

**IMPROVING PUBLIC HEALTH THROUGH BEHAVIOURAL
RULES: A LEGITIMATE LEGISLATIVE PROJECT OF A NANNY
STATE OR A NUDGE STATE?**

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Abstract

This paper concerns the proper role of government, when adopting legislative rules to improve public health. These rules have led to claims that governments embrace paternalism as a legislative principle which, in turn, facilitates the creation of the nanny state. However, whilst the nanny state controls or even prohibits behaviour which the state deems to be harmful, the nudge state merely influences and manipulates peoples choices by making non-wanted behaviour economically expensive or socially undesirable. The paper provides examples of nudge state intervention in the health sector and, in particular, critically assesses the Australian plain packaging legislation. Ultimately, it is argued that nudge state measures are futile and obstruct the proper role of government.

I Introduction

ONE OF the perennial legal and political issues of our time concerns the proper role of government in society. During the last decades, governments have been very interventionist to ensure that citizens are protected against many evils, identified by the legislator. This intervention led to the creation of the nanny state which, in relevant cases, largely replaced the free choice of individuals with the decision making power of the government. This intervention generated a discussion about the extent to which governments should embrace paternalism as a principle of legislation. However, this principle has proven an unpopular and burdensome imposition upon society because it resulted in governments taking those decisions which presumably the individuals should be able to take. For this reason, supporters of nanny

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state interventionism have more recently sought to moderate their approach through the medium of a nudge state, though in goal and philosophy they are very similar. This similarity arises from the fact that the nudge state seeks to achieve the same objectives, not by prescriptively controlling, forbidding or compelling the behaviour of individuals (as is usual under nanny state interventionism), but by making this behaviour economically expensive or socially undesirable.

This paper deals with the issue of nudge state interventionism involving the legislative adoption of behavioural rules to improve public health. In addressing this issue the authors consider whether improving public health through behavioural rules is a legitimate legislative project that comes within, and is supported by, the proper role of government.

Following this introduction, the second part of this paper examines two competing philosophies of the appropriate role of the state in relation to public health: the nudge state versus the libertarian approach. This part also contrasts the relatively non-interventionist approach of the common law developed by judges with the sternly interventionist tendencies of legislatures, which consists of politicians. The third part surveys the myriad of nudge state measures that governments have seen fit to introduce in recent years. The fourth part considers the undesirability of such measures as a matter of policy. The fifth part discusses the international legal objections to such measures, using the tobacco industry as a case study. The findings of this paper are summarised in the final section.

II Two competing philosophies of the proper role of the state

The nanny state and the nudge state: A distinction without a difference?

The term nanny state is a familiar description of the tendency of many modern governments to treat [their] citizens as children in a nursery,¹ supervising and influencing their choices according to the government's view of their well-being. Such an approach is authoritarian and paternalistic imposing on people what is good for them, for nanny knows best.²

The supporters of the nudge philosophy seek to make nanny less obvious and to preserve free choice. They rather wordily define a nudge as any

1 R.W. Holder, *How Not To Say What You Mean: A Dictionary of Euphemisms* 269 (Oxford University Press, 2007).

2 John Ayto and Ian Crofton, *Brewer's Dictionary of Modern Phrase and Fable* 520 (Weidenfeld & Nicolson, 2006).

aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives.³ According to Richard Thaler, the nanny state is coercive (such as by banning cigarettes) while the nudge state seeks to make it easier for people to move in a pre-determined direction that is favoured by the state (such as quitting smoking).⁴ The nudge state philosophy thus seeks to manipulate and influence people's choices, not by banning these choices, but by making it more difficult to freely choose or by making the choice socially undesirable. As such, although nanny does not make the decisions (for example, that people should not smoke), it influences individuals' choices to smoke. The philosophy is manipulative and nanny is still behind the curtain, superintending what everyone is doing.

The nudge state philosophy is cut from the same cloth from which the nanny state was fashioned. Both philosophies are zealously paternalistic: At the core of nudging is the belief that people do not always act in their own self-interest.⁵ Underlying that philosophy is the notion that the state can make better choices for citizens than those which citizens will make for themselves if left to their own devices. This worldview seeks to protect consumers even where they do not want protection, overriding consumer preferences to improve public health.⁶

A patronising sense of entitlement, to a guiding role over the lives of others pervades such policies. The nudge state seeks to coax and cajole autonomous adults into healthier decision making⁷ and to steer citizens towards making positive decisions as individuals and *for society* (emphasis added).⁸ While an educational programme is directed at the conscious mind, a nudge is a covert psychological influence.⁹

3 Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* 5-6 (Yale University Press, New Haven, 2008).

4 Interview with Richard Thaler, *HARD talk*, BBC World Service, Oct. 24, 2012, available at: <http://www.bbc.co.uk/podcasts/series/ht/all> (last visited on Nov. 15, 2015).

5 Katrin Bennhold, The Ministry of Nudges *New York Times*, Dec. 8, 2013.

6 Katherine Pratt, A Constructive Critique of Public Health Arguments for Antiobesity Soda Taxes and Food Taxes 87 *Tulane Law Review* 73, 107 (2012).

7 Jonathan Cummings, Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages 34 *Seattle University Law Review* 273, 294 (2010).

8 Alberto Alemanno, Nudging Smokers: The Behavioural Turn of Tobacco Risk Regulation 1 *European Journal of Risk Regulation* 32 (2012).

9 *Id.* at 37.

