

As one avenue closes for **TOBACCO INDUSTRY,** another opens

Plain packaging is on the agenda but ‘below the line’ internet advertising looms large for the anti-smoking lobby. SIMON CHAPMAN discusses the latest developments with Anne Susskind.

THE *Trade Practices Act* tobacco regulations should be amended to specify exact requirements for plain packaging, and eliminate the promotion of tobacco products through packaging.

This recommendation – made last month by the Federal Government’s Preventive Health Taskforce and now open to public comment on the web – would, says Sydney University’s Professor of Public Health Simon Chapman, mean all that would be allowed would be a colour-free standardised box, with only a brand name and health warning.

While several countries had plain packaging on the agenda, the UK and Canada among them, Chapman, who is on the government taskforce and is a leading anti-tobacco campaigner internationally, said Australia could well be the first to introduce this kind of legislation, which would “without any doubt” result in the tobacco industry trying to take the government to court.

At present, he said, our health warnings on cigarette packaging were the biggest in the world, but perhaps not the most gory. That honour belonged to Brazil and Thailand – which had the most

advanced tobacco control legislation, and had warnings which were “arguably even worse”.

Plain packaging was the issue of most concern to the industry because it was a key promotional tool in a climate where advertising was banned, Chapman said. Research had shown that brand imagery distracted from and reduced the impact of health warnings.

Legal argument

In a recent article in the journal *Addiction*, Chapman and his co-authors, Becky Freeman and Matthew Rimmer, said the tobacco industry was heavily reliant on trade-mark protection to communicate with consumers and exclude rivals from the market place.

Industry lawyers, they said, argued that plain packaging regulations would violate minimum obligations for the protection of intellectual property rights under international agreements such as the Agreement on Trade Related Aspects of International Property Rights 1994 (TRIPS). Industry lawyers maintained that plain packaging offended Article 20 of TRIPS, which provided that use of a trade mark in the course of trade was not to be encumbered unjustifiably by special requirements,

and that plain packaging would “undermine the very purposes underlying trade mark protection and the reason why trade marks are given protection under the agreement”. It would curtail, or even annul, tobacco companies’ most valuable asset – trade marks.

On the other side, the argument made by public health advocates maintained that nation states should be able to take advantage of flexibilities in international trade agreements to protect public health, and argued that plain packaging regulations were consistent and compliant with the obligations of multilateral and regional trade agreements.

Trade mark law did not merely serve the limited purpose of protecting private property rights, but ultimately also supported the broader public interest in providing accurate information to consumers.

In this light, the argument

ran, plain packaging of tobacco seemed an eminently reasonable and justifiable measure, entirely consistent with the goal of promoting consumer welfare.

In a Canadian case involving Peter Morris, a Canadian professor of international trade law, Professor J.G. Castel, had said plain packaging fell within the GATT provisions, the Agreement on Technical Barriers to Trade, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and NAFTA applicable to trade in goods, which contained numerous provisions that recognised “the health exception”. Even if one considered the issue of trade marks in isolation, there was enough in the NAFTA chapter on intellectual property and in TRIPS to allow for a health exception, Professor Castel had said.

Castel had observed further: “It would be unheard of and

The free-for-all of internet social networking provides opportunities for ‘viral’ marketing of tobacco. This Facebook site boasts thousands of friends for Lucky Strike.



