

Plain Packaging of Cigarettes

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Courtesy Cancer Council Aus

Tobacco's arguments

- Constitution: If Australian government **acquires** property, it must do so on just terms
- Breach of WIPO's Paris Convention re right to register trademarks
- Breach of the WTO TRIPS Agreement

The Constitutional Argument

- There is no **'acquisition'** of property.
- 'The mere extinguishment or deprivation of rights in relation to property does not involve acquisition'
Deane J, Tasmanian Dams case
- **All** cases support the proposition there is no acquisition eg
 - Commonwealth v Tasmania (1983) 158 CLR 1
 - Australian Tape Manufacturers Assn v Commonwealth (1993) 176 CLR 480
 - Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155
 - Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513
 - Nintendo Co Ltd v Centronic Systems Pty Ltd (1994) 181 CLR 284
 - Commonwealth v WMC Resources Ltd (1988) 194 CLR 1.

The WIPO Paris Convention argument

- There is a right to **register** a trade mark under the Paris Convention
- There is no right to **use** a registered trade mark or object to regulatory limitations on its use.
- The proposed legislation affects **use**, not registration.
- ‘While the provisions of the Bill do **not** seek to limit the **registration** of a trademark, it would seek to limit the intended value of such a mark, including the exclusive right (sic) to exploit its recognition.’
Governing in ignorance, p14. (emphasis added)

**WIPO to tobacco industry 31st August, 1994 and
Director General WIPO to WHO, February 1995**

- ‘the fact that a mark has been registered for such goods does not give the right ... to be exempted from any limitation or prohibition of use of the mark ... ’

TRIPS Arguments

- *Article 16*

- Rights Conferred*

- 1. The owner of a registered trademark shall have the exclusive right to **prevent all third parties ... from using** in the course of trade, identical or similar signs ...
- There is **NO** positive right for the owner to use a trademark. **EC-Geographical Indications** .

Article 20 - TRIPS

- The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

TRIPS- BASIC PRINCIPLES

- Art 8 Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health ...

Doha Declaration, 2001

- ... the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. ... we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health ...

The nation decides the level of protection – not the WTO

- ‘It is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation’ : **EC-asbestos** para 168
- **Brazil – Retreaded tyres.** Brazil restricted sales of retreaded tyres because of their shorter life and resulting disposal issues relating to collection of rain water, mosquito breeding and related diseases.
- Considered ‘necessary’ under article XX of GATT

The more important the nation thinks the health issue, the more likely is the measure necessary

- **Korea – Various Measures on Beef para 162:**

a treaty interpreter ... may,... , take into account the relative importance of ... values that the law to be enforced is intended to protect. The more vital or important those ... values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

The nation need **not** prove its case beyond doubt

- **US – Continued Suspension, para 590** dispute under the SPS Agreement.
- the role of a panel is ‘not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is ... objectively justifiable.’

The industry's own views

- **Philip Morris** ' a blue pack was lower in tar and milder than the identical product in a red pack.' Marlboro Ultra –Light Pack Study: Top-Line Results, February 9, 1981 available at www.pmdocs.com
- **RJ Reynolds** 'refinements in the package consist mainly of increasing the amount of white space on the pack and lightening the brown color tones. ... these were **essential** to give the revised package the appearance of reduced strength' Etzel E Consumer research proposal: Camel Filter revised packaging Test Study March 2, 1979
- Wakefield M et al. The cigarette pack as image: new evidence from tobacco industry documents. *Tobacco Control* 2002;11(Suppl 1):i73-80.

