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Advancing progressive health policy to reduce NCDs amidst international commercial opposition: Tobacco standardised packaging in Australia

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Abstract

This study examines how health advocates and the Australian government responded to international commercial pressure during the implementation of tobacco standardised packaging (SP) as a measure to reduce non-communicable diseases (NCDs). Relevant government and NGO documents, and media items were reviewed. Policymakers and health advocates ($n = 19$) in Australia were interviewed. In 2009, Australia's National Health Taskforce recommended SP, which the Australian government announced in April 2010. In response, tobacco companies threatened the government with litigation in both domestic and international courts, claiming that SP would violate their investment and intellectual property rights. However, these legal threats were unsuccessful in forcing the government to withdrawal the SP proposal. Tobacco companies legally challenged SP, but as of February 2018 failed with each legal challenge. The political success of enacting and implementing SP against international commercial pressure was supported by legal preparation and support, and a whole-of-government approach. The Australian SP case illustrates how, against international commercial opposition, governments can build and maintain political and official support to enact and implement progressive public health measures to reduce NCDs.

Keywords

Global health; health policy; tobacco control; international trade; tobacco industry

Introduction

Every year 38 million people die from non-communicable diseases (NCDs), which account for two-thirds of all deaths worldwide (World Health Organization, 2014). Almost two-

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thirds of NCD deaths are linked to tobacco use, alcohol misuse, unhealthy diets, and physical inactivity (World Health Organization, 2014). To combat the global NCD epidemic, governments have introduced progressive public health measures, including pictorial health warning labels on cigarette packages (Noar et al., 2016), sugar sweetened beverage taxes (Colchero, Popkin, Rivera, & Ng, 2016), and alcohol availability restrictions (Hahn et al., 2010), which have all contributed to reducing the consumption of these products. However, governments face fierce opposition from the tobacco, alcohol and food and beverage industries, which oppose these innovative, world first public health policies (Hiilamo, Crosbie, & Glantz, 2014; Yoon & Lam, 2013). In particular, these industries are increasingly turning to trade and investment agreements to prevent or slow the global diffusion of these policy innovations (Barlow, McKee, Basu, & Stuckler, 2017; Crosbie & Glantz, 2014).

While each industry has attempted to block progressive public health proposals by evoking concerns over trade and investment treaties (Thow, Jones, Hawkes, Ali, & Labonte, 2017), most of the legal threats and challenges have surfaced against tobacco control measures. In the 1980s and 1990s, tobacco companies lobbied states to file trade disputes against other governments' tobacco control policies in the General Agreement on Tariffs and Trade and the World Trade Organization (WTO) but experienced mixed results in overturning these policies (Jarman, Schmidt, & Rubin, 2012). More recently, tobacco companies have capitalised on using the investor-state dispute settlement mechanism in trade and investment agreements, which allowed them to directly challenge governments' public health policies. For decades, the mere threat of legal action helped create a regulatory chill (Tienhaara, 2011) by blocking, weakening, and delaying public health policies in many countries (Crosbie & Glantz, 2014; Crosbie, Sosa, & Glantz, 2017a)

More recently, some governments have been able to overcome international commercial pressure and legal challenges while implementing progressive public health measures (Crosbie et al., 2017a; Permanent Court of Arbitration under The United Nations Commission on International Trade Law Rules, 2015). Efforts to generate global momentum for advanced tobacco packaging and labelling laws has some scholars labelling this progress as 'too hot for regulatory chill' (Lencucha, Labonte, & Drope, 2015). This success can be partially attributed to the evolution of the intersection between tobacco and trade (referred to as the tobacco-trade nexus), in which the global discourse on tobacco norms has been integrated in international trade and investment discussions and decisions (Drope & Lencucha, 2013, 2014). These norms have been further institutionalised through the adoption of the WHO Framework Convention on Tobacco Control (FCTC), which established a set of guidelines, obligations, and standards for treaty parties to reduce tobacco use (World Health Organization, 2003).

Despite these advancements, including recent legal victories against tobacco companies (Crosbie et al., 2017a; High Court of England and Wales, 2016; Le Conseil d'État, 2016), industry legal threats continue to generate concerns for governments considering progressive health measures (Crosbie & Thomson, in press), especially in low and middle-income countries (Staff, 2016). Thus, it is imperative to understand how governments respond to international commercial pressure and minimise the legal risks associated with potential trade and investment challenges to enact and implement progressive public health measures

to reduce NCDs. Furthermore, while scholars have documented how the global discourse seeking to integrate trade and tobacco norms has evolved internationally (Drope & Lencucha, 2013, 2014; McGrady, 2007), it is less clear how this has played out in domestic contexts.