The nudge philosophy even made its presence felt in the formal structure of government. The British coalition government has established a behavioural insights team, popularly known as the nudge unit.¹⁰ This unit attempts to apply insights from behavioural psychology to the formation of governmental policy, seeking to influence individual behaviour in line with government policy objectives. The state thus employs people who are actively charged with dreaming up new ways to interfere in the lives of ordinary people. The unit's internet blog ranges over the staggeringly wide field in which they offer their valuable insights: from obesity, tax compliance, literacy, numeracy and organ donation, down to household appliances, loft insulation, mobile phone theft, Christmas presents, plastic shopping bags, staircases, and penalty shoot-outs.¹¹

The interventions made by the nudge state are not always irreversible. From time to time, one comes across an example of government action that involves an apparent reversal of the nudge state paternalistic philosophy. For example, the recent decision of the Government of Hong Kong to abolish tax on wine does not fit into any model of state interventionism which is considered in this paper. At best it may support the view that Hong Kong is a free market economy and the government wants to promote Hong Kong as a tourist destination. The financial secretary expected that, by developing various businesses in Hong Kong relating to quality table wine, our total business volume in trading, storage and auction of table wine may increase by as much as HK\$4 billion.¹² Thus, this example indicates that the nudge state philosophy may be arrested for the purpose of achieving trade-related objectives. Although the focus may be on an improvement of trade figures, the government is indirectly promoting consumption of alcohol, which is what has happened in Hong Kong. Indeed, the consumption of alcohol has increased in Hong Kong since 2009. The percentage of people aged 18 to 24 engaged in binge drinking has risen each year from 7.4% to 9.8% in 2010 and 2012 respectively.¹³ Thus, although Hong Kong has become a wine city after

10 The unit has recently left the cabinet office and is now a social purpose company, available at: <http://www.behaviouralinsights.co.uk/blogpost/behavioural-insights-team-social-purpose-company> (last visited on Sep. 17, 2015).

11 *Ibid.*

12 Available at: <http://www.china-briefing.com/news/2008/02/27/hong-kong-eliminates-duties-on-alcohol.html> (last visited on Nov. 12, 2015).

13 Available at: <http://www.scmp.com/news/hong-kong/article/1512953/officials-look-taxes-and-ads-curb-binge-drinking?page=all> (last visited on Aug. 29, 2015).

abolishing tax on wine, this abolition has come with a heavy price in terms of increased alcoholism, binge drinking and illness related to drinking.¹⁴

But in general, there is little difference in substance between the nanny state and the nudge state. The nudge state is simply an attempt to rebrand the way in which governments seek to influence the choices made by their citizens. As the nanny state has been rejected by the citizenry because of its paternalistic characteristics, a nudge state government seeks to influence individuals preferred choices by manipulating the choice. In doing so, nudge state governments often adversely impact on the rights and interests of the suppliers of these choices. Thus, the nanny state and the nudge state legislative programmes are both based on, and inspired by, the same nanny knows best philosophy. In essence, it is a distinction without a difference.

A libertarian philosophy of law

In contrast, a libertarian philosophy provides a socially healthy alternative to the implantation of the principle of paternalism. According to libertarian philosophy it is not the role of the state to hold the hands of adults of full capacity as they make their way through commercial life. This libertarian philosophy emphasises both personal choice and acceptance of individual responsibility for the consequences of those choices: people should be free to choose whether to live in ways that are healthy or unhealthy and take personal responsibility for their own health.¹⁵ Every time the government seeks to mould individual economic and social choices, personal freedom is diminished, therefore very strong justifications should be demonstrated for such interventions. Interference should be a last resort, not a reflex instinct.

Common law libertarianism versus legislative paternalism

Most nanny state or nudge state interventions take place by way of legislation rather than as judge-made law. Many rules of the common law and equity have libertarian characteristics, generally holding parties to their bargains and resisting the temptation to abolish or revise obligations freely undertaken merely because their outcomes subsequently prove disadvantageous to a party. Several recent decisions by Australian courts are illustrative of the libertarian tendencies of the common law.

14 *Ibid.*

15 *Supra* note 6 at 110, 129.

In a recent Australian High Court decision, over a 14-month period the appellant had lost over \$20 million while gambling at a Victorian casino.¹⁶ He had a compulsion to gamble, though he was able to control that compulsion. In a unanimous judgment the court rejected the gambler's unconscionability claim against the casino. Gambling was a rare commercial activity in which each party inherently sought to cause financial damage to the other party.¹⁷ The appellant was a wealthy high roller. He did not suffer from a constant compulsion that would have prevented him from staying away from the casino.¹⁸ He was able to stay away when he so wished.¹⁹ He had also gone to considerable lengths to convince the casino that his previous gambling problems were now past.²⁰

Two passages from the judgment reflect the court's reluctance to set aside commercial transactions. *First*, the court observed that, equitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business. A plaintiff who voluntarily engages in risky business has never been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business.²¹ Thus, equity did not characterise as victimisation the ordinary operation of a lawful commercial activity.²² It would be a different matter if a casino encouraged a pensioner to cash their pension cheque to fund gambling or if a gambler who was drunk or under an incapacity, had been encouraged to continue to gamble.²³

Second, the court also emphasised that indifference to the welfare of the other party to an arms length commercial transaction would not justify equitable intervention:²⁴

Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests

16 *Kakavas v. Crown Melbourne Ltd.* (2013) 250 CLR 392 at [1]; [2013] HCA 25.

17 *Id.*, para 25.

18 *Id.*, para 23.

19 *Id.*, para 33.

20 *Id.*, para 36.

21 *Id.*, para 20.

22 *Id.*, para 26.

23 *Id.*, para 30.

24 *Id.*, para 25.

of the other party is not sufficient for this purpose. The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arms length commercial transaction.

Similarly, the Australian Federal Court recently held that a banks honour, over limit and dishonour fees did not constitute unenforceable penalties. These fees were not dependent upon a breach of contract. They were payable where the bank provided an additional service or accommodation to the customer.²⁵ Only the banks fee for late credit card payments constituted a penalty. That fee was payable upon a breach of contract by the customer.²⁶ The fee was used *in terrorem* to deter a breach and was extravagant and unconscionable in amount in relation to the banks losses from the breach.²⁷ This decision was affirmed by the full Federal Court.²⁸

In stark contrast, the legislative and executive branches (as opposed to the judicial branch of government) of many western governments appear to be faithfully devoted to nudge state interventions. All of the numerous health-based interventions discussed below have arisen from legislative or executive action.

III Nudge state interventions in the name of health

Australia s plain packaging law

One of the most controversial nudge state interventions is the Australian federal law which provides that tobacco products may be sold only in generic packaging. The exterior of Australian cigarette packs must be dark drab brown in colour and have a matt finish.²⁹ The executively mandated specific colour is reputed to be the worlds ugliest colour .³⁰ The interior of packs must be white.³¹ The legislation effectively guts valuable tobacco trademarks of any economic significance. Trademarks may not appear on cigarette

25 *Paciocco v. Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at 161; [2014] FCA 35.

26 *Id.* at 4.

27 *Id.* at 182.

28 *Supra* note 25.

