BAT Australasia Ltd & ORS v Commonwealth of Australia [2012] HCA 43 at paragraph 81.

2. R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin) at paragraph 374

3. See note 2 at paragraph 592

4. See note 2 at paragraph 186

5. Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay (ICSID Case No. ARB/10/7) at paragraph 429

6. See note 5 at paragraph 267