Founding a Human Rights Culture for Trade Marks: A Human Rights-Based Analysis of Tobacco Plain Packaging and Anti-Counterfeiting in Australia

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A thesis in fulfilment of the requirements for the degree of Doctor of Philosophy

FACULTY OF LAW

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Genevieve Wilkinson, declare that this thesis, is submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law at the University of Technology Sydney.
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TABLE OF ACRONYMS

AAAQ	Availability, Accessibility, Acceptability and Quality
ABF	Australian Border Force
ACIP	Advisory Council on Intellectual Property
ACT	Australian Capital Territory
ACTA	Anti-Counterfeiting Trade Agreement
AHRC	Australian Human Rights Commission
AJPCHR	Australian Joint Parliamentary Committee on Human Rights
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AUSFTA	Australia-United States Free Trade Agreement
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
CHAFTA	China Australia Free Trade Agreement
CJEU	Court of Justice of the European Union
COMRC	Committee on the Rights of the Child
COP	Conference of Parties
CRC	Convention on the Rights of the Child
DSU	Dispute Settlement Understanding
DSB	Dispute Settlement Body
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCOR	Economic and Social Council Official Records
FCTC	Framework Convention on Tobacco Control
FTAAP	Free Trade Area of the Asia-Pacific
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
HRCS	Human Rights Compatibility Statement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission

INN	International Non-Proprietary Name
IPAC	Intellectual Property Advisory Committee
IPTA	Institute of Patent Attorneys of Australia
ISDM	Investor-State Dispute Mechanism
JSCOT	Joint Senate Committee on Treaties
NGO	Non-Government Organisation
NHRI	National Human Rights Institution
NSW	New South Wales
OHCHR	Office of the High Commissioner of Human Rights
RCEP	Regional Comprehensive Economic Partnership
TBT	Agreement on Technical Barriers to Trade
TGA	Therapeutic Goods Act 1989 (Cth)
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
TPP-11	Comprehensive and Progressive Agreement for Trans-Pacific
TPP 2016	Trans-Pacific Partnership Agreement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Economic and Social Council
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
WCO	World Customs Organisation
WHO	World Health Organization
WIPO	World Intellectual Property Organisation
WTO	World Trade Organization

ABSTRACT

It is important to recognise the human rights implications of trade mark law using a human rights-based approach to analysis of intellectual property that is part of a broader culture for trade marks which encourages compliance with human rights. International scholarly debate about the best way to conceptualise the relationship between intellectual property and human rights does not concentrate on trade marks. This research contributes a new approach to this scholarship, drawing on two case studies of Australian trade mark legislation to understand the position of trade marks more comprehensively. The case studies demonstrate that rights conferred by trade marks and the mechanisms used to protect trade marks can have important human rights implications. Disputes about tobacco plain packaging legislation demonstrate potential conflicts between trade mark rights and human rights to health, property and the right to benefit from science and culture. The scope of protection mechanisms to discourage the use of counterfeit trade marks indicates potential conflicts between trade mark rights and civil rights, although effective protection against counterfeiting could aid realisation of the human right to health.

The findings in the case studies reinforce concerns that features of the international legal environment influence states to give trade mark rights and associated protection mechanisms primacy over human rights in domestic lawmaking. This limits the ability of states to recognise their binding human rights obligations in international law. Protection for intellectual property through bilateral, plurilateral and multilateral trade agreements can also have a chilling regulatory impact on the realisation of human rights obligations. The negotiation and impact of these agreements needs to be reconsidered from a human rights perspective.

This thesis contributes to the field by proposing an analytical approach to intellectual property that recognises interdependent human rights obligations and special features of economic, social and cultural rights that are important to the relationship between intellectual property and human rights. The analytical approach should be used with other approaches recommended by existing models that conceptualise the relationship between intellectual property and human rights, to build a human rights culture for trade marks that emphasises binding human rights obligations. The approaches considered can also be modified to respond to local conditions in individual states. Using a range of analytical approaches in a manner that recognises different local conditions will have potentially valuable application in Australia, where there are several problems with the comprehensive implementation of human rights obligations. Further modifications that respond to specific conditions in other states could enable these analytical approaches to be used together to more broadly shape a human rights culture for trade mark

protection internationally so that states can promote and foster their binding international human rights obligations.

INTRODUCTION FOUNDING A HUMAN RIGHTS CULTURE FOR TRADE MARKS

INTRODUCTION

There is currently no human rights culture for trade marks in Australia. Developing a human rights culture for trade marks will require the transformation of existing values in domestic and international law.[1] This thesis explores why this is important. It explores methods that can be used to shape trade mark law so that it promotes and fosters human rights. Two case studies of trade mark legislation demonstrate that the rights conferred by trade marks and the mechanisms used to protect trade marks can have significant human rights implications. Human rights are important to consider as they assert both normative and doctrinal primacy in international law.[2] Despite growing attention to the relationship between intellectual property and human rights in international law and practice, there is limited recognition of the relationship between human rights and trade marks.[3] The focus of attention is most frequently on the relationship between human rights and patents or human rights and copyright. The scholarly debate about the best way to conceptualise the relationship between human rights and intellectual property

[1] See Zehra F Kabasakal Arat, 'Forging A Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights' (2006) 28(2) *Human Rights Quarterly* 416, 424.

[2] See Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 65–67; Samuel Murumba, 'Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property' (2012) 38(1) *Monash University Law Review* 119, 125–130.

[3] Yu excludes human rights recognition for trade marks: Peter K Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property' (2016) 69(1) *SMU Law Review* 37, 85–95; Peter K Yu, 'Ten Common Questions about Intellectual Property and Human Rights' (2007) 23(4) *Georgia State University Law Review* 709, 726–730. Carpenter focuses on a limited right to property protection: Megan M Carpenter, 'Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?' (2009) 99(4) *Trademark Reporter* 892, 915–916. Halabi argues for greater human rights protection for trade marks as property: Sam F Halabi, 'Reconciling International Obligations to Protect Health and Trademarks: A Defense of Trademarks as Property' in Daniel Gervais (ed), *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 389. There is limited recognition in the right to property context in Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 661, 661–689. Helfer and Austin focus on trade marks in relation to freedom of expression and traditional knowledge: Helfer and Austin, above n 2, 283–312, 496–502. Rahmatian describes Article 15 as 'cryptic': Andreas Rahmatian, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 335, 344. Ricolfi analyses European fundamental rights protection to propose an integrated system to balance between trade marks and human rights: Marco Ricolfi, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 453.

concentrates on the relationship between human rights and copyright and patents.[4] This research makes a new contribution to the debate as it more comprehensively considers the position of trade marks, recognising multiple significant connections between trade marks and human rights.