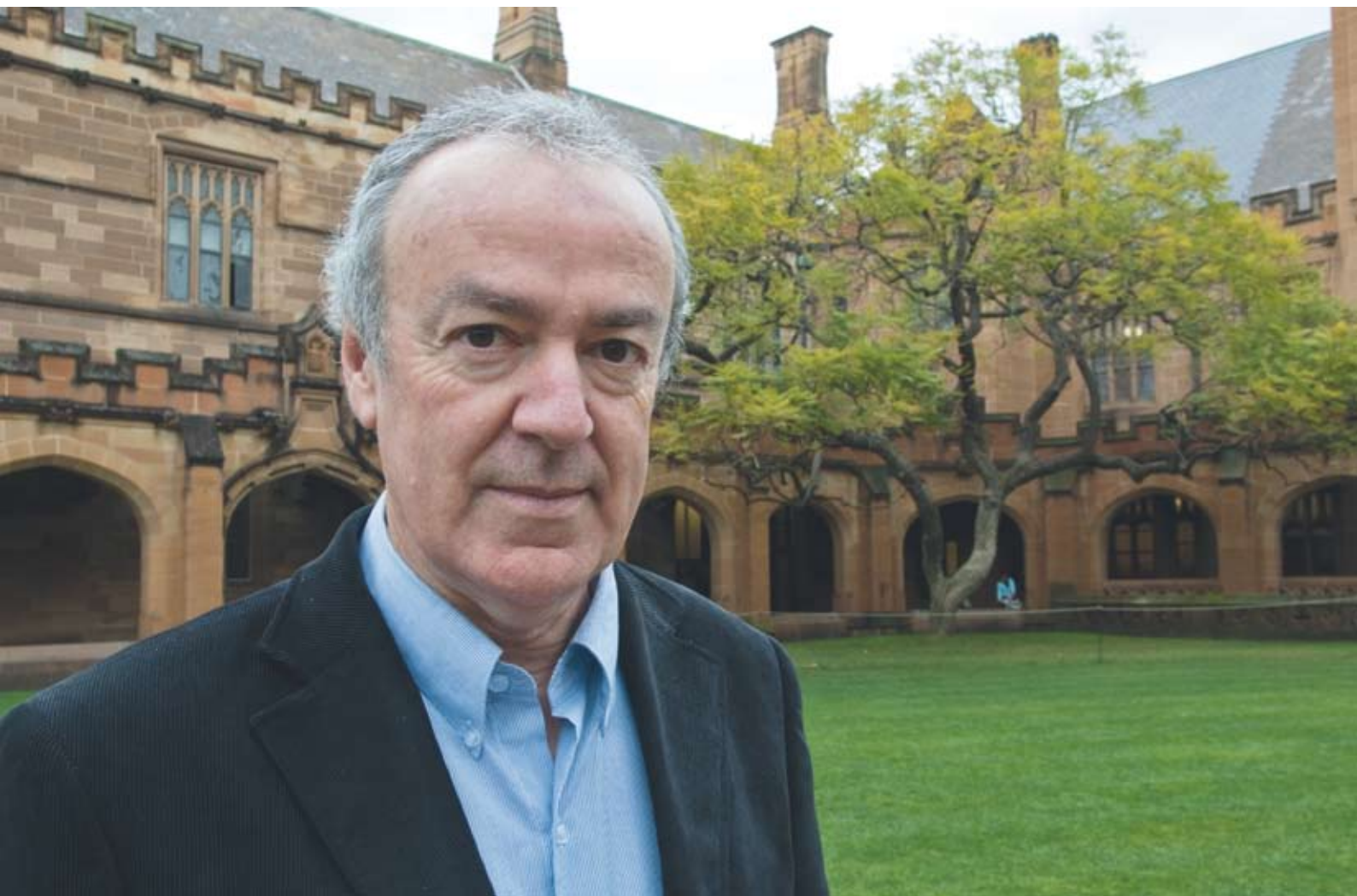


PHOTO: BRENT MILTON

contrary to international practice if Canada could not take necessary health measures to project its population without having to pay enormous sums of money to the American tobacco industry.”

In their paper, Chapman, Freeman and Rimmer went on to say that there was a strong

case to exclude tobacco from all trade agreements, and empower the 2003 Framework Convention on Tobacco Control (FCTC), which had been ratified by 166 nations, and banned all tobacco advertising and promotion, to assume priority over trade agreements.

And, they argued, although

The University of Sydney’s Simon Chapman says Australia could be the first country to mandate plain packaging for cigarettes.

they knew of no precedent laws requiring plain packaging for any other commercial goods, it was relevant that in Australia, for example, there was a voluntary de facto system of generic packaging for pharmaceuticals requiring prescriptions, which used only different colours or colour bars to distinguish between different strengths, and to assist the pharmacist in providing the correct drug.

“Such drugs are packaged in essentially plain packs, with no attention-getting features to entice either users or the mediating doctors who are required to prescribe such drugs. Prescription-only drugs and many other non-prescription, but ‘under-the-counter’ drugs where a sale is required to be handled by a pharmacist, do not see their manufacturers seeking to imbue such products with qualities of ‘brand identity’ or ‘personality’ via

packaging and other devices. The potential for abuse of such products (for example psychotropic and analgesic drugs) is such that nearly every society requires their advertising to be restricted to only prescribing doctors, that they not be displayed openly in pharmacies and that customers be counselled on their correct use and contraindications.