29 Tobacco Plain Packaging Act, 2011, s. 19(1)-(2).

30 Rachel Wells, Does this colour turn you off? *The Age*, Aug.17, 2012. The specific colour is set by the regulations (Pantone 448C). See, Tobacco Plain Packaging Regulations, 2011, r 2.2.1(2).

31 Tobacco Plain Packaging Regulations, 2011, r. 2.2.1(3) (Cth).

packaging, other than a single use of the brand name.³² Even the size, typeface and colour of the brand name are closely regulated.³³ Trademarks may not appear on the cigarettes themselves³⁴ or the packet wrappers.³⁵ Ugly graphic health warnings must take up 75% of the front of packets and 90 % of their reverse side.³⁶

Tightening of tobacco rules in India

As from April 1, 2015, the Government of India requires 85% of the surface area of all cigarette packs on both sides of the pack to be covered with pictorial warnings as well as written warnings.³⁷ This requirement has made India, together with Thailand, a reliable supporter of tightening tobacco advertising rules. In Australia and Uruguay, on average 82.5% and 80% of the surface area is covered with pictorials and letter warnings respectively.³⁸ Prior to adopting these rules, India ranked 136 out of 198 countries that use pictures on the pack of cigarette packs to warn smokers of the dangerous consequences of smoking. In effect, the Government of India has taken a nudge state approach by stating that, the war against tobacco consumption is very important for everybody to win and that this new requirement will tell each and everyone, including potential users of cigarettes, that tobacco means nothing else except death.³⁹ The tobacco lobby criticised these developments by commenting that the proposed warnings are unreasonable, drastic and impractical to implement and enforce.⁴⁰

New York's portion cap rule

The New York City Board of Health famously adopted a sugary drinks portion cap rule, which limited the size of the cups in which sugary drinks could be served by food service establishments. Such cups could be no

32 Tobacco Plain Packaging Act, 2011, ss. 20(1), (3), 21(2) (b) (Cth).

33 Tobacco Plain Packaging Regulations, 2011, r 2.4.1 (Cth).

34 Tobacco Plain Packaging Act, 2011, s. 26(1) (Cth).

35 Tobacco Plain Packaging Act, 2011, s. 22(2)(b) (Cth).

36 Competition and Consumer (Tobacco) Information Standard, 2011, ss. 9.13(1), 9.19(1), (Federal Register of Legislative Instruments F2013C00598).

37 Available at: <http://in.reuters.com/article/2014/10/15/india-tobacco-cigarette-idINKCN0I40P220141015> (last visited on Sep. 22, 2015).

38 Available at: <http://indianexpress.com/article/india/india-others/indian-government-tightens-rules-health-warning-to-cover-85-space-on-tobacco-pack/> (last visited on Aug. 30, 2015).

39 *Supra* note 37.

40 *Ibid.*

larger than 16 fluid ounces.⁴¹ The New York Court of Appeals ultimately held that the rule was unconstitutional as its adoption by an administrative body violated the separation of legislative and executive power under the New York City Charter.⁴² However, while the ban on giant sodas was widely ridiculed, such paternalistic strictures are likely to re-emerge elsewhere, perhaps in different guises but with the same intentions.

Denmark's fat tax

Samuel Johnson long ago described taxes on goods as hateful while Blackstone called them odious.⁴³ Legislators now drape themselves in justifications of health objectives while imposing such taxes. Taxes upon unhealthy foods are an extension of the old legislative practice of piously levying sin taxes upon disfavoured goods such as tobacco or alcohol.⁴⁴ Thus far, the most extraordinary food tax has been Denmark's wide-ranging fat tax.

A 2011 Danish statute imposed a special tax upon foods that were high in saturated fat.⁴⁵ A tax of approximately 2.15 per kilogram of saturated fat was imposed upon a range of domestic and imported foods. These foods included meat, margarine, animal fats, cooking oils and some dairy products. The tax was payable only if a specified percentage of saturated fat content was exceeded. Most milk fell below this threshold and was not taxable.⁴⁶ This imposition of fat tax was extremely unpopular and the Danish Parliament repealed the tax after just a single year in operation.⁴⁷ Anticipating a similarly adverse reaction, the government also abandoned its plans for a sugar tax.

41 *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*, 23 NY 3d 681 at 690-691 (2014).

42 *Id.* at 690, 693. See, New York City Charter, s. 21.

43 Sir Harry Gibbs, *A Hateful Tax? Section 90 of the Constitution* 5 *Upholding the Australian Constitution* 121, 123 (1995).

44 Robert Creighton, *Fat Taxes* 31 *Journal of Legal Medicine* 123 (2010).

45 Act no. 247 of Mar. 20, 2011, available at: <https://www.retsinformation.dk> (last visited on Sep. 20, 2015). The Act is summarised in Susie Størk Ekstrand and Kristine Lillholt Nilsson, *Danish Parliament Approves Fat Tax* 2 *European Food and Feed Law Review* 126 (2011).

46 Alemanno and Carreño, *Fat Taxes in Europe: A Legal and Policy Analysis under EU and WTO Law* 2 *European Food and Feed Law Review* 97, 102 (2013).

47 Act no. 1395 of Dec. 23, 2012, art. 1, available at: <https://www.retsinformation.dk> (last visited on Sep. 20, 2015).

Soda taxes and other tax strategies

Sugar has also been in the fiscal sights of legislators. Numerous states in the US impose soda taxes upon sugary beverages.⁴⁸ Legislators have also charged differential tax rates depending upon the nutritional content of the food. Under the Canadian goods and services tax, basic foodstuffs are not taxed, whereas junk foods are subject to the full rate of the general sales tax (GST).⁴⁹ Legislators have also experimented with tax incentives. The Canadian Federal Government and some provinces have also offered tax credits for various activities that may promote physical fitness.⁵⁰ Under the Australian GST processed foods are taxed but unprocessed foods are not subject to the tax.⁵¹

Hong Kong: payments for plastic shopping bags and a requirement to switch off car engines while waiting

The Government of Hong Kong, acting as a nudge state legislator, has relied on environmental arguments to change the behaviour of individuals. As a geographically small place, disposal of solid waste has been a serious concern for the Government of Hong Kong. According to a report, published in 2008, the average disposal of solid wastes per day stood at 13,503 tonnes. It was estimated that, on average, one person uses and discards three plastic shopping bags in one day which translates into over eight billion plastic shopping bags every year.⁵² To curb the indiscriminate use of plastic shopping bags which was causing a major and visible environmental problem, the Hong Kong Government introduced a levy of 50 cents on each plastic shopping bag. The objective of the scheme is to provide an economic

48 J Angelo DeSantis, Formulating A Soda Tax Fit For Consumption: A Pragmatic Approach to Implementing the Failed New York Soda Tax 16 *Michigan State University Journal of Medicine and Law* 363 at 397-398 (2012). In 2010 such a proposal failed in the State of New York, 367-370. For historical lists of state soda taxes see, Michael F Jacobson and Kelly D Brownell, Small Taxes on Soft Drinks and Snack Foods to Promote Health 90 *American Journal of Public Health* 854 at 855-856 (2000).