A human rights culture facilitates the realisation of human rights.[5] It recognises states' human rights obligations and utilises structures to ensure implementation of these obligations. This promotes and fosters human rights. Why is it important for trade marks to operate in a culture that promotes and fosters human rights? This thesis demonstrates how different functions of trade marks and mechanisms for their protection are able to foster and restrict human rights. Although trade marks are often considered in isolation from human rights, their operation engages a range of human rights considerations. Trade marks can contribute to the human rights enshrined in Article 15 of the *International Covenant on Economic Social and Cultural Rights* ('*ICESCR*') dealing with culture, science and creative activity.[6] Trade mark rights can be protected for some creators pursuant to the human right to moral and material recognition of intellectual creations.[7] Trade marks increasingly have strong cultural significance.[8] Protection conferred on trade marks can encourage the development of culturally significant trade marks, which play a significant role in the development and diffusion of culture.[9] Trade marks can also function to support innovative activities relevant to the development and the diffusion of science and culture.[10] Although this includes innovation protected by patent and copyright, it can also include other socially valuable scientific and cultural productions that are not protected using these intellectual property mechanisms.[11] However, this supporting or auxiliary function of trade marks has the potential to interfere with a balance between incentivising innovative activities, through moral and material recognition of intellectual creations in international human rights law, and other objectives of cultural participation and realising the benefits of scientific

[4] There is a separate but linked focus on the relationship between the protection of traditional knowledge and human rights which sometimes considers trade marks but this is usually more focused on consideration of issues relevant to patents and copyright: see Helfer and Austin, above n 2, 432–502.
[5] Sarkin characterises a human rights culture as one that promotes and fosters human rights: Jeremy Sarkin, 'The Development of a Human Rights Culture in South Africa' (1998) 20(3) *Human Rights Quarterly* 628, 628.
[6] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').
[7] Ibid art 15(1)(c).
[8] Ibid art 15(2).
[9] Richardson makes this argument and develops the work of Rosemary Coombe in Megan Richardson, 'Trade Marks and Language' (2004) 26(2) *Sydney Law Review* 193, 194–196. See also Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke University Press, 1999) 55–62, 166–167; Helfer and Austin, above n 2, 306–309.
[10] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 3.
[11] Yu identifies several in relation to scientific productions: ibid 70–80.

innovation.[12] Some regional and domestic jurisdictions that confer human rights to property can also protect owners of trade marks.[13] However, the expansion of the protection of property rights in trade marks, particularly through domestic and international protection for the enforcement of these rights, engages further human rights concerns of civil rights to a fair trial and privacy. The way in which trade mark rights permit a limited monopoly of certain signs in language also restricts the right to freedom of expression for people who do not hold that monopoly or have a licence to use those signs.[14] Yet once those rights are granted, owners of trade marks have argued that restricting their use of those signs restricts their freedom of expression.[15]

Trade marks are most commonly justified for their contribution to social welfare by reducing search costs for consumers, usually permitting identification of products of known quality standards and incentivising the maintenance of those standards.[16] This quality identification function can be an important mechanism to protect consumers from potentially negative health impacts of products manufactured outside known trade channels. This function is weakened by counterfeiting activities in which trade marks are used without the permission of the registered trade mark owner.[17] In this thesis, trade mark legislation in both case studies engages the human right to health. This relationship between trade marks and the human right to health has received limited prior consideration.[18] In both case studies, the right to health implications of the trade

[12] *ICESCR* art 15; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 27 ('*UDHR*').
[13] *Anheuser-Busch Inc v Portugal (Merits)* (2007) I Eur Court HR 39 ('*Anheuser-Busch*'); Laurence R Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1, 3; Carpenter, above n 3, 915–916; Halabi, above n 3, 389.
[14] Lisa P Ramsey, 'Free Speech and International Obligations to Protect Trademarks' (2010) 35 *Yale Journal of International Law* 405, 406–408; Lisa P Ramsey, 'Reconciling Trademark Rights and Free Expression Locally and Globally' in *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 341, 341–388.
[15] Imperial Tobacco, Submission No 51 to the House Standing Committee on Health and Ageing, *Inquiry into Plain Tobacco Packaging*, 22 July 2011, 45-46. See also Jonathan Liberman, 'Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia' (2013) 39(2&3) *American Journal of Law & Medicine* 361, 367–368. See also discussion of the freedom of expression implications of *RJR-MacDonald* and *JTI-MacDonald* in Mariette Brennan, 'Canada's Next Step in Tobacco Control Laws: Is Plain Packaging Legislation a Viable Proposal?' (2013) 51(1) *Alberta Law Review* 23, 36–38.
[16] William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) 173.
[17] Carsten Fink, Keith E Maskus and Yi Qian, 'The Economic Effects of Counterfeiting and Piracy: A Review and Implications for Developing Countries' (Policy Research Working Paper No 7586, World Bank Group, 29 February 2016) 2–3.
[18] The main consideration has been in relation to Australia's plain packaging legislation, which is the focus of the first case study in this thesis. See Henning Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health' (2013) 9(2) *Journal of Private International Law* 308; Ernst-Ulrich Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes' (2015) 10 *Asian Journal of WTO & International Health Law and Policy* 27; Murumba, above n 2; Henning Grosse Ruse-Khan, *Protection of Intellectual*

mark legislation studied have received limited attention because the dominant paradigm for understanding the health dimensions of the legislation is public health.[19] Although a public health perspective is relevant and useful, additional obligations associated with a human right to health approach are important when considering actual and potential conflicts between human rights and intellectual property.[20] Many of these obligations are relevant dimensions of what this thesis defines as a human rights culture: participation; accountability; recognising interrelated and interdependent rights; progressive realisation of economic, social and cultural rights; very limited permissible restrictions for human rights; and obligations of international cooperation and assistance. This thesis builds on a rights-based approach to health and develops a human rights-based approach to intellectual property in order to demonstrate that the relevant domestic trade mark legislation studied engages human rights in significant ways.

Theories explaining the relationship between human rights and intellectual property often concentrate on lessons derived from examples of exacerbated conflict between human rights and intellectual property.[21] Some theories emphasise this conflict, assert the primacy of human rights and recommend comprehensive overhauls of existing intellectual property structures.[22] Others assert that the groups already largely coexist.[23] A third group acknowledges the conflict and

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Property in International Law (Oxford University Press, 2016); Brigit Toebes, 'Human Rights and Public Health: Towards a Balanced Relationship' (2015) 19(4) *The International Journal of Human Rights* 488, 495; Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership' (2017) 7(1) *Victoria University Law and Justice Journal* 76.