“Cigarettes, which cause the death of 50 per cent of their long-term users, are sold in very different circumstances: in nearly all nations, there are no restrictions on where they may be sold, ineffective policing of their supply to minors and, other than accommodating prescribed warnings, no restrictions on packaging.

“This paradox, whereby lifesaving drugs are regulated heavily and life-harming drugs such as nicotine sold in tobacco products are subject to

What we might see on cigarette packaging if Simon Chapman and other anti-tobacco campaigners get their way.

IMAGE COURTESY SIMON CHAPMAN

The cigarette pack in 2010?



few restrictions, requires radical change. Plain packaging would be an important step in that direction," the *Addiction* article concluded.

Below the line

And, again despite the fact that 166 nations had ratified the 2003 Framework Convention on Tobacco Control, which banned all tobacco advertising and promotion, the law still needed to catch up with the internet in this area.

While Australia had banned 'above the line' advertising for tobacco products in magazines, on billboards, radio and TV, the industry was now engaging in 'below the line' advertising, for example, using market research on the web to help design new brand packaging.

Chapman said that from the market research, which was not banned, companies were also trying to develop websites for particular brands which are "immensely interesting to young people". This was, he said, called "viral or buzz" marketing.

On YouTube, he said, if you put in 'smoking', alongside the anti-smoking material about 120,000 clips came up, often showing scantily clad young women saying how they loved a particular brand of cigarette.

"The tobacco companies always say 'it's nothing to do with us', but it's not difficult to imagine that in the environment in which they operate, that they wouldn't be too disappointed if there was a lot of stuff extolling the virtues and merits of their products. I have also found examples of tobacco companies starting Facebook pages ... [LSJ found fan clubs with thousands of fans for Benson & Hedges and Lucky Strike].

"The number of people on Facebook makes the Facebook community equivalent to one of the most populated countries in the world. For example, I have 120 friends, and if any of them posts a message, they get to see the messages that the other people are posting and if one is to British American Tobacco's Lucky Strike page, it is there for everyone to see every time they browse through." □

Clouds remain LEGAL SERVICES

DESPITE THE FACT THAT the mood around town is upbeat these days, below the bonhomie it seems lawyers may still be worried about the GFC, with a substantial number believing it may not be over until 2011 and beyond.

Much has been written about the crisis and its impact on various sectors of the economy. To ascertain current sentiment in the legal services market, Elias Recruitment in association with the *Law Society Journal* undertook a survey in July/August 2009. The following results, based on 119 survey responses, provide a snapshot of how the legal profession is faring.

While a small number (8.5 per cent) of respondents have felt a slight positive impact and 1.7 per cent a significant positive impact, and some 23.9 per cent of respondents felt that the GFC had not affected their firm in the last six months, a clear majority (66 per cent) felt that it had. Over a quarter deemed this negative effect to be significant, while around 40 per cent felt it was slight.

With the squeeze on credit and market uncertainty, the deals lawyers rely on for work have dramatically decreased. Coupled with declining share and property prices, lawyers are feeling the impact.

Law firms with over 80 partners (large firms) have been hit hardest, with exactly half reporting that the GFC had a significant negative impact and 33.3 per cent reporting a slight negative impact. Anecdotally, firms with large litigation sections and government work fared better.

Firms with between 30 to 80 partners (medium firms) seemed to do better with only 20 per cent reporting a significant negative impact. Sixty per cent felt a slight nega-

tive impact, with the balance equally divided between none or slight positive impact.

Law firms with 10 to 29 partners (small-mid firms) were better placed, with over 30 per cent saying the last six months have been positive (23.1 per cent slightly positive and 7.7 per cent significantly so). This is reinforced by 15.4 per cent reporting a neutral impact.

Practices with fewer than 10 partners (boutique firms) have been doing it tough, with 24.4 per cent noting a significant negative impact, and 39.5 per cent a slight negative impact. Some 29.1 per cent felt no change, while less than 8 per cent felt any positive change.

Recovery sentiment

Only 18.9 per cent of respondents anticipated an improvement in economic conditions for their firm before the end of this calendar year. Some 36.9 per cent felt conditions would pick up in the first half of 2010, while 21.3 per cent anticipated this in the second half of 2010. 12.6 per cent did not anticipate improvement before 2011 or beyond. A small number commented that they had already experienced a turn-around, especially insurance-focused firms.

Practice areas

Practices most adversely affected were transactional in nature including commercial and property/conveyancing (although the first-home buyers' grant has helped).

Negative effects were also felt in corporate and banking and finance and to a lesser degree employment, intellectual property and construction practices.

