

**MCCABE
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FOR LAW & CANCER**

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The role of evidence in defending against legal challenges to cancer prevention laws

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Outline

- why think about legal challenges
- kinds of legal challenges
- importance of evidence
- approaches to evidence
- who is deciding
- some lessons

Why think about legal challenges?

- when legislation / regulations adopted, can often (usually) be challenged in courts or tribunals by those whose interests are affected
- we see a lot of this with tobacco control
 - Australia, Brazil, Canada, EU, Norway, Philippines, South Arica, Sri Lanka, Thailand, Uruguay (to name a few)

Kinds of legal challenges

- domestic challenges
 - constitutional, administrative
 - rights-based, procedural
- challenges under international trade and international investment law
 - State-to-State
 - by industry under investor-state dispute settlement mechanisms

The importance of evidence

- in many (but not all) cases, resolution will ultimately depend on ‘evidence’
 - eg where lawfulness depends on concepts such as ‘necessity’, ‘proportionality’, ‘arbitrariness’, ‘justifiability’, ‘reasonableness’
 - some consideration of the relationship between the means chosen to achieve the objective and any rights impaired

Approaches to evidence

- questions of onus
 - who has to establish what?
 - does Government have to establish that a measure is 'necessary' or 'justifiable'?
 - does industry have to establish it's not? or that it's arbitrary?
- deference by courts to Government decisions / judgments
 - 'margin of appreciation'?

Who is deciding?

- adjudicators will invariably not have the expertise to understand complex behavioural, epidemiological evidence
 - judges (lawyers)
 - investment arbitrators

Some lessons

- a lot of care needs to be taken in the presentation of evidence when defending a challenge
 - admissibility
 - relevance to the legal issues
- just as (or even more) importantly, care needs to be take in the policy development process
 - what evidence is developed and used, how it is presented

Some lessons

- need to recognise that measures are often complementary and may not be able to be disentangled
 - ‘certain complex public health ... problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health ... objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy.’
 - (WTO Appellate Body in Brazil – Retreaded Tyres)

Some lessons

- need to give measures time to work

‘the results obtained from certain actions — for instance ... certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time — can only be evaluated with the benefit of time.’

(WTO Appellate Body in Brazil – Retreaded Tyres)

Some lessons

- adjudicators should show appropriate respect, sensitivity and deference
 - recognise the limitations of their own expertise
 - show respect for the way other disciplines make sense of the world

Some lessons

- how legislation / regulations are framed matters enormously
 - with thought to what can be demonstrated / ‘proved’

2010-2011

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Tobacco Plain Packaging Bill 2011

No. , 2011

(Health and Ageing)

A Bill for an Act to discourage the use of tobacco products, and for related purposes

3 Objects of this Act

- (1) The objects of this Act are:
 - (a) to improve public health by:
 - (i) discouraging people from taking up smoking, or using tobacco products; and
 - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
 - (iv) reducing people's exposure to smoke from tobacco products, and
 - (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.

- (2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
 - (a) reduce the appeal of tobacco products to consumers; and
 - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
 - (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

Conclusions

- importance of interdisciplinary work
- through all stages of policy development, implementation and evaluation
- sharing of experience and expertise

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