[19] See, eg, Sam Halabi, 'International Trademark Protection and Global Public Health: A Just-Compensation Regime for Expropriations and Regulatory Takings' (2012) 61(1) *Catholic University Law Review* 325; Valentina S Vadi, 'Trade Mark Protection, Public Health and International Investment Law: Strains and Paradoxes' (2009) 20(3) *European Journal of International Law* 773; Jonathan Liberman, 'Combating Counterfeit Medicines and Illicit Trade in Tobacco Products: Minefields in Global Governance' (2012) 40(2) *Journal of Law, Medicine and Ethics* 326.

[20] Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) *Health and Human Rights* 109; Helen Potts, 'The Right to Health in Public Health: Is This a New Approach?' (2008) 15(5) *Journal of Law and Medicine* 725.

[21] Helfer and Austin, above n 2.

[22] Audrey R Chapman, 'The Human Rights Implications of Intellectual Property Protection' (2002) 5(4) *Journal of International Economic Law* 861; Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property Rights and Human Rights*, ESC Res 2000/7, ESCOR, 52nd sess, 25th mtg, UN Doc E/CN.4/Sub.2/RES/2000/7 (17 August 2000) Preamble para 11; Lea Shaver, 'The Right to Science and Culture' (2010) 1 *Wisconsin Law Review* 121, 122–124; Aurora Plomer, 'The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science' (2013) 35(1) *Human Rights Quarterly* 143, 150–153. See also Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights - Report of the High Commissioner*, UN ESCOR, 54th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2002/9 (25 June 2002); Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Human Rights, Trade and Investment - Report of the High Commissioner for Human Rights*, UN ESCOR, 55th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/9 (2 July 2003); Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property and Human Rights*, ESC Res 2001/21, ESCOR, 53rd sess, 26th mtg, UN Doc E/CN.4/Sub.2/RES/2001/21 (16 August 2001).

[23] See Aik Hoe Lim, 'Trade and Human Rights: What's at Issue?' (2001) 35(2) *Journal of World Trade* 275; Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural*

seeks to prescribe approaches that can overcome conflicts and promote coexistence between the fields.[24] This thesis tests some of these theories by considering how they apply to domestic legislation in circumstances of both recognised conflict and potential conflict. It integrates these theories into a new approach for protecting human rights impacted by trade marks and building a human rights culture for trade marks.

Although this thesis concentrates on the specific features of a human rights culture for trade marks, this is inevitably influenced by broader human rights culture. While human rights culture operates at an international level, specific human rights cultures also operate within individual states.[25] These respond to local conditions. An important limiting feature for protection of human rights in Australian law is the absence of constitutionally enshrined fundamental rights. This is despite Australia's obligations to protect, respect and fulfil human rights enshrined in key international agreements. Accordingly, this thesis does not identify one human rights culture for trade marks. It identifies features that can be useful within an approach to trade marks that promotes and fosters a culture of human rights, consistent with the international obligations of most states.

RESEARCH QUESTIONS AND TERMINOLOGY

This thesis explores the relationship between human rights and trade marks. It uses legislative case studies to analyse the human rights implications of Australian trade mark laws. Because each law engages justifications related to the protection of health, the research focuses particularly on the human right to health implications of the legislation and its operation. Despite this focus, the research recognises the interdependent nature of human rights and considers the broader human rights implications of the legislation studied.

Laws regulating the use of trade marks on tobacco plain packaging were introduced into Australia in 2011.[26] These laws place restrictions on the manner of use of trade marks on the

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Rights: Intellectual Property Rights and Human Rights - Report of the Secretary-General, UN ESCOR, 52nd sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2001/12 (14 June 2001); Rochelle Cooper Dreyfuss, 'Patents and Human Rights: Where Is the Paradox?' in Wilem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 72; Estelle Derclaye, 'Intellectual Property and Human Rights: Coinciding and Cooperating' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 133, 134–140.

[24] Geiger, above n 3; Helfer and Austin, above n 2; Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 3.

[25] Sarkin describes development of a human rights culture in South Africa: Sarkin, above n 5.

[26] *Tobacco Plain Packaging Act 2011* (Cth).

packaging of tobacco.[27] The justification for this is the protection of health objectives in a manner consistent with the *Framework Convention on Tobacco Control*.[28]

Laws protecting trade mark owners against the importation of goods bearing counterfeit trade marks where they have registered objections to that importation are found in the *Trade Marks Act 1995* (Cth). These are supplemented by prohibitions relating to counterfeit therapeutic goods in the *Therapeutic Goods Act 1989* (Cth). These prohibitions address therapeutic goods bearing counterfeit trade marks but do not focus specifically on trade marks. These laws are linked to health protection because of a correlation between goods produced outside of traditional supply chains and threats to the health and safety of consumers of those goods.

This thesis asks the following research questions:

1. To what extent does the relevant legislation studied foster or restrict the realisation of human rights?
2. What does this tell us about the relationship between trade marks and human rights, domestically, and in a broader international context?
3. What do the case study findings tell us about the way that we can build a human rights culture for trade marks, using approaches from models that conceptualise the relationship between intellectual property and human rights?

What is a Human Rights Culture?

In this thesis, a human rights culture describes a culture that recognises and implements key human rights obligations, incorporating human rights standards and protection of human rights in customary international law. At a national level, institutions monitor this implementation to promote and foster human rights.[29] At an international level, accountability mechanisms provide additional monitoring and guidance for states in the implementation of their human rights obligations. These international bodies aid in the interpretation of human rights and recognise the dynamic nature of rights. Additionally, a human rights culture recognises obligations to promote respect for and observance of human rights through individual and joint actions, in cooperation with the United Nations.[30] States are similarly obligated to promote 'economic and

[27] Ibid s 11.
[28] Ibid s 3; *World Health Organization Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) ('*FCTC*').
[29] Sarkin describes these in a South African context: Sarkin, above n 5, 649–662.
[30] *Charter of the United Nations* art 55, 56.

social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.' [31]

The objective of a human rights culture for trade marks is one that promotes and fosters recognition of human rights that can both protect and restrict trade mark rights. This thesis considers appropriate limitations for these protective and restrictive dimensions. These restrictions may not be appealing for all stakeholders. Describing the process of adopting human rights culture, Arat notes that 'ethical, social, and economic transformation… makes it attractive to the disadvantaged, on the one hand, but leads to resistance and selective treatment by the states, on the other.'[32] Human rights culture can surround, underpin or influence the development of trade marks protection but it is not intended to subsume it.[33] A human rights culture for trade marks supports the protection of trade mark rights in a manner that is consistent with human rights obligations.

The proposed approach contrasts with previous proposals by Petersmann for a human rights culture for trade law that integrates human rights and international law in the institutions of international organisations.[34] Alston relevantly criticised the abstract nature of this proposal, the inclusion of controversial rights such as a 'human right to trade' in an international human rights law framework and the failure to recognise the practical impact of fragmentation in emphasising the complementary nature of trade and competition rules and human rights.[35] Petersmann more recently recognised some of Alston's criticisms but argued that greater integration remains important and asserted that it is paternalistic to assume human rights primacy without input from economic experts.[36] This is a valuable reminder of the need for assessments of the relationship between human rights and intellectual property to engage with

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[31] Ibid.

