

Kluwer Arbitration Blog

Australia's Plain Packaging legislation leaps the first hurdle

Kate Lalor (Linklaters) · Wednesday, September 12th, 2012

The decision handed down by the High Court of Australia, just weeks ago, regarding Australia's plain packaging legislation is just the beginning of what is destined to be a long battle. And a battle that is being closely watched by legislators around the world, including the EU which is shortly due to publish a draft revision to its 2001 Tobacco Products Directive ([here](#)).

On 15 August [Australia's High Court](#) handed down its decision in favour of the government, finding that the plain packaging legislation does not violate the Australian Constitution. The High Court has not yet published its reasoning on the decision.

In a media release Australia's Trade Minister announced that — on the same day that the High Court decision was handed down — the Ukraine, which had requested WTO consultations with Australia back in March 2012 regarding the plain packaging legislation, filed a request for the establishment of a WTO panel ([here](#)) (although the formal document suggests that the request was filed one day earlier ([here](#))).

On Friday 31 August, Australia blocked the Ukraine's attempt to establish a WTO panel, the government describing the plain packaging legislation as “a sound, well-considered measure” ([here](#)). It is now open to the Ukraine to make a second request for the constitution of a WTO panel, which request will likely be deliberated at the next Dispute Settlement Body meeting which is scheduled for later this month. Australia does not have a second opportunity to block the action; the decision whether or not to establish the panel will lie with the Dispute Settlement Body.

Remaining in contention then for Australia – now that the High Court battle has been resolved and presuming that the Ukraine will be successful in a second attempt to form a WTO panel – are the following:

- first and foremost the bilateral investment dispute under the Hong Kong/Australia BIT (for earlier posts on this see [here](#) and [here](#)) which at the moment is in its early stages;
- WTO consultations with Honduras and the Dominican Republic; and
- a formal WTO dispute with Ukraine.

As mentioned above, keeping a close eye on all this action – alongside various governments such as New Zealand, Britain, Norway, India and South Africa – is the EU which this Autumn is looking to publish a draft revision to its 2001 Tobacco Products Directive. It is reported that the

EU is considering plain packaging alongside various other options, and hopes to have implementation of its final Directive, whatever it shall include, between 2014 – 2016.


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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with a magnifying glass positioned over one of them, suggesting a search or investigation function. The text is arranged in a clean, modern layout, with the main title in a large, bold font and the company logo at the bottom left.

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