On 21 November 2011, the Australian government became the first country to enact tobacco standardised packaging (SP) (Commonwealth of Australia, 2011b), which required tobacco products to be sold in drab dark brown packages with pictorial health warning labels and that only include the brand name and variants in plain font on the front and top of the package (Figure 1). The case of SP implementation in Australia is a significant public health advancement and as a result has been studied by several scholars. This includes an examination of the type and content of tobacco industry challenges in Australia (Jarman, 2013), a detailed description of the context and policy process (Chapman & Freeman, 2014), an analysis of online public comments on the proposal (Freeman, 2011), and an examination of the international legal context (Mitchell & Studdert, 2012; Voon & Mitchell, 2011).

However, there are unexplored areas, such as how the Australian government prepared for potential legal challenges when introducing and implementing SP amidst international commercial pressure. In this paper, we examine the Australian government's legal preparation and their response to commercial attacks. In particular we analyze the (1) the strategies developed in response to commercial opposition, (2) the mechanisms of influence both outside and within government, and (3) the ways different sectors cooperated and coordinated their efforts to ensure SP was legally strong enough to withstand this opposition. We argue that the political success of enacting and implementing SP against international commercial pressure was supported by legal preparation and support, and a whole-of-government approach (Lencucha, Drope, & Chavez, 2015). The Australian SP case illustrates how, against international commercial opposition, governments can build and maintain political and official support to enact and implement progressive public health measures to reduce NCDs.

Methods

We reviewed Australian government and health group documents, and Australia media items from official and media websites using standard snowball searches (Malone & Balbach, 2000), beginning with search terms 'plain packaging', 'international trade', 'intellectual property', and 'tobacco companies', as well as using specific actors and key dates. Between February and June 2015, we attempted to recruit via email and telephone 36 Australian interviewees closely involved in the SP process as politicians, officials, advisors or advocates. Nineteen agreed to be interviewed, ten declined, and seven never responded to multiple requests. The 17 potential interviewees that declined or never responded were mostly National and Liberal Party members of parliament and Department of Foreign Affairs and Trade (DFAT) and Department of Finance officials, which limited a more complete understanding of how various political parties responded to industry commercial pressure and whole-of-government approach to SP. The 19 interviews during June to July 2015 included five tobacco control advocates, two legal scholars, eight members of parliament (MPs), one Health Department politician, one Health Department official, and

one DFAT politician. The advocates worked for the main national health groups in Australia, and were active advocates for SP, including serving as members of the National Preventative Health Taskforce. The legal scholars reside in prominent Australian universities. They participated in media discussions and by counselling with policymakers concerning SP. The MPs include policymakers from the major Australian political parties that participated in SP parliamentary hearings and readings. They include both the Health and Trade Ministers that were actively involved in the SP process. This sample involved a sufficient number of key actors to enable the analysis of the strategies developed in response to commercial opposition, the mechanisms of influence both outside and within government, and the coordinated efforts by different governmental sectors. The interviewees agreed to waive their anonymity in accordance with a protocol approved by the University of California, Santa Cruz Committee on Human Research, except for one interviewee who requested anonymity. Results from these sources were triangulated and thematically analyzed. EC transcribed and coded the interviews and analyzed the consistent themes across the interviews. The specific major themes coded were: (1) tobacco control context in Australia; (2) advocacy and legal preparation; and (3) sector cooperation and coordination. Thematically, there was no major disagreements among the interviewees' views, which indicated a clear narrative using the themes to describe the tobacco advocacy strategies and whole-of-government approaches to implementing SP.

Results

Tobacco control context in Australia and SP introduction

Australia has been a global leader in tobacco control for decades, with a well-established advocacy network and strong bi-partisan support in parliament. This facilitated some of the world's strongest public health policies and one of the lowest smoking prevalence rates (Chapman & Freeman, 2014). This progress continued in April 2008 when the Australian Federal government commissioned a National Preventative Health Taskforce, which consisted of health researchers and advocates, to examine the effects of tobacco use, alcohol misuse, and obesity. In June 2009, the Taskforce delivered its final report to the Department of Health and Ageing, which aimed at reducing the smoking prevalence from 17% in 2008 to 10% (National Preventative Health Taskforce, 2009). The Taskforce recommended several policies to achieve this goal, including tobacco SP, which was formally introduced on 29 April 2010 (CNN Wire Staff, 2010).