[32] Arat, above n 1, 424.

[33] Dinwoodie identifies human rights as one of five different frames (economics, trade, development, culture and human rights) that can advance understanding of intellectual property law: Graeme B Dinwoodie, 'Diversifying Perspectives of the International Intellectual Property System' in Christophe Geiger (ed), *Intellectual Property System in a Time of Change? European and International Perspectives* (LexisNexis, 2016) 222. See also Daniel Wuger and Thomas Cottier, *Genetic Engineering and the World Trade System: World Trade Forum* (Cambridge University Press, 2008) 27.

[34] See Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13(3) *European Journal of International Law* 621. See also Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19. For a more recent approach that recognises the application of an integration approach to intellectual property law as a part of trade law, see Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes', above n 18.

[35] Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13(4) *European Journal of International Law* 815.

[36] Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes', above n 18, 35–38.

the weight that states give to property rights and free trade.[37] The human rights culture proposed should also recognise Petersmann's recommendation concerning the need for national and international approaches to the protection of human rights and recognition of the link between human rights, democratic legitimacy and social value.[38]

Australia has agreed to the obligations found in human rights agreements and is bound to recognise general principles of international law where they constitute customary international law, as a member of the international community.[39] However, this thesis will identify important ways in which Australia is lacking a human rights culture. These include the broader absence of justiciable human rights, the limited mandate and dismissive attitude towards Australia's national human rights institutions and the limitations of internal legislative scrutiny mechanisms.[40] Although human rights culture can also be influenced by regional human rights protection mechanisms, the Asia-Pacific does not have a binding mechanism. Consequently, approaches grounded in regional approaches, like Petersmann's proposal, cannot be applied straightforwardly in the foreseeable future.[41] However, Chapter 5 of this thesis identifies evidence of growth in a rights scrutiny culture in Australia. This is a key feature of human rights awareness, which can have longer-term impacts on human rights protection.[42]

The Right to Benefit from Science and Culture

A common focus of the analysis of the relationship between human rights and intellectual property is on the human right enshrined in Article 15 of *ICESCR*.[43] This is an integrated right

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[37] Ibid. See also Alston, above n 35; Ernst-Ulrich Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13(4) *European Journal of International Law* 845. The debate about Petersmann's approach has continued. See, eg, Tao Li and Zuoli Jiang, 'Human Rights, Justice, and Courts in IEL: A Critical Examination of Petersmann's Constitutionalization Theory' 21(1) *European Journal of International Law* 193.

[38] Petersmann recognises the need for governments to 'promote and protect human rights in all policy areas across national frontiers': Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', above n 34, 622.

[39] Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman, 2003) 57.

[40] See Gillian Triggs, 'Creating a Human Rights Culture' (2014) 17 *Southern Cross University Law Review* 59.

[41] Petersmann acknowledges that Australia has a different system of constitutional rights protection but does not engage with the significant disparities between that type of protection and the protection provided in the European human rights frameworks: Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes', above n 18, 35–38. The difficulties with applying an approach derived from European fundamental rights protection will be addressed specifically in the analysis of Christophe Geiger's model in this thesis.

[42] See Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *UNSW Law Journal* 40.

[43] *ICESCR* art 15, which can also be found in *UDHR*, UN Doc A/810, art 27. See Plomer, above n 22; Shaver, above n 22; Audrey R Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2009) 8(1) *Journal of Human Rights* 1; Christine T Phan, 'Can the Intellectual Property-Human Rights Framework Bridge the Gap Between Vietnam's Legal

that recognises entitlements to benefits from science and culture. It evolved from protection recognised in Article 27 of the *Universal Declaration of Human Rights* (‘*UDHR*’), which protects the rights of everyone to participate in culture, enjoy the arts and share in scientific advances. It also recognises the rights of authors to benefit from protection of moral and material interests resulting from their scientific, literary and artistic productions.[44]

The nature of state obligations to protect these rights was developed in Article 15. Realisation of the right includes taking steps for the conservation, development and diffusion of science and culture; respect for freedom ‘indispensable for scientific research and creative activity;’ and ‘encouragement and development of international contacts and co-operation in the scientific and cultural fields.’[45] These additional obligations reinforce the integrated nature of the right. Guaranteeing the moral and material rights of authors incentivises the development of innovative contributions to cultural life and science and supports authors’ freedom to research and create.[46] Development and diffusion promote access to science and participation in culture, which can be enhanced by international cooperation.[47]

Trade marks are signs that are used to distinguish goods and services. Effective trade marks not only perform traditional trade mark functions of identifying source and quality but can also be used to convey important cultural messages.[48] Chapter 1 will consider how trade marks can become powerful cultural symbols that may also be eligible for Article 15 protection. A famous example is the Marlboro trade mark used in relation to cigarettes. Advertising campaigns using the trade mark linked it to strong imagery associated with American cowboys and masculinity.[49] As negative health connotations became linked to smoking, multiple layers of symbolism increased the mark’s cultural significance.[50] The extent to which cultural symbols should be protected from public use engages questions about the scope and nature of trade mark protection.[51] Chapter 8 will demonstrate that regulation of tobacco trade marks engages

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Reality and Rhetoric?’ (2008) 22(1) *Columbia Journal of Asian Law* 143, 156–159; Peter K Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’ (2006) 40(3) *University of California Davis Law Review* 1039; Helfer and Austin, above n 2, 171–212.

[44] *UDHR*, UN Doc A/810, art 27; *ICESCR* art 15.

[45] *ICESCR* arts 15(2), 15(3), 15(4).

[46] Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15, Para 1(c) of the Covenant)*, UN ESCOR, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [4].

[47] Ibid [36]-[38].

[48] Richardson, above n 9, 194–196. See also Coombe, above n 9, 55–62, 166–167; Helfer and Austin, above n 2, 307–309.

[49] Michael E Starr, ‘The Marlboro Man: Cigarette Smoking and Masculinity in America’ (1984) 17(4) *Journal of Popular Culture* 45, 54.

[50] See ibid 55–56.

[51] Patricia Loughlan, ‘Protecting Culturally Significant Uses of Trade Marks (Without a First Amendment)’ (2000) 22(7) *European Intellectual Property Review* 328, 329.

questions not only of Article 15 protection but rights of freedom of expression, the right to property and the right to health.

OBJECTIVES AND VALUE OF RESEARCH

The objectives of this research are to improve understanding of the relationship between trade marks and human rights and to use the analysis involved to propose methods for ensuring that the operation of trade mark law is consistent with human rights. These methods should recognise as fully as possible the functions of intellectual property that are consistent with human rights. This recognition will permit intellectual property to contribute to broader social welfare objectives that are consistent with the realisation of economic, social and cultural rights.