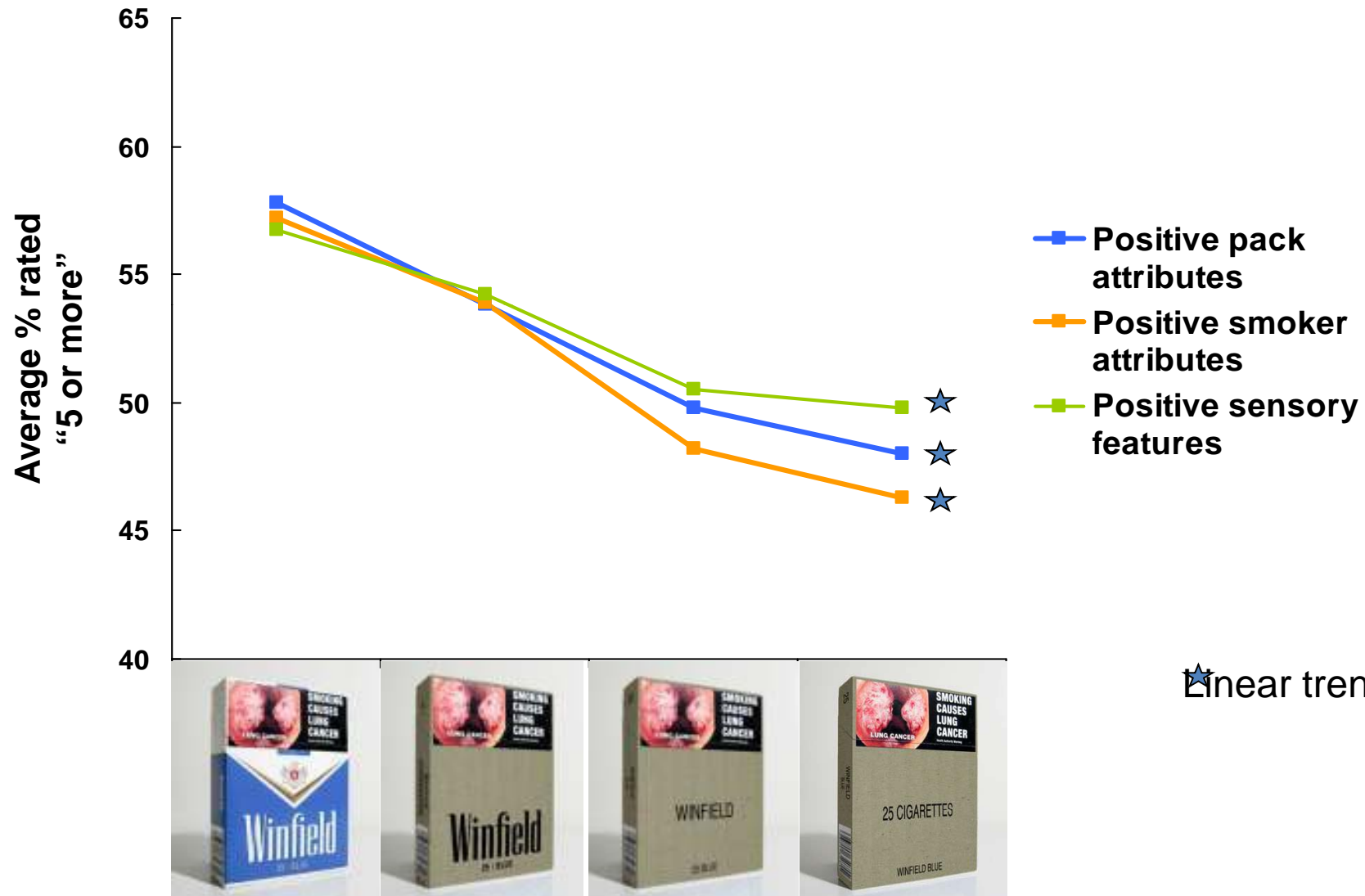
Morgan Stanley Research 2007

“In our opinion, ... the two regulatory environment changes that concern the industry the most are homogenous packaging and below-the-counter sales. Both would significantly restrict the industry’s ability to promote their products.”