Tobacco industry opposition

British American Tobacco (BAT), Philip Morris International (PMI), and Imperial Tobacco opposed SP through press releases, media campaigns, comments to the media and through parliamentary hearings and submissions (British American Tobacco Australia Limited, 2011; Imperial Tobacco Australia Limited, 2011). Their opposition centred around four arguments that SP: (1) would not work, (2) would increase illicit tobacco trade, (3) would create unnecessary problems for retailers, and (4) would violate domestic laws and international treaties governing intellectual property and investment (Chapman & Freeman, 2014).

Within the fourth argument, the industry claimed the proposal would: (a) constitute an unnecessary barrier to trade, (b) deprive them of intellectual property rights by degrading the value of their trademarks and expropriate their investments, and (c) did not accord them fair and equitable treatment (Jarman, 2013). In particular, the industry argued that the proposal violated Australia's constitution, and obligations under various trade and investment agreements. This included 'slippery slope' arguments, which claimed that tobacco SP would lead to SP of other products (e.g. food and alcohol) that violated basic business trademark rights protected under these agreements. If SP was enacted, tobacco companies threatened to sue the government for compensation, which they claimed would amount to billions of dollars (British American Tobacco Australia, 2010; Staff, 2010). The industry issued threatening letters to Cabinet and then attempted to pressure parliament with similar threats (British American Tobacco Australia Limited, 2011; Imperial Tobacco Australia Limited, 2011).

Health advocacy strategies developed in response to commercial opposition

In addition to opposing industry arguments concerning retailers, smuggling and the effectiveness of SP, the national public health groups in Australia, including the Public Health Association, Australia, the Cancer Council, and the National Heart Foundation of Australia, developed strategies to address the commercial opposition to SP. Recognising the potential political impact of industry legal threats, and anticipating the possibility of a legal challenge, the health groups mobilised support from legal scholars with expertise in trade and investment law (Kate Purcell, 2015; Lynn Roberts, 2015; Michael Moore, 2015; Rob Moodie, 2015; Simon Chapman, 2015). Following initial meetings and discussions, health groups and legal scholars agreed to consistently frame SP through the unique harms of tobacco, emphasise the Australian government's international legal commitment to the FCTC, expose the historical and manipulative nature of industry legal attacks, and provide legal analysis of potential trade and investment challenges. Health advocates had 'laid the ground work' and developed close relationships with government officials, policymakers, and media members throughout the 2000s and thus utilised these connections to respond to commercial opposition to SP (Kate Purcell, 2015; Lynn Roberts, 2015; Michael Moore, 2015; Rob Moodie, 2015; Simon Chapman, 2015).

Health advocacy mechanisms of influence

The health groups and legal scholars disseminated these strategies using stakeholder communication/framing and counselling/advocacy mechanisms of influence (Viveros, 2017). Communication/framing mechanisms of influence involve outlining particular messages and enabling other stakeholders (e.g. policymakers) to embrace tailored messages (e.g. unique harms of tobacco). Counselling/advocacy mechanisms of influence include acting as advisors, and often applying direct pressure in the form of lobbying other stakeholders to apply, change, or toughen regulations (in this case SP).

Communication and framing mechanisms

Health advocates continuously communicated and framed the SP proposal as a public health issue and did not engage with the industry in serious discussions about trade and investment (Kate Purcell, 2015; Lynn Roberts, 2015; Michael Moore, 2015; Rob Moodie, 2015; Simon

Chapman, 2015). In response to ‘slippery slope’ arguments, advocates emphasised the unique harms of tobacco use, where, unlike other unhealthy commodities (e.g. food and alcohol) there is no safe level of consuming tobacco. Instead of being drawn into debating the government’s international trade and investment obligations, health advocates stressed the importance of ‘Australia’s international legal commitment to the FCTC’ (Kate Purcell, 2015; Lynn Roberts, 2015; Michael Moore, 2015; Rob Moodie, 2015; Simon Chapman, 2015). Additionally, health advocates advised MPs to not engage with trade and investment arguments, and to remain focused on the public health benefits of SP, the unique harms of tobacco use and Australia’s FCTC commitments.