49 Nola M Ries, Legal and Policy Measures to Promote Healthy Behaviour: Using Incentives and Disincentives to Control Obesity 6 *McGill Journal of Law and Health* 1, 19 (2012).

50 *Id.* at 15-16.

51 A New Tax System (Goods and Services Tax) Act 1999, ss. 38.2-38.4 and sch 1 (Cth).

52 Available at: <http://www.epd.gov.hk/epd/psb/en/intro.html> (last visited on Aug. 12, 2015).

disincentive to users of plastic shopping bag and, instead, to encourage them to use their own shopping bags.⁵³ This levy, presumably, also helps retailers because they do not have to pay for environmental damage caused by their customers. If retailers collude with customers or do not charge the levy, then retailers commit an offence and they would be subject to a maximum fine of HK\$100,000 for the first offence and HK\$200,000 for a subsequent offence.⁵⁴ The ultimate aim of the government is to bring about behavioural changes by reducing the excessive use of plastic shopping bags and to encourage people to embrace BYOB (bring your own bag).⁵⁵

In a similar effort to protect the environment and to change the behaviour of individuals, the Government of Hong Kong now requires a motor vehicle to be switched off if it is stationary for more than three minutes in any 60 minute period. This is a governmental response to the practice of taxis and buses to keep their engines running, thereby causing environmental problems. The violator of this requirement has to pay a fixed penalty of HK\$320 and a substantially increased fixed penalty for subsequent violations.⁵⁶ One can certainly agree with the government that, allowing idling vehicles to run their engines causes air pollution, heat and noise nuisance and wastes fuel, thereby contributing to global climate change.⁵⁷

Not the toys

The nudge state philosophy has even extended as far as seeking to veto parental choices regarding childrens diets, with several cities in the US prohibiting restaurants from offering free toys with their meals unless those meals meet certain nutritional standards.⁵⁸ This is state paternalism seeking to undercut parental decision making regarding the diets of their children. One television programme satirised this ordinance as giving kids the menu choice of the Crappy Meal , equipped with the Periodic Table of Elements,

53 *Available at:* http://www.epd.gov.hk/epd/psb/en/faq_public01.html (last visited on Aug. 19, 2015).

54 *Available at:* http://www.epd.gov.hk/epd/psb/en/faq_trade01.html (last visited on Aug. 22, 2015).

55 *Available at:* <http://www.legco.gov.hk/yr11-12/english/panels/ea/papers/ea1128cb1-424-5-e.pdf> (last visited on Aug. 22, 2015).

56 *Available at:* http://www.epd.gov.hk/epd/english/environmentinhk/air/prob_solutions/idling_prohibition.html (last visited on Aug. 19, 2015).

57 *Ibid.*

58 Alexis M Etow, No Toy for You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection? 61 *American University Law Review* 1503, 1512-1513 (2012).

CPR instructions, and a toy figurine of Kathleen Sebelius, Secretary of the US Department of Health and Human Services.⁵⁹

Health star ratings

Australian health ministers intend to introduce a voluntary health star rating system for food manufacturers.⁶⁰ The proposed rating system gives each product a numerical value out of five, based on the energy, saturated fat, sugar and salt content of the foodstuff.⁶¹ The numerical ratings are determined by entering nutritional values into a spreadsheet calculator.⁶² When the scheme was first proposed, it was intended that a voluntary system would be trialed for two years. If an insufficient proportion of food manufacturers were to adopt the system, a mandatory standard would be adopted by Food Standards Australia New Zealand Act,⁶³ an executive body. Such mandatory standards would not be subject to parliamentary disallowance.⁶⁴

Menu labeling requirements

The US federal Obamacare legislation requires that restaurants with more than 20 stores include on their menus nutritional information about their food offerings, along with a statement of the recommended daily calorie intake.⁶⁵

IV Policy considerations: The futility of nudge state measures

There are numerous policy objections to such paternalistic interventions. This section outlines some of these objections: the ready alternative of promoting and accepting individual responsibility, the substitution effect, the probable circumvention of such laws, the likelihood of unintended consequences, the availability of voluntary alternatives, the lack of public support for such measures and the likelihood of endless litigation challenging nudge state impositions.

59 *Id.* at 1531.

60 *Available at:* <http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-front-of-pack-labelling-1> (last visited on Oct. 15, 2015).

61 *Available at:* http://www.ahmac.gov.au/cms_documents/Health_Star_Rating_Style_Guide_30_June_2014.pdf (last visited on Oct. 15, 2015)

62 *Available at:* http://www.ahmac.gov.au/cms_documents/Health_Star_Rating_Calculator.xlsm (last visited on Nov. 10, 2015).

63 Food Standards Australia New Zealand Act 1991, s 54 (Cth).

64 Food Standards Australia New Zealand Act 1991, s. 94 (Cth).

65 21 USC 343(q)(5)(H), enacted by Act of Mar. 23, 2010, Pub L 111-148, 124 Stat 119 at 573.