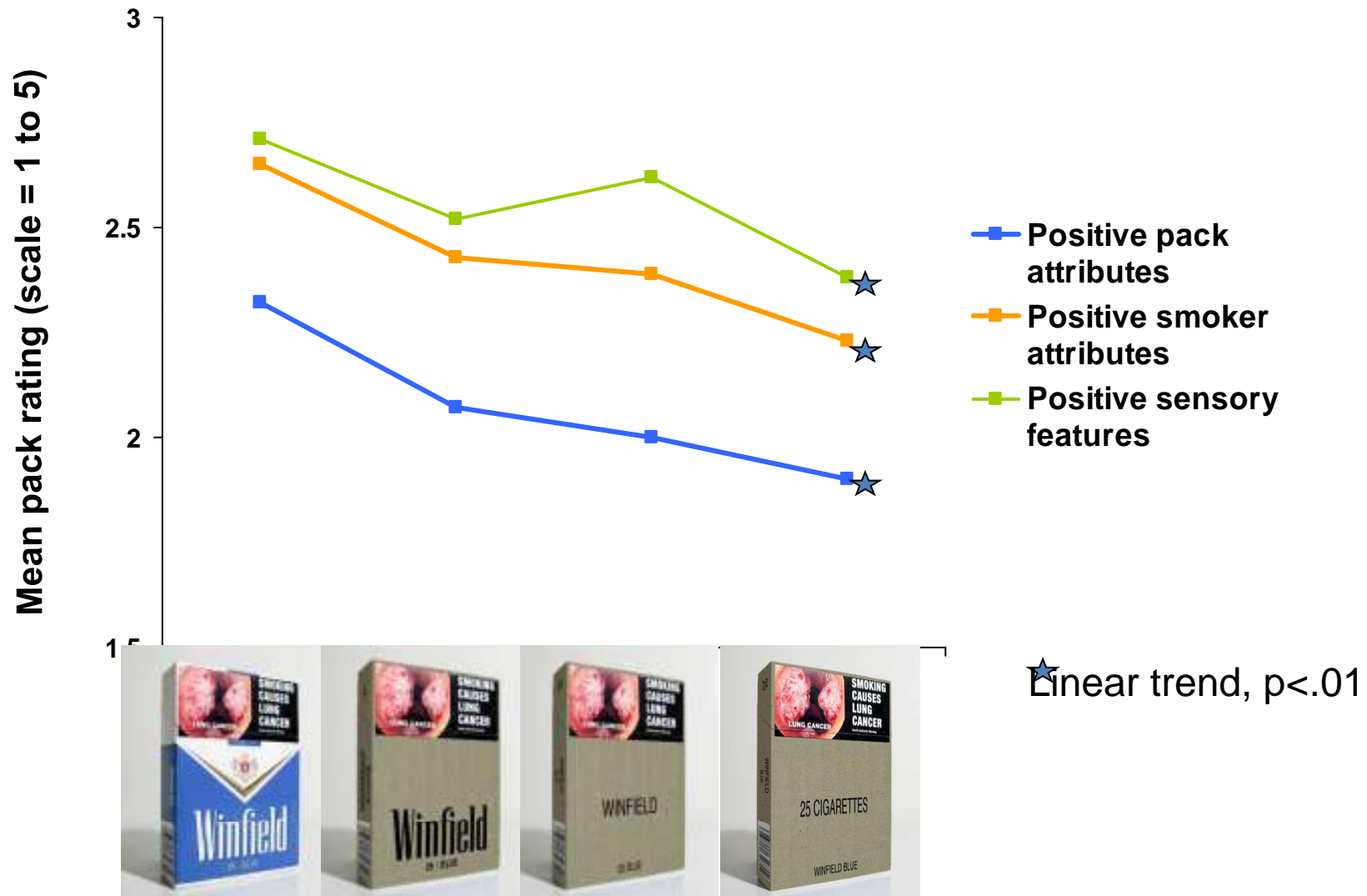
Health Canada, 1995

- ‘When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products’
Goldberg ME et al
<http://legacy.library.ucsf.edu/tid/rce50d00>
- ‘plain packaging ... would likely depress the incidence of smoking uptake by non-smoking teens, and increase the incidence of smoking cessation by teen and adult smokers.’

Cancer Council Vic - Adult Smoker Ratings



Cancer Council Vic - Adolescent Pack Ratings



Guidelines to FCTC (Framework Convention on Tobacco Control), 2008.

- Recommended plain packaging be considered by each member
- Conference of 130 **member nations** (national representatives, **NOT** bureaucrats as alleged) - **unanimously** endorsed the guidelines.
- Such guidelines **relevant** to matters of fact relating to WTO interpretation eg whether tobacco a health issue, what is necessary, etc.

TOBACCO STRATEGY GROUP
International Conference on Sales and Distribution
TSG MEETING - MAY 11th 1994

- **Plain pack group**
- Review attacks on designs and Trademarks
- Membership SAT, PMI. RJR . Rothmans . Rheemstrna, Imperial UK Gallaher
- *Strong legal accent (emphasis added)*
- **Plain pack group**
- Examining
- Treaties & conventions
- GATT/TRIPS
- **Findings**
- Current conventions & treaties afford little protection
- GATT/TRIPS little joy