Legal scholars who were allied to public health engaged with the media and with industry front group opposition to frame Australia’s legal right to implement SP. Legal scholars published journal articles and books (Mitchell & Studdert, 2012; Voon & Mitchell, 2011), commented in the media (CBS, 2011; Siegel, 2011), and participated in legal debates surrounding SP (Chapman & Freeman, 2014). The themes included to ‘emphasize Australia’s legal and sovereign right’ to implement SP, and to restrict and prohibit the use of trademarks on tobacco packaging (Mark Davison, 2015; Tania Voon, 2015). Additionally, they communicated to politicians and Department of Health officials ways of conveying a trade-related tobacco control policy like SP to a trade audience. This included suggesting framing SP not as a barrier to trade, but as beneficial to the economic prosperity and health and well-being of the country.

Counselling and advocacy mechanisms

Health advocates and legal scholars met directly with government officials and policymakers to highlight the legal implications and risks of SP (Mark Davison, 2015; Nicola Roxon, 2015; Tania Voon, 2015). This included providing details about average costs and trade tribunal timeframes associated with previous trade and investment challenges to Australia and to other governments. In particular, advocates and legal scholars recommended that government officials and policymakers consider setting aside adequate funds to defend SP against potential industry challenges. They cautioned policymakers to not disclose these amounts, as the tobacco companies could likely exaggerate these costs.

Health advocates and legal scholars also alerted government officials and policymakers to the historical and manipulative nature of industry legal attacks (Kate Purcell, 2015; Nicola Roxon, 2015; Rachel Siewert, 2015; Rob Moodie, 2015; Simon Chapman, 2015). This included communicating the ways that tobacco companies had legally threatened governments for decades to successfully force governments to withdraw similar proposals. This was despite internal industry documents revealing that the industry’s lawyers advised them that governments had the sovereign right to implement SP (Crosbie & Glantz, 2014).

Department of Health responses to health advocacy to confront commercial opposition

The Department of Health politicians and officials interviewed for this study credited communication and advice from the health advocates and legal scholars for their part in the successful introduction and implementation of SP (Chris Picton, 2015; Nicola Roxon, 2015). Health Minister Nicola Roxon (2007–2011) who championed SP, said that the health groups

had begun advising her on some of these issues when she was part of the minority government, before becoming Health Minister. Department of Health politicians and officials said ‘the ground work from researchers and NGOs was really important’, their strategies were ‘clever and sophisticated’ and their advice was ‘very powerful’ (Chris Picton, 2015; Nicola Roxon, 2015). In particular, Minister Roxon said understanding the industry’s manipulative history of legal threats was particularly helpful as the ‘legal threats would have seemed to be more serious if they came out of the blue rather than seen as a history of this is how they have always behaved’ (Nicola Roxon, 2015). Minister Roxon also acknowledged that framing SP on the unique harms caused by tobacco was ‘persuasive to say’ and a ‘powerful argument’ as ‘the framing is important’ for introducing and implementing SP.

It should be noted that several advocates and policymakers also praised Minister Roxon’s political leadership in helping to secure and eventually implement SP. Many interviewees said she maintained a bold and committed approach to SP throughout the political process (Anne McEwen, 2015; Lynn Roberts, 2015; Rachel Siewert, 2015; Richard Di Natale, 2015; Rob Mitchell, 2015; Rob Moodie, 2015; Warren Snowdon, 2015) and that Minister Roxon (a lawyer) gave the public health community ‘confidence’ and ‘reassurance’ about the legality of SP (Lynn Roberts, 2015; Rachel Siewert, 2015; Richard Di Natale, 2015; Rob Moodie, 2015).

Parliament responses to health advocacy encouragement to confront commercial opposition

MPs from the Labor and Green parties interviewed for this study also credited the health advocates and legal scholars for their part in communication and counselling the need to address the commercial opposition to SP (Anne McEwen, 2015; Jan McLucas, 2015; Peter Whish-Wilson, 2015; Rachel Siewert, 2015; Richard Di Natale, 2015; Rob Mitchell, 2015; Warren Snowdon, 2015). Although the MPs viewed the legal threats as ‘having low credibility’ due to the tobacco companies’ reputation in the country, some of these MPs acknowledged it was helpful to understand the history of manipulative industry legal threats (Rachel Siewert, 2015; Rob Mitchell, 2015). Some MPs also credited health advocates for helping frame the legal threats as an attempt to ‘undermine Australia’s sovereign right’ to protect public health (Anne McEwen, 2015; Jan McLucas, 2015; Peter Whish-Wilson, 2015; Rachel Siewert, 2015; Richard Di Natale, 2015; Rob Mitchell, 2015; Warren Snowdon, 2015). During the House and Senate second parliamentary readings of the Bill in August and September 2011, MPs who spoke in support of the Bill generally criticised the industry’s intimidation tactics, but refrained from engaging in a dialogue concerning trade and investment and instead emphasised the importance of public health (Commonwealth of Australia, 2011c).