Using a human rights-based approach to legislative analysis, the thesis explores the way in which trade marks fit into a conceptual relationship between intellectual property and human rights. By understanding and recognising the cultural significance of trade marks, it is possible to find a place for their protection in frameworks that conceptualise the relationship between intellectual property and human rights. This thesis develops our understanding of the normative aspects of that relationship by comparing theoretical justifications for human rights to theoretical justifications for trade marks. There have been comparisons of justifications for human rights and intellectual property generally,[52] but this thesis will consider the specific justifications for trade marks. These are less focused on incentives for innovative activity that can benefit society than the justifications for patent law or copyright law.[53] Some models conceptualising the relationship between human rights and intellectual property that focus on patent and copyright protection argue that the fields coexist because the objectives of each field are fundamentally the same.[54] This thesis explores the extent to which trade mark objectives are consistent with the objectives of human rights protection and questions this aspect of coexistence models.

Another objective of this research is to explore the relationship between industrial property and human rights in a developed country. Industrial property is a subset of intellectual property and includes protection for patents, trade marks and designs.[55] Although the relationship between

[52] Dreyfuss, above n 23; Murumba, above n 2. Gervais focuses on copyright and patent protection: Daniel Gervais, 'Human Rights and the Philosophical Foundations of Intellectual Property' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 89.
[53] Jan Brinkhof, 'On Patents and Human Rights' in Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 140, 140. See also Yu, 'Ten Common Questions about Intellectual Property and Human Rights', above n 3, 726–730.
[54] Derclaye, above n 23, 134–140.
[55] *Paris Convention for the Protection of Industrial Property*, opened for signature 20 March 1883, 828 UNTS 305, revised at Stockholm 14 July 1967, amended 28 September 1979 (entered into force 6 July

human rights and industrial property is governed by international law, this thesis recognises that the two primary actors in human rights agreements are the state and the individual. This does not exclude the importance of international cooperation and assistance.[56] Uneven global economic development means that some states rely on the assistance of other states to realise their human rights obligations. Despite this, the relationship between the individual and the state means that ordinarily the operation of the laws within the state impact most directly on human rights. Consequently, the case studies in this thesis concentrate on domestic legislation and recognise the broader international context for that legislation. The emphasis of previous research of this nature has been on the human rights implications of industrial property in developing countries, usually on patent rights.[57] Developing countries may benefit from international cooperation and assistance obligations to realise human rights but developed countries also need to consider their international cooperation and assistance obligations.[58] These obligations have not been a focus of existing literature that conceptualises the relationship between intellectual property and human rights.[59]

The broader international context cannot be ignored in attempting to develop a human rights culture for trade marks. Fragmentation between the fields of intellectual property and human rights is recognised in many theories that conceptualise the relationship between human rights and intellectual property. An objective of this research is to better understand the practical impact of this fragmentation on the development and operation of domestic legislation. The thesis explores the way that both human rights and trade mark obligations in international law influence the development of legislation for trade marks in Australia. A detailed analysis of the

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1884). Greater attention has been given to the relationship between copyright and human rights in developed countries. See, eg, Helfer and Austin, above n 2, 243–283.

[56] *Charter of the United Nations* arts 55, 56; Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) para 51. There is growing recognition of the role of third-party actions: Committee on Economic, Social and Cultural Rights, *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN ESCOR, 61st sess, UN Doc E/C.12/GC/24 (23 June 2017).

[57] See, eg, Lisa Forman, 'From TRIPS-Plus to Rights-Plus? Exploring Right to Health Impact Assessment of Trade-Related Intellectual Property Rights through the Thai Experience' (2012) 7(2) *Asian Journal of WTO and International Health Law and Policy* 347.

[58] See Molly Land, 'Rebalancing TRIPS' (2011) 33(3) *Michigan Journal of International Law* 433, 437. Kur and Grosse Ruse-Khan identify the potentially negative impact of increasing standards on industrialised countries: Annette Kur and Henning Grosse Ruse-Khan, 'Enough Is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection' in Annette Kur and Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) 359, 366.

[59] See, eg, Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014).

international influences on post-colonial trade mark law has not previously occurred.[60] This is important for understanding the weight that Australia gives to international influences in trade mark law.

The case studies in this thesis indicate that there are significant limitations for the development of a human rights culture for trade marks even though trade marks can function to protect human rights. The case studies are used to provide examples of potentially competing international obligations in intellectual property law and human rights law. These examples are considered within a broader international context where the consequences of these competing obligations are reduced domestic regulatory autonomy and conflicts for states seeking to recognise the binding obligations in each field. Despite their normative significance, the obligations of human rights law may be given less weight in these conflicts because the enforcement mechanisms associated with them are less likely to result in sanctions. Furthermore, the nature of certain economic, social and cultural rights means that failures to progressively realise these rights are harder to identify and criticise as breaches of state obligations. State protection for owners of intellectual property has grown with a regime shift towards embedding intellectual property protection obligations in bilateral and regional trade agreements. This thesis explores the way in which this shift reduces transparency during the development of additional protection obligations and employs enforcement mechanisms to protect concerns of foreign investors above those of domestic actors, without appropriately safeguarding human rights.[61] Tobacco plain packaging disputes demonstrate how this can have a chilling regulatory impact on the protection of human rights.[62] Features of the broader international context for trade mark law indicate the importance of focusing on the development of a positive human rights culture, rather than the current reactive approach of using human rights as a corrective for serious human rights concerns engaged by the operation of international intellectual property law.[63]

Creating a positive human rights culture requires appropriate analytical tools for identifying existing and potential conflicts between intellectual property obligations and human rights. Such

[60] Scardamaglia surveys colonial trade mark law: Amanda Scardamaglia, *Colonial Australian Trade Mark Law: Narratives in Lawmaking, People, Power and Place* (Australian Scholarly Publishing, 2015).
[61] Cynthia Ho, 'Sovereignty Under Siege: Corporate Challenges to Domestic Intellectual Property Decisions' (2015) 30(1) *Berkeley Technology Law Journal* 213; Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19 *Journal of International Economic Law* 27. Chapman addresses the influence of neoliberal ideology on realisation of human rights in Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016).
[62] See Jennifer L Tobin, 'The Social Cost of International Investment Agreements: The Case of Cigarette Packaging' (2018) 32(2) *Ethics & International Affairs* 153.
[63] Murumba, above n 2, 136. See Noah Novogrodsky, 'After AIDS' (2013) 14(2) *Melbourne University Law Review* 643, 644.

an analysis can be part of a more comprehensive road map for promoting and fostering human rights culture in trade mark law.