The alternative of individual responsibility

It is often argued that nudge state measures against obesity are warranted because obesity results in higher health costs which are absorbed by private or public health insurance systems. However, these costs could arguably be minimised if the health insurance system prices insurance premiums in line with individual risk, so that those who are obese would pay higher premiums since their treatment costs are likely to be higher than those of non-obese persons.⁶⁶

Such a measure would certainly be controversial and sensitive because those who have to pay the higher premiums would claim to be the victim of unjustifiable discrimination. Nevertheless, this approach would send a strong price signal against obesity and is consistent with individual responsibility for health since it cannot be denied that a large proportion of cases of obesity are the result of individual lifestyle choices. With such a financial penalty, individuals would have a constant economic disincentive against an unhealthy lifestyle. Such an approach is supported by research suggesting that most people are more likely to modify their behaviour in response to a financial loss than to achieve an economic gain.⁶⁷

The substitution effect

When a tax is imposed upon a good, people tend to substitute an alternative that has similar qualities or effects. For example, raising the price of alcohol has often been followed by an increase in the consumption of marijuana as one drug is substituted for the other.⁶⁸ This effect has also been observed in the case of food. While soda taxes reduce the consumption of soda, consumers substitute other high calorie drinks, with the result that there is no reduction in the obesity rate.⁶⁹ This is exactly what economic theory predicts will occur in these cases.⁷⁰ Furthermore, alcohol taxes drastically reduce consumption by light drinkers but have little effect upon consumption by heavy drinkers.⁷¹

66 Alexander Copp, The Ethics and Efficacy of a Fat Tax in the Form of an Insurance Surcharge on Obese State Employees 15 *Quinnipiac Health Law Journal* 1 (2012).

67 *Id.* at 25.

68 *Supra* note 46 at 100.

69 Jonathan Klick and Erich A Helland, Slim Odds 34 *Regulation* 20 (Spring 2011); Susan Yeh, Laws and Social Norms: Unintended Consequences of Obesity Laws 81 *University of Cincinnati Law Review* 173, 184 (2012); *supra* note 49 at 24; *supra* note 6 at 112, 126-127.

70 Michael L Marlow and Alden F Shiers, Would Soda Taxes Really Yield Health Benefits? 33 *Regulation* 34, 37 (Fall, 2010).

71 *Id.* at 37.

Circumvention of nudge state laws

Sometimes, consumers do not even need to substitute a different food. It is also often easy for consumers to circumvent a tax. The effect of the Danish fat tax was simply to encourage Danish consumers to buy high fat foods in neighbouring Germany and Sweden where the prices were lower.⁷² It was only Danish businesses that were hit by the tax. The American no free toys ordinances were quickly circumvented by fast food restaurants, which simply charged a nominal fee for the toys and thereby bypassed the nutritional strictures.⁷³

Unintended consequences

Many nudge state measures have unintended consequences. Stricter anti-obesity laws have been associated with an increase in the social stigma attached to obesity. Furthermore, obesity rates did not actually decline.⁷⁴ Punitive measures against obese people may also be challenged as infringements of anti-discrimination laws.⁷⁵ To provide another example, soda taxes have a far greater impact upon the incomes of poor people than the rich.⁷⁶ There is another class bias to such taxes: they target beverages generally favoured by the poor rather than those favoured by the rich, though the calorie content of each drink may be similar.⁷⁷

Availability of voluntary alternatives

It could be argued that there is no need to compel food manufacturers to submit to a government nutritional labeling system for their products. Private bodies can create their own educational resources concerning a healthy

72 Stephanie Strom, 'Fat Foods Tax is Repealed in Denmark' *New York Times*, Nov.13, 2012; Sarah Kliff, 'Denmark scraps world's first fat tax' *Washington Post*, Nov. 13, 2012.

73 *Supra* note 58 at 1536.

74 *Supra* note 69 at 176, 211; Alberto Alemanno and Amandine Garde, 'The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets' 50 *Common Market Law Review* 1745, 1759 (2013).

75 *Supra* note 49 at 34-36.

76 *Supra* note 6 at 122-123, 131; Chris L Winstanley, 'A Healthy Food Tax Credit: Moving Away from the Fat Tax and Its Fault-Based Paradigm' 86 *Oregon Law Review* 1151 (2007); Rachel E Morse, 'Resisting the Path of Least Resistance: Why the Texas Pole Tax and the New Class of Modern Sin Taxes are Bad Policy' 29 *Boston College Third World Law Journal* 189, 208-209 (2009).

77 Winstanley, *supra* note 76 at 1175-1176; Trevor Burrus, 'The Dangers of a Soda Tax', Nov. 29, 2013, available at: <http://www.cato.org/blog/dangers-soda-tax>. (last visited on Sep. 25, 2015).

lifestyle. For example, an Australian medical research institute recently developed its own food star rating system.⁷⁸ Such a private initiative is preferable to a legislative imposition upon business because it is not coercive.

Lack of public support for nudge state measures

Such measures do not arise from popular demand. Where voters have been given a direct choice about nudge state measures they have usually rejected such interventions. For example, in several US states soda taxes have been repealed at statewide referenda.⁷⁹ That is not surprising in view of the fact that, usually, individuals do not want the government telling them what to eat and charging them more if they chose something that is not on their menu.

Endless litigation

If business is subject to onerous regulation, it will naturally seek to challenge those rules. Extensive litigation is thus the inevitable result of nudge state policies. One knows this because one has already seen the reaction of an industry that has been subject to numerous restrictive nanny state interventions: the tobacco industry. The industry's response was litigation seeking to defend its interests.

The scale of litigation regarding tobacco restrictions has been extensive. Nations with tobacco industries and the industry itself have challenged restrictive legislation under international trade law, EU law, international investment protection law, European Free Trade Association law, European human rights law and national constitutional law. The challenges brought under national law are far too numerous to outline.⁸⁰ However, the challenges brought under international rules give some indication of the scale and scope of the litigation. In 2011, Thailand's customs and taxation treatment of imported cigarettes was brought before the WTO and reached up to the level of appellate body for final determination.⁸¹ In 2012, the differential treatment of imported

78 Available at: <http://www.foodswitchstars.com.au>. See New star ratings for food Lateline, Sep. 17, 2014, available at: <http://www.abc.net.au/lateline> (last visited on Oct. 20, 2015).

79 De Santis, *supra* note 48 at 398-399.

80 Available at: <http://www.tobaccocontrollaws.org/litigation/browse/country> (last visited on Sep. 20, 2015). See for examples, *JT International SA v. Commonwealth* (2012) 250 CLR 1; [2012] HCA 43 (acquisition of property); *Canada (Attorney General) v. JTI-Macdonald Corp* [2007] 2 SCR 610 (freedom of expression).