MPs from the Liberal and National parties interviewed for this study stated they had minimal contact with health advocates (Andrew Southcott, 2015; Anonymous interviewee, 2015). These MPs had legal concerns related to SP and although they felt it was important to protect public health, they argued there were some ‘legal uncertainties’ pertaining to SP (Andrew Southcott, 2015; Anonymous interviewee, 2015). These MPs claimed it was important to ‘avoid any unnecessary and lengthy legal battles’ with the tobacco companies.

During parliamentary readings, some MPs in opposition to the Bill (from the Liberal-National Coalition Party) reiterated the industry's arguments by discussing the potential 'legal risk' of SP (Commonwealth of Australia, 2011c). Some of these MPs raised concerns that the Labor government had 'exposed Australian taxpayers to potentially expensive legal action' and that this would result in 'costly legal action for very little to gain' (Commonwealth of Australia, 2011c). MPs also raised these issues with news reporters, which helped promote this perception in the media (Kerr & Dunleavy, 2011).

Ministerial framing and communication

In response to the tobacco companies' efforts to shift the debate towards trade and investment, Minister Roxon consistently framed SP as an issue of public health and the protection of children. Throughout the political process Minister Roxon boldly framed SP as 'anti-cancer and not anti-trade' and acknowledged that 'with the advocates, we were all a full court press to say the same thing' (Nicola Roxon, 2015). Her media statements included 'I never met people who said they wanted their kids to be smokers' and 'tobacco companies are fighting to protect their profits; but we are fighting to protect lives' (Commonwealth of Australia, 2011b). In an interview for this study Minister Roxon said that for every meeting, press announcement, and contact with the media, she carried a one-page document with the same key phrases to drive home these messages (Nicola Roxon, 2015). She emphasised the importance of 'avoiding trade diversions by the industry' and suggested that as soon as you are drawn in that area of argument 'the core purpose is lost' (Nicola Roxon, 2015).

In drafting the SP Bill, Minister Roxon ensured that Cabinet ministers from the Department of Finance and the DFAT clearly understood the health implications of the legislation. She acknowledged to Cabinet ministers the potential benefits of trade liberalisation, but sought to preserve those benefits without compromising health, especially by letting each sector 'understand why tobacco is a different product' (Nicola Roxon, 2015). Additionally, Minister Roxon helped limit internal misconceptions and conflicts by strongly invoking the government's international legal commitment to the FCTC.

Sector cooperation and coordination on legal issues around SP implementation

The politicians and officials from the Health and Trade Departments interviewed for this study stated that the communication and collaboration among Departments and across Cabinet was key to addressing any potential legal issue with SP (Chris Picton, 2015; Craig Emerson, 2015; Nicola Roxon, 2015). When discussing the obstacles and challenges to the SP proposal, Minister Roxon commented on how initial Cabinet meetings and decisions to prioritise particular legislation can be quite challenging with regard to drafting and consulting (Nicola Roxon, 2015). She explained that 'anytime you are coordinating with different sectors there is always room for error' so it is important 'to make sure everyone is on the same page' (Nicola Roxon, 2015). As a result, the consultation included lengthy conversations with DFAT and the attorney general's office, to carefully draft a Bill that was legally robust, in anticipation of a potential tobacco industry legal challenge.

According to Minister Roxon, in drafting the legislation, officials were 'incredibly careful and incredibly professional' (Nicola Roxon, 2015). This included understanding that the

risks posed by trade agreements to SP are not uniform or universal, and the need to assess the risks of SP posed by each trade and investment agreement. Minister Roxon also said that the government set aside money for litigation, but did not disclose this information ‘because the industry would just try to outspend’ the government (Nicola Roxon, 2015). She said that everyone in Cabinet was in agreement on the legal issues regarding SP and that ‘making the decision to proceed required a whole of government approach’ (Nicola Roxon, 2015).

