

Big Tobacco's challenge disappears in a puff of smoke - High Court rules in favour of Tobacco Plain Packaging Laws

By Roger Green, Watermark, Australia

First published on www.lexology.com

The Australian High Court has rejected a constitutional challenge by big tobacco companies, Philip Morris and others, against the Australian government's tobacco plain packaging legislation.

Cigarettes and other tobacco products sold in Australia after 1 December 2012 must be in drab olive/brown packaging, and brand names will be restricted to small, generic type. The packaging will also include large health warnings, and possibly disturbing graphics depicting the ill health effects of smoking.

IAM: Understanding your IP rights

The big tobacco companies have failed in their arguments that, with compulsory plain packaging laws, the government was acquiring their intellectual property (IP) unjustly, and that the legislation deprives them of the right to use their IP, mainly the trade marks and copyright associated with their branding. The High Court handed down its ruling on 15 August 2012, but its full reasoning for the decision will not be published until later this year.

The High Court ruling appears to confirm that a registered right to exclude others from using IP (in this case a trade mark) carries no guarantee that the proprietor has any right to use the IP itself. This applies equally to patents and registered designs. For example, just because you are able to obtain a granted patent for an improvement to a product or process, does not necessarily mean that you can use the patent without risk of infringing an earlier patent for the original product or process.

This emphasises the importance of understanding the nature of your IP rights. If an individual, a company or organisation has any doubts about what rights are conferred by their intellectual property, they should consult a specialist in management of IP and other intellectual assets.

Consequences

It is likely that the fight will not end yet, and that the big tobacco companies will take up their case with the World Trade Organisation (WTO), arguing that the plain packaging legislation is contrary to international treaties, such as TRIPS.

Australia currently has one of the lowest rates of smoking in the world, currently about 15 per cent. The Australian government is hopeful that the plain packaging laws will reduce the rate to about 10 per cent.

Several other countries have been closely monitoring the appeal by the big tobacco companies against the plain packaging laws, and it is anticipated that some, such as New Zealand, and the United Kingdom may follow suit. They will probably, however, wait for the full reasoning of the High Court of Australia to be published, and the outcome of any possible appeals to the WTO, before taking definite steps to introduce plain packaging legislation.

For more information, please contact:



Roger Green
Principal
Patent and Trade Marks Attorney
Watermark
mail@watermark.com.au
www.watermark.com.au