81 Appellate Body Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted on July 15, 2011, DSR 2011: IV, 2203.

clove cigarettes and domestic menthol cigarettes by the US was also challenged before the appellate body.⁸²

Numerous other international cases are pending. The Australian plain packaging legislation is currently the subject of five disputes under the WTO dispute settlement framework⁸³ and a Permanent Court of Arbitration (PCA) investor-state proceeding brought under a bilateral investment protection treaty.⁸⁴ The knee-jerk response of the former Gillard Labor government was simply to announce that it would no longer accept investor-state arbitration mechanisms in future treaties.⁸⁵

Challenges against restrictive laws are being brought on other fronts. A tobacco company has brought *International Centre for Settlement of Investment Disputes* (ICSID) proceedings concerning Uruguayan requirements for pictorial health warnings.⁸⁶ In June, 2014 Philip Morris International brought an action in a British court seeking a preliminary ruling concerning the validity of the new European Union Tobacco Products Directive.⁸⁷ If a restrictive approach was adopted towards fast food restaurants and the snack food industry, the industry response is very likely to be the same. For example, the New York soda portion cap rule was recently successfully challenged in the state's highest court.⁸⁸

82 Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted on Apr. 4, 2012, DSR 2012: XI, 5749; 51 ILM 755.

83 DS434 (Ukraine), DS435 (Honduras), DS441 (Dominican Republic), DS458 (Cuba), DS467 (Indonesia). The progress of these disputes *available at*: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Sep. 25, 2015).

84 *Philip Morris Asia Ltd (Hong Kong) v. Australia* (PCA Case 2012-12). Related documents, *available at*: http://www.pca-cpa.org/showpage.asp?pag_id=1494 and <http://www.ag.gov.au/tobaccoplainpackaging> (last visited on Sep. 22, 2015).

85 Jürgen Kurtz, *Australia's Rejection of Investor State Arbitration: Causation, Omission and Implication* 27 *ICSID Review* 65(2012). By contrast, the new Australian federal government has indicated that it would consider the inclusion of such clauses on a case-to-case basis. See Leon E Trakman, *Investor-State Arbitration: Evaluating Australia's Evolving Position* 15 *Journal of World Investment and Trade* 152 (2014); Luke Nottage, *The Anti-ISDS Bill Before the Senate: What Future for Investor-State Arbitration in Australia?* XVIII *International Trade and Business Law Review* 245-293 (2015).

86 *Philip Morris Brands Sarl v. Uruguay* (ICSID Case ARB/10/7). Related documents, *available at*: <http://www.italaw.com/cases/460> (last visited on Oct. 10, 2015).

87 Dir. 2014/40 of the European Parliament and of the Council of Apr. 3, 2014 on the approximation of the laws, regulations and administrative provisions of the member states concerning the manufacture, presentation and sale of tobacco and related products (OJ L 127, at 1).

88 *Supra* note 41.

International legal objections to nudge state measures

There are considerable legal objections, based on international law, against nudge state measures. One reason why there have been numerous challenges to nudge state interventions under international law is that they are often in tension with the strictures of widely accepted international trade law and investment protection obligations. The Australian plain packaging legislation provides an instructive case study of how the nudge state can collide with international law. Numerous treaty obligations are potentially implicated by the plain packaging regime. For present purposes it is necessary only to refer to some of the more obvious legal obstacles.

Opponents of the nudge state argue that Australia's plain packaging requirement is inconsistent with article 20 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),⁸⁹ since it encumbers the use of trade marks in trade with unjustifiable special requirements. Article 20 provides in relevant part: 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.

Several key concepts appear in article 20 of TRIPS:

- (i) special requirements;
- (ii) use in a special form;
- (iii) use in a manner that is detrimental to the mark's capacity to distinguish the goods;
- (iv) encumbrance; and
- (v) the encumbrance must be unjustifiable.

Firstly, special requirements may include requirements that diminish the distinguishing capacity of the trademark. A plain packaging requirement eliminates the trademark's function of distinguishing the product from competing goods. *Secondly*, use in a special form is a special requirement. This may include use in a standard format for all trademark owners.⁹⁰ Plain

89 Marrakesh, Apr. 15, 1994, 1869 UNTS 299; [1995] ATS 8 at 341.

90 Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO Trade-Related Aspects of Intellectual Property Rights* 345 (Martinus Nijhoff, 2009).

packaging constitutes use in a standard format for all tobacco trademark owners, given its requirements for standard packaging, colour and size.

Thirdly, another example of a special requirement is use in a manner that is detrimental to the capacity of the mark to distinguish the goods. Plain packaging eliminates the capacity of trademarks to distinguish tobacco products. *Fourthly*, the special requirements must encumber the use of the trademark in trade. Plain packaging imposes a very substantial burden (encumbrance) upon the use of the trademark. It prevents the use of almost all characteristics of the trademark, including any colours, lettering, insignias or packet size that falls outside the very limited range permitted. *Fifthly*, the encumbrance must be unjustifiable. The use of the word *unjustifiably* implies that some special requirements are justifiable.⁹¹ In determining the limits of justification particular regard should be paid to the essential function of the trademark, which is to distinguish the goods offered by different businesses. The special requirements imposed by plain packaging are unjustifiable because they almost nullify the distinguishing capacity of the trademarks.

Plain packaging does not fall within the limited exceptions to trademark rights permitted under article 17 of the TRIPS. The article provides: Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Academic commentary regards article 17 as having a fairly restricted scope. The article is directed only to limitations relating to unfair competition.⁹² Article 17 is about limiting the rights of trademark owners to prevent others from using signs similar or identical to the protected marks.⁹³ Plain packaging of tobacco products does not fall within the limitations permitted by article 17 since it is not a measure related to unfair competition.

Furthermore, to be justified under article 17 an exception must: (i) be limited, and (ii) take into account the legitimate interests of the owner. *Firstly*, the exception must be limited. A WTO panel has emphasised that the word

91 Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* 200 (Oxford University Press, Oxford, 2007); Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 286 (Sweet & Maxwell, London, 3rd edn., 2008).

92 *Supra* note 90 at 333, 334.

93 Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs* 294 (Kluwer, Hague, 2006).

limited means that the exception must be narrow and permit only a small diminution of rights.⁹⁴ The panel added that the question is whether the exception to trademark rights is narrow, not the number of trademark owners who are affected by the exception. Plain packaging does not constitute a narrow exception giving rise to a small diminution of rights. It is a major diminution of trademark rights.