Echoing similar statements, former Trade Minister Craig Emerson (2010–2013) affirmed that the government’s approach rested on strong legal grounds, with lawyers from both the Attorney General’s office and DFAT confirming that SP was consistent with Australia’s international trade legal obligations (Craig Emerson, 2015). Minister Emerson agreed that it is important to ‘ensure you are not creating barriers or unnecessary trade restrictions,’ but that the SP proposal was not creating such barriers and that trade-related health measures always involved striking a ‘balance between international trade and domestic health’ (Craig Emerson, 2015). He added that he was not worried that the proposal would harm Australia’s trade reputation, as suggested by the tobacco companies, as the health measure did not violate Australia’s trade commitments. Instead, Minister Emerson discussed the importance in protecting public health and referred to ‘Australia’s international legal commitment to the FCTC’ (Craig Emerson, 2015).

Industry litigation and the government response

Following the parliamentary readings, on 21 November 2011, the Australian parliament passed the SP Bill (Commonwealth of Australia, 2011a), with the new SP format to come into effect on 1 December 2012. In response, the tobacco companies challenged the SP legislation, both domestically in Australia’s High Court (High Court of Australia, 2012) and internationally through an Australian-Hong Kong bilateral investment treaty (BIT) (Allens Arthur Robinson, 2011), in addition to supporting a challenge through the WTO (World Trade Organization, 2014).

Unlike other countries that enacted strong tobacco packaging and labelling policies (Hiilamo et al., 2014), the government did not attempt to weaken or delay SP during the implementation stage. Minister Roxon said that any policy decision requires government to ‘be prepared to see it through’ (Nicola Roxon, 2015). This included the investment of official resources to ensure a strong legal stance to defend SP in the various legal arenas (Nicola Roxon, 2015). Several health advocate and policymaker interviewees said that the Gillard government’s decision to assign former Health Minister Roxon as Attorney General (2011–2013) was key to ensuring proper implementation of SP, as she continued to champion SP within the Cabinet and across the relevant government departments (Anne McEwen, 2015; Lynn Roberts, 2015; Rachel Siewert, 2015; Richard Di Natale, 2015; Rob Mitchell, 2015; Rob Moodie, 2015; Warren Snowdon, 2015). Given the public support for SP (Swift et al., 2015), and the largely bipartisan political support, advocate and policymaker interviewees said that it would have been difficult for successive governments to weaken or overturn SP (Andrew Southcott, 2015; Craig Emerson, 2015; Lynn Roberts, 2015; Nicola Roxon, 2015; Rob Moodie, 2015). These efforts were successful as the Australian government defended SP against the constitutional, PMI investment challenges.

On 5 May 2017, news sources reported that the WTO will uphold the Australian SP policy (Miles & Geller, 2017). Although a formal ruling was expected in mid-2017, as of February 2018, no formal ruling has been issued by the WTO.

Discussion

The Australian SP case illustrates the importance of building and maintaining political and institutional support across parties and ministers based on strong legal grounds and messaging, especially when introducing and implementing world first health policies and countering international commercial pressure. It underscores the importance of legal preparation and support and a whole-of-government approach to reducing NCDs.

The evolving nature of the trade-tobacco nexus at the domestic level

The Australian case illustrates the evolving nature of both the tobacco control norms message and the nature of the messengers to resolve tensions in the tobacco-trade nexus at the domestic level (Drope & Lencucha, 2013, 2014; McGrady, 2007). In terms of evolving messages in the tobacco-trade nexus, key framing and communication mechanisms involved effectively couching arguments more consciously in language familiar to trade policy officials (Drope & Lencucha, 2013), and emphasising Australia's international legal commitments to health agreements, including the FCTC. Evidence from key actors involved in the process demonstrate that in this setting public health norms (in the form of tobacco control measures) were gaining acceptance even within the sphere of more established economic norms (Drope & Lencucha, 2014), as trade officials explicitly respected health goals and cited the FCTC as an important international legal commitment. In terms of evolving messengers, health advocates anticipated industry commercial opposition and recruited legal scholars with expertise in international trade and investment to help form a broad network of support. By not limiting themselves to public health alliances, tobacco control advocates successfully built coalitions beyond the health sector (Smith, Buse, & Gordon, 2016). This helped integrate a new set of trade-related messengers (Drope & Lencucha, 2013), which actively link public health and trade (Drope & Lencucha, 2014), to communicate with policymakers about the legality of SP. In turn, these messengers can help diffuse trade-related health norms and values by spreading visions of expanding health rights in relation to trade worldwide (Gonzalez, Green, & Glantz, 2012).

