HD **Plain packaging in the age of obesity and Free Trade Agreements**

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According to a 2011 Forbes article, the value of the Google trade mark is US$44.3 **billion** (as at 2011, when the article was written). People overlook trade marks, but they are an important and valuable asset.

Imagine if you had a US$44.3 **billion** dollar asset. Now imagine that the Australian Government says, "We're not appropriating that asset for ourselves, we're just saying that you can't use it for yourself." But, you know, the effect is still the same. Your (formerly) US$44.3 **billion** dollar asset is now effectively worthless. The Government's semantics probably would not provide you with much comfort. But this is exactly the position at law, according to the High Court cases of British American Tobacco Australasia Limited and Ors v. Commonwealth of Australia and J T International SA v. Commonwealth of Australia.

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Take comfort - there may be other avenues for recourse. Not necessarily for Australians, but for foreign corporations which may be in a position to challenge the plain packaging laws on the basis of international treaties.

In this Alert, Partner Hayden Delaney and Associate Hayley Tarr, address the issue of the erosion of trade mark value through plain packaging laws for processed foods marketed to children proposed in an attempt to adhere to the sentiments of the Rome Declaration on Nutrition, and whether Australia's recent entry into a flurry of international Free Trade Agreements may give grounds for these plain packaging laws to be challenged.

Key Points

Plain packaging laws limit a trade mark owner's ability to use their trade mark, thereby largely negating the value of the trade mark.

In Australia, the limitation of a right to use a trade mark through the introduction of plain packaging laws does not amount to compulsory **acquisition** without compensation, and thus plain packaging laws do not breach the Constitution.

However, the limitation of a right to use a trade mark through the introduction of plain packaging laws may cause Australia to breach its international treaty obligations.

Implementing plain packaging on processed foods to adhere to the sentiments of the Rome Declaration on Nutrition

One in four Australian children is overweight or obese.

The 21 November 2014 Rome Declaration on Nutrition reaffirms that:

inappropriate marketing and publicity of foods"improvements in diet and nutrition require relevant legislative frameworks for food safety and quality... while avoiding and non-alcoholic beverages to children, as recommended by resolution WHA63.14"

(Presumably inappropriate marketing of alcoholic beverages to children is fine.)

WHA63.14 states that:

restricting all marketing"Member States can adopt a comprehensive approach to to children of foods with a high content of saturated fats, trans-fatty acids, free sugars, or salt, which fully eliminates the exposure, and thereby also the power, of that marketing."

One way of restricting marketing is via the enactment of plain packaging laws.

This has been implemented in relation to tobacco, via the enactment of the Tobacco Plain Packaging Act (2011).

Supporters of the Tobacco Plain Packaging Act claim that it has been extremely effective, citing statistics that show that whilst in 2010 the daily smoking rate was 15.1 percent, since the Tobacco Plain Packaging Act was enacted the daily smoking rate has plunged to 12.8* percent (* in 2013, and may be lower now).

If these supporters are correct, and plain packaging is effective, to adhere to the sentiments of the Rome Declaration on Nutrition, we must at least consider the possibility of plain packaging for processed foods that are directed at children (for example, lollies and biscuits shaped to look like appealing objects such as a pineapple or a frog or a bear, lunch-box sized chip packets and so forth).

But if we attempt to do so, will these new laws cause Australia to be in breach of international trade agreements that empower foreign corporations to such an the extent that they effectively have the power to trump what is otherwise lawful under our Constitution?

Benefits and dangers of international trade agreements - where foreign corporations effectively have the power to trump what is otherwise lawful under our Constitution

The Tobacco Plain Packaging Act has been upheld as constitutionally sound by the High Court in British American Tobacco Australasia Limited and Ors v. Commonwealth of Australia and J T International SA v. Commonwealth of Australia, as the Act does not cause an **acquisition** of any rights. Under the Australian Constitution, an **acquisition** must involve the accrual to some person of a proprietary benefit or interest. Although the Act limits a tobacco **company**'s right to use its trade mark, it does not confer a proprietary benefit or interest in relation to that trade mark on the Commonwealth or any other person. As a result, there is no **acquisition** of any rights in that trade mark and the Constitution is not breached.

Hong Kong AgreementFollowing this decision, Philip Morris Asia is claiming against the Australian Government for breach of the Agreement between the Government of **Hong Kong** and the Government of Australia for the Promotion and Protection of Investments (). They argue that Philip Morris Asia's investments in Australia (including their Australian subsidiary companies, Australian trade marks and good will) are all investments which the Australian Government has undertaken to protect under article 6 of the **Hong Kong** Agreement, and that the Tobacco Plain Packaging Act amounts to a breach of article 6 of the **Hong Kong** Agreement because it constitutes an expropriation of its Australian investments. Article 6 of the **Hong Kong** Agreement does not stipulate that an **acquisition** must involve the accrual to some person of a proprietary benefit or interest. Thus, while we are yet to receive the results of this action, there remains the possibility that a law that was deemed to be constitutionally sound by the High Court will be successfully challenged by a foreign corporation.

This is a topical issue at present.

Australia has entered into a number of new Free Trade Agreements in 2014.

KAFTAThe Korea-Australia Free Trade Agreement () was signed on 8 April 2014;

JAEPAPrime Minister Abbott and Prime Minister Abe signed the Japan-Australia Economic Partnership Agreement () on 8 July 2014; and

ChAFTAPrime Minister Abbott and President Xi announced the conclusion of negotiations for the **China**-Australia Free Trade Agreement () on 17 November 2014.

South Korea invested a total of $15 **billion** in Australia in 2013. Japan is Australia's third largest investor, with Japanese investment totaling $131 **billion** in 2013. **Chinese** investment in Australia has been growing strongly in recent years up from $3 **billion** 10 years ago to around $32 **billion** today. The recent spate of Free Trade Agreements will promote further growth of foreign investment in Australia.

It is possible that this further growth will be seen in industries such as food processing, in addition to the traditional industries of agribusiness and **energy** and resources.

If plain packaging laws are implemented in relation to processed foods that are directed at children, in an attempt to improve national health standards, will these foreign investors have grounds to sue the

Australian Government under the relevant Free Trade Agreement, for the expropriation of their investment in Australian food processing plants?

That is, could the terms of certain Free Trade Agreements inadvertently trigger international trade disputes regarding domestic legislation centered on domestic public policy issues, such as public health?

There's a perfect storm. Weâ€"re in the eye of it and we're waiting to see how it unfolds.

Award-winning law **firm** HopgoodGanim offers commercially-focused advice, coupled with reliable and responsive service, to clients throughout Australia and across international borders.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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