However, there was little negative or even some positive impact on litigation, insolvency, wills and estates, insurance, family and criminal

practices. Growth in litigation and insolvency is an obvious consequence of any economic downturn, and areas such as wills and criminal are fairly recession-proof. Anecdotally, many insurance lawyers are claiming that the market has been the best since the introduction of NSW tort reform. Family lawyers mentioned that widespread financial pressures are putting strain on relationships. Tax and infrastructure were also mentioned as being fairly insulated.

In the large firms, commercial, corporate and property were hardest hit, while insurance, litigation and insolvency remained buoyant. The medium firms also felt effects in property (especially in Sydney), commercial and corporate transactions including mergers and acquisitions, and banking and financial services. Insurance, insolvency and litigation were travelling well, as was probate, health/aged care, workplace relations and mid-cap corporate deals.

Small-mid firms reported a decline in property and commercial work as well as intellectual property, with mention made of a decline in mental health and local government matters. Insurance, commercial litigation and insolvency were also travelling well in these firms as was family law, workouts and recoveries. Some small-mid firms also mentioned conveyancing, infrastructure, planning and construction going well.

Boutique firms reflected the decline in property, especially conveyancing and higher value sales, and commercial and banking-related work. However, probate, government, insolvency, criminal, family, estate and first-home buyer conveyancing were not as badly affected.

Head count

Overall, 28.4 per cent

over sentiment in MARKET

reported a slight decrease in staff numbers and 12.9 per cent a significant decrease. Some 10.3 per cent reported a slight increase. Almost half (47.4 per cent) reported no change, although this is likely due to the large number of boutique firms who responded. In the top end of town, two thirds of large firm respondents noted a significant decrease. In medium firms, around 70 per cent had a slight decrease, with equal numbers having a significant decrease, no change or slight increase. Of small-mid firms only 23.1 per cent reported decreases in head count, all of which were slight. Some 46.2 per cent reflected no change, while over 30 per cent actually increased head count.

Staff lay-offs

Many firms have been avoiding laying off fee-earning staff. Areas most affected include general corporate, commercial, and property (including conveyancing), migration, personal injury/motor vehicle, banking, corporate finance, financial services, securitised mortgages, climate change,

tax and asset management. Lay offs in the large firms tended to be across several practice groups. A third of respondents from medium firms indicated that they did not let any fee-earners go, and those that did were in property, corporate, commercial and banking. In the small-mid firms, few let fee-earners go and, when they did, they were in specialised areas like climate change and securitised mortgages. Boutique firms have had lay-offs in personal injury, property (including conveyancing) and migration. Many employers have used the GFC as an opportunity to cut out the "deadwood" or "non-performers".

Human resource retention strategies

To avoid lay-offs, firms adopted a number of strategies, including not replacing departing staff (30.7 per cent), salary freezes (26.4 per cent) and cutting discretionary overheads (20.2 per cent). Some also reduced work hours (9.8 per cent), but salary cuts were rare (1.8 per cent), and large

firms utilised sabbaticals (1.8 per cent).

Likely growth areas

While around half of respondents indicated that they did not plan to hire in the next 12 months, those who did were most likely to hire in commercial, property, intellectual property, commercial litigation, dispute resolution, family, wills and estates, personal injury and workplace relations and employment.

Challenges ahead

Many respondents felt that the biggest challenges facing the legal profession in the next 12 months included:

- maintaining the quality of service with lowered fees as clients experiencing budget constraints demand better value;
- insufficient work, particularly considering the large number of unemployed graduates (some saw the failure of recruiting this year's graduates as a source for future shortages);
- maintaining staff morale;
- retaining trained staff;
- dealing with tighter budgets and containing costs;
- retaining and attracting new clients;
- differentiating the firm from competitors;
- government regulation and compliance;
- recovering fees, cash flow;
- pricing;
- succession and mergers;
- image of the profession (negative perceptions of over-charging); and
- curtailing direct barrister/client contact and difficulty in re-skilling in other areas to ride out the downturn.

Survey composition

The majority of survey participants (74.8 per cent) were from boutique firms. 5.2 per cent of respondents were from large firms, 8.7 per cent from medium firms and 11.3 per cent from small-mid firms. The survey was open to responses from 14 July to 31 August 2009, and conducted by Elias Recruitment (www.eliasrecruitment.com) in association with the *Law Society Journal*. Enquiries to Jason Elias on 9264 5513.