'Whole-of-government' approach to NCDs

The Australian government's ability to introduce and implement SP also rested upon a collective 'whole-of-government' approach to NCDs (Lencucha, Drope, et al., 2015), both within Cabinet and across government departments. While governments are increasingly putting forward multisectoral approaches to address the NCD epidemic, inter-bureaucratic alliances between departments of government can be quite challenging, even in tobacco control (Drope & Lencucha, 2013). Minister Roxon had the ability to communicate the health objectives and legality of SP against commercial pressure, in language familiar to other Ministers. This helped integrate common practices rather than rejecting the principles of some departments (e.g. open trade). This collaborative approach minimised conflicting departmental objectives, enhanced policy coherence and accountability (Greer & Lillvis,

2014), and incorporated health considerations into the decision-making process across all sectors (Wilkins, 2002).

Policy implications

While Australia experienced success in implementing SP amidst national and international commercial opposition, assessing the legal risks of progressive tobacco packaging and labelling laws will continue to be based on the circumstances of individual countries, including a government's health and trade sector relationships, trading partners, and financial capacity. In New Zealand (Crosbie & Thomson, in press) and Costa Rica (Crosbie, Sosa, & Glantz, 2017b), health and trade sector differences and a lack of communication and coordination helped contribute to delayed policy implementation. In Honduras concerns over trade barriers to exported tobacco products led to weakened health warning labels in the country (Campaign for Tobacco-Free Kids, 2016). In Uruguay, the government initially weakened its tobacco packaging and labelling law due to financial concerns over a potentially costly legal battle against the tobacco industry (Crosbie et al., 2017a).

Despite these individual circumstances, health groups can help governments minimise these legal risks by providing legal assistance and counselling to policymakers. Health groups can partner with legal scholars with skills in international law and investment to assist policymakers to assess the legal risks for a particular government from various trade and investment agreements. In countries such as Uruguay, where sufficient legal support domestically did not exist, a transnational tobacco control network (Crosbie, Sebrie, & Glantz, 2011; Crosbie, Sosa, & Glantz, 2016; Uang, Crosbie, & Glantz, 2017), comprised of domestic and international health groups, philanthropy donors and legal scholars, helped fill this void and assisted the government to legally defend its tobacco packaging and labelling regulations (Crosbie et al., 2017a). This transnational network, which includes characteristics of epistemic communities can influence policymakers as they act as scientific gatekeepers in the policymaking process (Mamudu, Gonzalez, & Glantz, 2011). In particular, health groups can use their access to policymakers to strengthen the effectiveness of their advocacy role acting as a public health conscience and expose obstructionist positions by tobacco companies during negotiations (Collin, Lee, & Bissell, 2002). In March 2015, Michael Bloomberg and Bill Gates expanded this support by launching a \$4 million 'Anti-Tobacco Trade Litigation Fund' which assists countries in drafting policies to avoid potential trade and investment challenges (McKay, 2015).

To overcome government capacity constraints, health advocates can lobby policymakers to institutionalise trade and investment assessments that form a basis for sound policy that can mitigate legal risks (McGrady, 2007). This includes health advocates holding governments accountable as ratified parties to the FCTC (Gonzalez et al., 2012), which can institutionalise risk assessments by reporting international legal commitments and obligations to the treaty.

The tobacco company losses to Australia in domestic and international courts are part of a greater international trend that should also help governments minimise these legal risks. The UK (High Court of England and Wales, 2016) and Indian (Rana, 2016) High Courts upheld strong tobacco packaging and labelling regulations, concluding that governments could

restrict the use of trademarks and that this was not expropriating their intellectual property rights. Additionally, PMI lost a BIT investment challenge against Uruguay, with a similar ruling in the arbitration process (Crosbie et al., 2017a). These victories against the industry provide greater legal clarity surrounding a country's sovereign right to implement public health regulations and should assist other countries, including Canada, South Africa, Panama, Brazil, Turkey, Malaysia, and Chile, which, as of February 2018, had announced plans to introduce SP (Canadian Cancer Society, 2017). The WTO ruling should assist other countries, including the UK, Ireland, France, New Zealand, Slovenia, and Hungary that have enacted SP and may signal a green light for other countries to implement similar policies, not only for tobacco but also for alcohol and unhealthy foods (Emrich, Qi, Lou, & L'Abbe, 2017).