Secondly, the exception must take into account the legitimate interests of the trademark owner. A WTO panel has held that the legitimate interests of the trademark owner are less than their full legal rights. These legitimate interests are justifiable in the sense that they are supported by relevant public policies or other social norms. An exception must take account of these interests, which is less than a duty to protect them.⁹⁵ The legitimate interest of the trademark owner in this context is its interest in continuing to exercise its valuable trademark rights by branding its lawfully sold products. In depriving the trademark owner of this right, plain packaging does not take account of the legitimate interests of the trademark owner.

The public health clause in article 8(1) of the TRIPS does not provide legal justification for plain packaging. Article 8(1) provides in its relevant part: Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health provided that such measures are consistent with the provisions of this Agreement.

There are two conditions for the applicability of article 8(1): (i) consistency with TRIPS, and (ii) necessity. The first condition is consistency with the remainder of the TRIPS Agreement. Article 8(1) expressly states that measures protecting public health must be consistent with the other provisions of TRIPS.⁹⁶ These other provisions include articles 17 and 20, which have been discussed above. Article 8(1) is not a true exception clause because it does not justify derogations from the remainder of the agreement.⁹⁷ Article 8(1)

94 *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (WT/DS290), adopted on April 20, 2005, DSR 2005: X-XI, 4603, 5121 at 7.650.

95 *European Communities – Trademarks and Geographical Indications* (WT/DS174/R), adopted on April 20, 2005, DSR 2005: VIII-IX, 3499, 4083 at 7.662 - 7.663.

96 *Supra* note 93 at 191.

97 Benn McGrady, *TRIPs and Trademarks: The Case of Tobacco* 3 *World Trade Review* 53, 67-68 (2004); *Supra* note 90 at 191-192, 198.

confers no legal justification for plain packaging since it does not justify measures that are inconsistent with other provisions of TRIPS.⁹⁸

The second condition is necessity, *i.e.*, the public health measure must be necessary. While the public health exception in the General Agreement on Tariffs and Trade (GATT) does not apply to TRIPS,⁹⁹ the concept of necessity in both provisions is likely to be similar. In applying the concept of necessity under the GATT exception, the appellate body ascertains whether there is a reasonably available alternative measure that would achieve the same end and that is less restrictive of trade.¹⁰⁰ The appellate body has stressed the strictness of the necessity test, stating that a necessary measure is located significantly closer to the pole of indispensable than to the opposite pole of simply making a contribution to.¹⁰¹

An insight into the limited scope of article 8(1) of TRIPS may be gained by examining the GATT provision. While the GATT health exception is a true exception clause (unlike that in TRIPS), it has been narrowly interpreted. Only one measure has been held to be necessary under the GATT exception: a prohibition of the importation of asbestos products.¹⁰² The appellate body held that a WTO member was entitled to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place.¹⁰³ Given the strictness of the necessity test, the necessity of this measure under article 8(1) is doubtful. There are reasonably available alternatives which would protect public health and would be less restrictive of trade. Article 8(1) of TRIPS thus does not provide legal justification for plain packaging since (i) it does not justify measures that are inconsistent with other provisions of TRIPS and (ii) plain packaging fails the necessity test.

98 Mudge Rose Guthrie Alexander & Ferdon, Legal Opinion with Regard to Plain Packaging of Tobacco Products Requirement under International Agreements, May 3, 1994 at 17.

99 GATT 1994, art. xx (b) *supra* note 95 at 7.114.

100 *European Communities Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R), adopted on Apr. 5, 2001, DSR 2001: VII, 3243 at 172; 40 ILM 1193.

101 *Korea Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161/AB/R), adopted on 10 Jan. 10, 2001, DSR 2001: I, 5 at 161 (referring to art. XX(d) of GATT 1994).

102 *Supra* note 91 at 107.

103 *Supra* note 100 at 168.

Plain packaging also violates article 2.2 of the Agreement on Technical Barriers to Trade (TBT).¹⁰⁴ It constitutes a technical regulation imposing an unnecessary obstacle in international trade. Article 2.2 provides in relevant part:

[m]embers shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia protection of human health

A technical regulation is defined as a [d]ocument which lays down product characteristics with which compliance is mandatory. A technical regulation may also deal with terminology, symbols, packaging, marking or labeling requirements as they apply to a product.¹⁰⁵ This definition refers to product characteristics. The appellate body has held that the characteristics of a product include any objectively definable features, qualities, attributes, or other distinguishing mark of a product.¹⁰⁶ Distinguishing mark includes a trademark.

Plain packaging lays down mandatory product characteristics. It imposes requirements concerning the terminology, symbols, packaging, marking and labeling applied to tobacco products. It thus constitutes a technical regulation. A plain packaging requirement imposes an unnecessary obstacle in international trade. Less trade-restrictive alternatives exist for the reduction of tobacco use. A plain packaging requirement violates article 2.2 of the agreement.

Australia has also entered into bilateral investment treaties with numerous governments, including Hong Kong.¹⁰⁷ A challenge against the Australian plain packaging law has been brought under the treaty with Hong Kong.

104 Technical Barriers to Trade (TBT) Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade was adopted at Marrakesh, April 15, 1994, 1868 UNTS 120; [1995] ATS 8 at 114.

105 Agreement on Technical Barriers to Trade, annex 1(1).

106 DS135, *supra* note 100 at 67.

107 Agreement between Australia and Hong Kong for the Promotion and Protection of Investments, Hong Kong, Sep. 15, 1993, 1770 UNTS 385; [1993] ATS 30.

The expropriation guarantees under the treaty applies to measures with an effect that is equivalent to expropriation.¹⁰⁸ The treaty does not define equivalent, so guidance must be sought in the practice of international tribunals. The interference with property rights must cause at least a substantial loss of control or value or severe economic impact.¹⁰⁹ A plain packaging measure deprives the trademarks of tobacco companies of all or almost all of their economic value.¹¹⁰ A measure that disappoints legitimate investor expectations is more likely to be regarded as an expropriation.¹¹¹ Plain packaging frustrated the reasonable investment-backed expectation of tobacco companies that they would continue to be able to use their trademarks.

The Government of Australia did not acquire a financial benefit by expropriating the trademarks of tobacco companies. However, it is not necessary that the government itself acquires a financial benefit by its expropriation measure.¹¹² Finally, the expropriation must not be temporary.¹¹³ Plain packaging is a permanent measure. The conditions for classification as an indirect expropriation are satisfied. The treaty does not contain a clause relating to public health or other public objectives. However, even where a treaty contains no specific provision regarding regulatory measures, some international tribunals have held that customary international law exempts non-discriminatory *bona fide* regulatory measures from the requirement to pay compensation for expropriation.¹¹⁴ Measures for the protection of public health would fall within the ambit of legitimate regulatory measures.