METHODOLOGY

Human rights-based methodology has not previously been used to consider the relationship between trade marks legislation and human rights in Australia.[64] Although the relationship between the human right to health and trade marks has been considered internationally, this has not involved a detailed human rights-based analysis of domestic trade marks legislation.[65] Some studies have focused on decisions involving trade mark rights that engage human rights considerations.[66] The approach of using human rights-based methodology is important to understanding how these standards might be useful guides for developing a human rights culture for trade marks.

This thesis undertakes two analytical projects:

1. The development of a framework for the analysis of the human rights implications of domestic intellectual property legislation and an application of that framework to two case studies of Australian trade mark legislation; and
2. The development of a framework conceptualising the relationship between human rights and trade marks designed to strengthen recognition of human rights obligations in trade mark law, building on the analysis of other frameworks that conceptualise the relationship between intellectual property and human rights.

Human Rights-Based Analysis of Trade Mark Legislation

The literature regarding human rights-based approaches to health is reviewed in Chapter 4 of this thesis. These approaches recognise the interdependence and interrelatedness of human rights.[67] They also incorporate characteristics that are specifically relevant to the realisation of the right to health, which is a concern in each case study. These characteristics include progressive realisation and recognition of obligations of international cooperation and

[64] See limited analysis in Murumba, above n 2; Genevieve Wilkinson, 'The Human Rights (Parliamentary Security) Act 2011 (Cth) and the Increasingly Visible Intersections between the Human Right to Health and Intellectual Property in Australia' (2016) 105 *Intellectual Property Forum* 46; Rimmer, above n 18, 76–80.
[65] See Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes', above n 18; Grosse Ruse-Khan, above n 18.
[66] Laurence R Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights' (2008) 49(1) *Harvard International Law Journal* 1; Ricolfi, above n 3, 464–490.
[67] Hunt, above n 20; Chapman, above n 61.

assistance.[68] Adopting a human rights-based approach, the case studies consider the following questions:

1. How do the legislation and its operation contribute to the tripartite obligations to respect, protect and fulfil the right to health?
2. Is this consistent with progressive realisation of the right to health? Is the legislation effective in realising the human right to health?
3. Is the legislation consistent with obligations of international cooperation and assistance?
4. What other human rights are relevant to the legislation and its operation? Are these rights impacted positively or negatively by the legislation? Is this consistent with human rights obligations?
5. Whose rights are impacted positively and negatively by the legislation and its operation? Do the legislation and its operation permit participation of these stakeholders? Are the legislation and its operation consistent with principles of transparency and non-discrimination?
6. What system of monitoring, evaluation, accountability and redress exists to ensure that the legislation is progressing towards its intended human rights goals and that adverse effects can be addressed?

The analysis reviews primary sources of legislation and regulations and supporting legislative material. This material includes explanatory memoranda, bill digests, parliamentary debate and parliamentary committee scrutiny materials. The case studies also analyse published policies and annual reports of relevant government agencies and relevant journal articles and books analysing the legislation and its operation.[69] The plain packaging case study employs doctrinal analysis of parts of the World Trade Organization decision on Australian plain packaging legislation.[70] The anti-counterfeiting case study includes empirical analysis through compilation and analysis of data regarding notices of objection lodged by trade mark owners in relation to anti-counterfeiting measures and alerts issued by the Therapeutic Goods Administration regarding counterfeit therapeutic goods. This is used to assess the potential prevalence of health and safety risks amongst goods that can be seized as part of our anti-counterfeiting regime.[71]

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[68] Hunt, above n 20.

[69] For examples of the type of primary research undertaken, see Ann R Taket, *Health Equity, Social Justice and Human Rights* (Routledge, 2012) 113–145. See also approach in Phan, above n 43. For a further example, see Forman, above n 57.

[70] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018).

[71] This risk has been described in Melanie Jose, 'Raising the Bar on Australia's Border Measures: Improvements to the Notice of Objection Scheme Resulting from the IP Laws Amendment (Raising the

The case studies have been chosen to permit an in-depth exploration of the position of trade marks in the relationship between human rights and intellectual property. The two types of legislation chosen permit a broader understanding of the nature of trade mark rights. Plain packaging legislation engages conflicts concerning the scope of rights granted to the rights holder. Anti-counterfeiting considers the human rights implications of mechanisms that permit protection and enforcement of those rights. As both engage health concerns, analysis of these two different aspects of trade marks protection permits a broader understanding of the relationship between trade marks and the right to health. Both case studies also engage other human rights. This permits a broader understanding of the relationship between trade marks and human rights and the way this can also engage conflicts between different human rights. Importantly, the legislation analysed operates in the same jurisdiction. The human rights implications in each case study are influenced by common structural restrictions to the realisation of human rights in Australia, which are addressed in Chapter 5. These are relevant to assessing whether restrictions on rights relate directly to intellectual property laws or obligations or to other jurisdictional features.

Application of Conceptual Models to the Case Studies

The second analytical project addresses theories about the relationship between intellectual property and human rights that have been developed by other authors. It applies analytical approaches used by theoretical models explaining the interaction between the fields to the relationship between intellectual property and human rights identifiable from the case studies. Further, it incorporates this analysis into a conceptual framework for human rights and trade marks. As will be considered in greater detail in Chapter 1, the original focus of the relationship between intellectual property and human rights concentrated on two types of models.[72] One emphasised conflict between intellectual property and human rights and asserted the primacy of human rights in this conflict. The other asserted that the two fields could coexist without conflict. These conflict and coexistence models are relevant guides to understanding features of the relationship between intellectual property and human rights and are analysed in the thesis. Subsequently, a third type of model has developed. This type recognises the conflict between

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Bar) Act 2012' (2012) 90 *Intellectual Property Forum* 52, 55; Connor Duffy and Nikki Tugwell, 'Global Crime Gangs Behind Surge in Counterfeiting, Customs Says: Fake Pharmaceuticals Laced with Rat Poison' *ABC News (online)*, 8 October 2014 <http://www.abc.net.au/news/2014-10-08/global-crime-gangs-behind-counterfeiting-surge-customs-says/5799660>. There is also analysis of the threat internationally: Michele Forzley, 'Counterfeit Goods and the Public's Health and Safety' (International Intellectual Property Institute Research Paper, July 2003); Liberman, above n 19.