Governments seeking to introduce other world's-first health policies to reduce NCDs should expect aggressive opposition by the relevant industries to prevent the diffusion of innovative practices worldwide. To minimise these pressures, governments should continue to adopt whole-of-government approaches. The seventieth World Health Assembly (2017) global action plan to address NCDs calls for the 'need to enhance multi-sectorial and multi-stakeholder advocacy, engagement and action that supports whole-of-government approaches across sectors beyond health' (World Health Organization, 2017). In particular, this could include establishing institutional arrangements and mechanisms that better incorporate health objectives systematically across government sectors (e.g. CONICQ in Brazil, an inter-sectoral body to implement the FCTC) (Lee, Chagas, & Novotny, 2010).

However, governments should be wary of interagency arrangements that permit the inclusion of industry representatives (e.g. the Philippine Interagency Committee-Tobacco) as this can contradict health objectives (Lencucha, Drope, et al., 2015). This may be more plausible with tobacco, given the increased global consensus concerning the social norms surrounding the harmful effects of tobacco use and the deceitful nature of tobacco companies (World Health Organization, 2003) (Gilmore, Fooks, Drope, Bialous, & Jackson, 2015), including FCTC guidelines that explicitly prohibit government partnerships with the tobacco industry. The food and beverage and alcohol companies continue to be partners in government health processes (Stuckler & Nestle, 2012), which makes their regulation more challenging (Moodie, Stuckler, & Monteiro, 2013) and thus governments should be cautious of interagency arrangements that include industry representatives. Nevertheless, whole-of-government approaches to regulation should help minimise commercial pressures through policy coherence and coordination (Greer & Lillvis, 2014).

Limitations

Some Cabinet members and officials from the DFAT declined requests to be interviewed for this study, limiting a complete understanding of how the Rudd, Gillard, Abbott, and Turnbull administrations responded to tobacco industry legal threats and challenges. To protect attorney-client privileges, policymakers in the Health Department and DFAT could not discuss the legal advice given to the Prime Minister surrounding the legal challenges against Australia. We were unable to interview anyone in the Department of Finance to achieve a

more complete understanding of whole-of-government approach to SP. We were also unable to interview anyone from the tobacco industry.

Conclusion

The Australian SP case illustrates the ways that governments can build and maintain political and official support cutting across parties, Cabinet and government departments to properly enact and implement progressive public health measures. Our research demonstrates that advancing world first policies and protecting them against international commercial opposition is possible with legal preparation and support and a whole-of-government approach.

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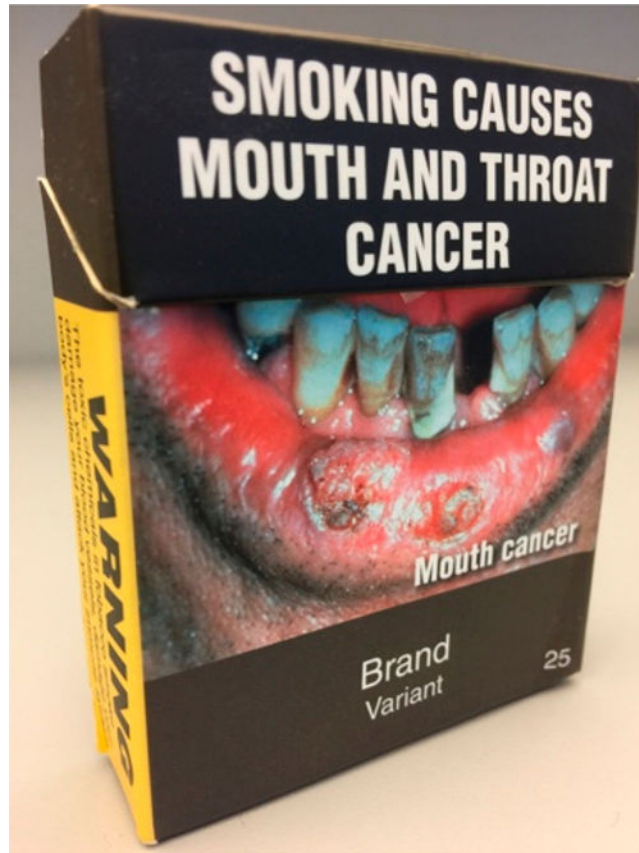


Figure 1. Sample of standardised packaging of tobacco in Australia. Photo taken by Eric Crosbie.