On the other hand, some tribunals have held: [e]xpropriatory environmental measures no matter how laudable and beneficial to society as a whole are similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated,

108 *Id.*, art. 6(1).

109 August Reinisch, Expropriation in Peter Muchlinski *et. al.*, *The Oxford Handbook of International Investment Law* 438-439 (Oxford University Press, Oxford, 2008).

110 *LG&E Energy Corp v. Argentina (Decision on Liability)* (ARB/02/1), Oct. 3 2006, 21 ICSID Rev-FILJ 203 at 191; 46 ILM 40.

111 *Supra* note 109 at 448.

112 *Tippetts v. TAMS-AFFA Consulting Engineers of Iran* (1984) 6 Iran-US CTR 219 at 225; *Motorola Inc v. Iran National Airlines Corp* (1988) 19 Iran-US CTR 73 at 95.

113 *Tecnicas Medioambientales Tecmed SA v. Mexico* (ARB(AF)/00/2), May 29, 2003, 10 ICSID Rep 130; 43 ILM 133; *supra* note 110 at 193.

114 *Methanex Corp v. United States (Final Award)*, Aug. 3, 2005, 44 ILM 1345 at 1456; *Saluka Investments BV v. Czech Republic (Partial Award)* Mar. 17, 2006, 15 ICSID Rep 274 at 254, 255.

even for environmental purposes, whether domestic or international, the states obligation to pay compensation remains.¹¹⁵ This reasoning also applies to public health measures. If an international tribunal adopted this approach, expropriatory public health measures would ordinarily be compensable.

Under bilateral investment protection treaties the Government of Australia must also ensure fair and equitable treatment for investments made by investors from the other treaty partner.¹¹⁶ Numerous arbitral tribunals have held that the obligation of fair and equitable treatment includes maintaining a stable framework for the investment,¹¹⁷ including the legal framework. Here the investments are trademarks.

An investor is not entitled to expect that the applicable legal framework will remain entirely unchanged.¹¹⁸ However, introduction of plain packaging constitutes a fundamental change to the legal regulations applicable to the investment. Such a fundamental change violates the obligation to ensure fair and equitable treatment by failing to maintain a stable framework for the investment.¹¹⁹

Finally, the World Health Organization Framework Convention on Tobacco Control¹²⁰ does not impose an obligation to introduce plain packaging. Australia is a party to the WHO Convention.¹²¹ While the implementing guidelines for

115 *Compañía del Desarrollo de Santa Elena SA v. Costa Rica (Final Award)* (ARB/96/1), Feb. 17, 2000, 5 ICSID Rep 153 at 72; 39 ILM 1317; *applied in Tecmed, supra* note 113 at 121.

116 *Supra* note 107, art 2 (2).

117 *Occidental Exploration and Production Co v. Ecuador (Award)* (UN 3467), July 1, 2004, 12 ICSID Rep 59 at 183, 43 ILM 1248; *CMS Gas Transmission Co v. Argentina (Award)* (ARB/01/8), May 12, 2005, 14 ICSID Rep 158 at 273, 274, 276; 44 ILM 1205; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Pakistan (Jurisdiction)*, Nov. 14, 2005, 18 no. 1 WTAM 163 at 237, 241; *LG&E, supra* note 116 at 124, 125, 131; *PSEG Global Inc v. Turkey (Award)* (ARB/02/5), Jan. 19, 2007, 19 no. 3 WTAM 107 at 239-240, 253-254; *Enron Corporation v. Argentina (Award)* (ARB/01/3), May 22, 2007, 19 no. 4 WTAM 109 at 259-260.

118 *CMS, id.* at 277; *Saluka, supra* note 114 at 305.

119 *Id.* at 275.

120 Geneva, May 21, 2003, 2302 UNTS 166; [2005] ATS 7.

121 Ratification by Australia, Oct. 27, 2004: 2302 UNTS 168.

the convention recommend the adoption of plain packaging,¹²² these guidelines are not legally binding.¹²³

VI The proper role of government as a health regulator

This paper highlights, that nudge state interventionism in the field of public health diminishes the authority of individuals to make their own health decisions and is incompatible with the proper role of government. In particular, it has discussed a number of policy objections to paternalistic nudge state interventions. These objections include the ready alternative of promoting and accepting individual responsibility, the substitution effect, the probable circumvention of such laws, the likelihood of unintended consequences, the availability of voluntary alternatives, the lack of public support for such measures and the likelihood of endless litigation challenging nudge state impositions. The Australian plain packaging regime as a case study to remind readers that, nudge state interventions sometime involve, or result in, violations of Australia's obligations under international trade law and investment protection law.

Discussions on the proper role of government often invoke a phrase which has been attributed to Thomas Jefferson, even though it is not found in his writings: That government is best which governs least . The phrase indicates that it is not the proper role of government to over-regulate the economy or to second-guess decisions which individuals themselves could take. It also impliedly warns against the dangers of overzealous government regulation which effectively prevents individuals from pursuing their own goals. The proper role of government is to cultivate the conditions which enable individuals to make their own health decisions and to access health services.

As indicated by the acrimonious Abamacare legislation in the US, there is a danger, often observed in parliaments around the world, that politicians will personalise debates on government intervention in individuals health choices. This reminds one of the celebrated statement attributed to the Roman

122 WHO Framework Convention on Tobacco Control. Guidelines for Implementation, arts. 5.3, 8, 11, 13, 41, 55.

123 Conference of the Parties to the WHO Framework Convention on Tobacco Control. Third Session, Durban, South Africa, Nov. 17-22, 2008. Convention Secretariat, Geneva, Summary Records of Committees, Reports of Committees, 2009 (FCTC/COP/3/REC/3).

orator and lawyer, Cicero, who reportedly said: When you have no basis of argument, abuse the plaintiff . Abuse is, of course, but a poor substitute for the rational assessment and consideration of legitimate arguments relating to the proper role of government as a health regulator. There is an expectation that parliamentarians will contribute, in a meaningful, but non-acrimonious manner, to debates on governance and the propriety of nudge state measures. Ensuring that these debates on improving public health through behavioural rules can take place in a rational, non-threatening environment also comes within the legitimate role of government.