[72] Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5(1) *Minnesota Intellectual Property Review* 47.

the fields but seeks to prescribe conditions for integration between the fields.[73] A significant feature of the models is their emphasis on tools and approaches that aid our understanding of the human rights dimensions of intellectual property.[74]

The thesis identifies tools and approaches suggested by three different prescriptive models. These approaches are applied to the case studies to understand the conflicts and potential conflicts between human rights and intellectual property that are identified using human rights-based analysis. Geiger's approach integrates protection for the right to benefit from science and culture into a domestic or regional constitutional framework for human rights.[75] Yu explores what types of intellectual property might be protected as part of the right to benefit from science and culture, developing foundational principles and a structured analysis for identifying human rights-protected scientific productions.[76] This can also be used to understand human rights protection for literary or artistic productions.[77] Where this protection is identified, Yu prescribes mechanisms for addressing potential conflicts between these human rights-protected intellectual property rights and other human rights.[78] Helfer and Austin establish both protective and restrictive standards for human rights protection of intellectual property through the right to benefit from science and culture and the right to property.[79] Although they accept that intellectual property rights may need to be modified to protect certain human rights standards, they emphasise the need to protect the beneficial contribution of intellectual property to the greatest extent possible.[80] They assess the nature of that contribution and how it might be protected.[81] They also assess whether intellectual property protection is, in fact, the cause of the restriction of human rights.[82]

Although each model emphasises different approaches, they all recognise the importance of promoting and fostering human rights. The approaches they recommend are largely complementary, although they engage different thresholds of protection for human rights. The case studies are used to understand the significance of these different thresholds, which include

[73] Laurence R Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' in Rochelle C Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, 2018) 117, 130–131.
[74] Subsequently, there have been several other approaches to exploring the relationship between human rights and intellectual property, but these place less emphasis on understanding a broader conceptual relationship or one that is specific to trade marks: ibid 132–134.
[75] Geiger, above n 3.
[76] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 3.
[77] Ibid 70.
[78] Ibid; Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 43, 1094–1095.
[79] Helfer and Austin, above n 2, 512–522.
[80] Ibid 518–519.
[81] Ibid 516–522.
[82] Ibid 520.

protection of core minimum standards of human rights and protection for progressive realisation of rights. The analysis of how these models can be used to understand the example of conflict and potential conflict identified in the case studies is incorporated into a framework encompassing tools and approaches that can be adapted to support a positive human rights culture in Australia and other states.

THESIS OUTLINE

Chapter 1 considers approaches to describing the relationship between intellectual property and human rights and how those conceptualisations relate to trade marks. The chapter explores how the limited human rights protection for the moral and material rights of creators of literary, artistic and scientific productions can apply to some trade marks. Usually linked to patent and copyright protection, this right is the basis for some human rights frameworks for intellectual property protection that seek to harmonise the relationship between intellectual property and human rights.

Chapter 2 explores the normative weight given to human rights by some frameworks introduced in Chapter 1. Theoretical justifications for trade mark law show some existing links between trade mark law and human rights. These links do not extend to expanded protection for trade mark owners. However, the justifications disclose numerous stakeholders and interests. Although no common theory harmonises the fields, the chapter explores the use of a spectrum recognising normative and positivist dimensions of both fields. This spectrum can be a useful tool to build a culture for trade marks that promotes and fosters human rights as it recognises the significance of international legal obligations in each field.

International law provides an important framework for the relationship between trade marks and human rights. **Chapter 3** identifies significant features of both international intellectual property law and international human rights law and considers how international law resolves conflicts between them. A key aspect of conflict resolution is the forum used for addressing disputes. The chapter considers how conflict norm integration applies to disputes that engage trade marks and human rights.

Human rights protection for intellectual property is based in protection of economic, social and cultural rights but the operation of trade mark legislation engages all type of human rights. **Chapter 4** develops a methodological framework that is suitable for assessing the implications of civil, political, economic, social and cultural rights for intellectual property, with special emphasis on the right to health. It identifies standards relevant to economic, social and cultural human rights: progressive realisation, international cooperation and assistance, and participation

and accountability. These are important features of a human rights-based approach that the public health approach, more frequently used in analysis of trade marks legislation, does not similarly address. While public health approaches are often complementary to a human right to health approach, Chapter 4 establishes the benefits of asserting human rights standards that are built into international law.

Chapter 5 uses this framework to understand broader limitations to the operation of a human rights framework in Australia, using examples relevant to the relationship between human rights and intellectual property. These examples suggest that significant tools for building a human rights culture for trade marks in Australia include legislative scrutiny of international agreements and new legislation. These and other mechanisms should be developed to improve human rights culture for trade marks.

Australia is bound by international intellectual property law when it develops trade mark legislation. It is important to understand the degree to which this restricts the implementation of its human rights obligations. **Chapter 6** assesses the extent to which obligations in international law permit states necessary domestic regulatory autonomy to calibrate intellectual property laws so that they recognise stakeholder interests and are consistent with other obligations in international law, such as human rights obligations. It considers trends in international trade mark law that influence international expansion of trade mark protection in domestic legislation and the justifications for that expansion.

Chapter 7 finds that Australian trade mark legislation is not always influenced by international trends supporting increases in protection for trade mark owners against dilution and tarnishment. This is relevant to understanding whether Australia is likely to withstand international pressure to adopt and implement future intellectual property obligations that may be inconsistent with human rights. The chapter also shows existing limitations for a human rights culture for trade marks.

Chapter 8 considers the case study of Australia's tobacco plain packaging legislation. It identifies obligations in international law that guide the legislation and considers the historical legislative approach to tobacco regulation on trade mark owners. It analyses the human rights implications of the legislation and identifies disputes that have emerged that may limit the ability of the legislation to support the human right to health. Despite its stated intention to support health objectives that are consistent with the right, the legislation emphasises public health.[83] This is consistent with limited legislative recognition of human rights obligations generally in the development of trade mark legislation. This limitation is important because the

[83] *Tobacco Plain Packaging Act 2011* (Cth) s 3.

relevant human rights engaged by the legislation are not limited to the human right to health, but include creators' rights to moral and material benefits from intellectual creations, freedom of expression, property and development.

Similarly, protection of trade mark owners against counterfeiting engages multiple human rights concerns, including rights to health, privacy and civil rights. **Chapter 9** considers the case study of Australia's anti-counterfeiting legislation. It identifies both relevant obligations in international law that guide the legislation and future obligations in other trade agreements that have human rights implications. The human rights implications have received limited analysis in Australia. Analysis is restricted by the limited availability of relevant data about the operation of the legislation. This makes it difficult to assess the effectiveness and accountability of the legislation. Available information suggests a potentially serious health threat. The case study identifies potential limitations of the legislation for the effective protection of human rights it engages or may engage if proposed further international obligations are implemented.

The case studies establish that domestic trade mark law raises significant human rights concerns that are not always addressed in a manner that is consistent with Australia's human rights obligations. This reflects potentially competing international obligations for states bound by both human rights agreements and intellectual property agreements. **Chapter 10** explains how each case study suggests restrictions on the implementation of human rights obligations resulting from increasingly narrow domestic regulatory autonomy for Australia to calibrate intellectual property policy. This becomes even more complex with the proliferation of bilateral and plurilateral trade agreements that contain additional intellectual property provisions and investor-state dispute mechanisms. This can contribute to a chilling regulatory environment in which intellectual property rights are preferred over human rights.

Chapter 11 identifies elements of a human rights culture for trade marks that can promote positive protection of human rights rather than simply relying on reactive, corrective mechanisms. The case studies permit an understanding of the relationship between trade marks and human rights in Australia. This analysis of the human rights implications of the case studies builds on the earlier analysis of the normative and positivist dimensions of the relevant legal rights and guides assessment of the conceptual models. This permits the identification of useful analytical approaches to support the implementation of both sets of norms in domestic law. These analytical approaches can vary between jurisdictions, but they acknowledge the importance of positive recognition of human rights in domestic trade mark law.

The thesis concludes with a summary of the outcomes and recommendations of the thesis and a discussion of avenues for future research.

CHAPTER ONE FOCUSING THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY AND HUMAN RIGHTS ON TRADE MARKS

1.1 INTRODUCTION

The international laws regulating human rights and intellectual property developed separately. Few interactions occurred between them until the World Trade Organization (WTO) *Agreement on Trade Related Aspects of Intellectual Property* ('*TRIPS*') entered into force in 1995,[1] introducing significantly stronger incentives for compliance with minimum intellectual property standards that potentially engaged human rights concerns.[2] In a seminal analysis of the field in 2003, Helfer identified two competing discourses emerging at this time.[3] The conflict model focused on the difficulties that the *TRIPS* intellectual property regime posed for several different human rights.[4] The coexistence model argued that little or no conflict existed between the two fields and *TRIPS* could be interpreted harmoniously with states' existing international human rights obligations.[5] Since 2003, intersections between the fields are increasingly evident.[6] A new

[1] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS*').

[2] Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 1–2; Aurora Plomer, 'The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science' (2013) 35(1) *Human Rights Quarterly* 143, 146.

[3] Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5(1) *Minnesota Intellectual Property Review* 47.

[4] See Audrey R Chapman, 'The Human Rights Implications of Intellectual Property Protection' (2002) 5(4) *Journal of International Economic Law* 861. See also Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property Rights and Human Rights*, ESC Res 2000/7, ESCOR, 52nd sess, 25th mtg, UN Doc E/CN.4/Sub.2/RES/2000/7 (17 August 2000) Preamble para 11. See further Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights - Report of the High Commissioner*, UN ESCOR, 54th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2002/9 (25 June 2002); Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Human Rights, Trade and Investment - Report of the High Commissioner for Human Rights*, UN ESCOR, 55th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/9 (2 July 2003); Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property and Human Rights*, ESC Res 2001/21, ESCOR, 53rd sess, 26th mtg, UN Doc E/CN.4/Sub.2/RES/2001/21 (16 August 2001).

[5] See Rochelle Cooper Dreyfuss, 'Patents and Human Rights: Where Is the Paradox?' in Wilem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 72; Aik Hoe Lim, 'Trade and Human Rights: What's at Issue?' (2001) 35(2) *Journal of World Trade* 275, 289, 292; Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Intellectual Property Rights and Human Rights - Report of the Secretary-General*, UN ESCOR, 52nd sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2001/12 (14 June 2001) 16–17, pt III div G [1]-[2]; Estelle Derclaye, 'Intellectual Property and Human Rights: Coinciding and Cooperating' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 133, 134–140.

international agreement addresses matters of human rights and intellectual property.[7] Human rights and intellectual property have intersected in the reports of several United Nations Special Rapporteurs[8] and the deliberations of domestic courts and regional courts.[9] In response to this, discourses engaging human rights and intellectual property have expanded.

A conceptual framework that engages international human rights law and international intellectual property law is an important part of this discourse. It can provide a map for states to navigate the different theoretical and legal dimensions of each field in domestic law. A conceptual framework that explains or prescribes the interactions between international human rights law and international intellectual property law is an important tool for analysis of the two fields.[10] This chapter reviews some of these frameworks addressing the relationship between human rights law and intellectual property law. These frameworks rarely analyse the specific role of trade marks. This chapter contributes to the literature by considering the place of trade marks in the models in detail. Previous analysis has identified protection for trade marks pursuant to a human right to property.[11] Others who consider models that emphasise protection

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[6] Laurence R Helfer, 'Mapping the Interface between Human Rights and Intellectual Property' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 6, 7.

[7] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, opened for signature 27 June 2013 [2014] ATNIF 1 (entered into force 30 September 2016).

[8] Olivier De Schutter, Special Rapporteur, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation. Report Presented to the UN General Assembly*, UN GAOR, 64th sess, Agenda Item 71 (b), UN Doc A/64/170 (23 July 2009); Paul Hunt, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur, Paul Hunt, on His Mission to the World Trade Organization: Addendum*, UN ESCOR, 60th sess, Agenda Item 10, UN Doc E/CN.4/2004/49/Add.1 (1 March 2004); Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN GAOR, 17th sess, Agenda Item 3, UN Doc A/HRC/17/27 (16 May 2011); Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, UN GAOR, 20th sess, Agenda Item 3, UN Doc A/HRC/20/26 (14 May 2012).

[9] For an example of a decision in the European Court of Human Rights, see *Anheuser-Busch Inc v Portugal (Merits)* (2007) I Eur Court HR 39 ('*Anheuser-Busch*'). For a domestic example, see *Laugh It Off Promotions CC v South African Breweries International (Finance) BV* (2006) 1 SA 144 (Constitutional Court) ('*Laugh It Off*'). For a discussion of 1000 Brazilian constitutional cases asserting social and economic rights, see Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, 2009) 77.

[10] For a detailed description of this approach and an overview of these models see Helfer and Austin, above n 2, 64–89. See also Helfer, 'Mapping the Interface between Human Rights and Intellectual Property', above n 6, 11–15; Lea Shaver, 'The Right to Science and Culture' (2010) 1 *Wisconsin Law Review* 121, 122–124; Plomer, above n 2, 150–153.

[11] Megan M Carpenter, 'Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?' (2009) 99(4) *Trademark Reporter* 892, 915–916; Sam F Halabi, 'Reconciling International Obligations to Protect Health and Trademarks: A Defense of Trademarks as Property' in Daniel Gervais (ed), *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 389.

for the right to benefit from science and culture have dismissed a role for trade marks[12] or not considered the role of trade marks in great detail.[13] However, there is important recognition of the freedom of expression implications of trade marks.[14] Others focus on the separate nature of the human rights regime from the intellectual property system[15] or argue for the integration of that regime within the WTO.[16]

The first section of this chapter considers the historical and contemporary significance of the right to benefit from science and culture to debates about what a conceptual framework for human rights law and intellectual property law should comprise. This chapter contributes to the field by exploring potential human rights protection for trade marks as literary and artistic productions protected by the right to benefit from science and culture or from unjustifiable expropriation by states. This assessment forms part of the analysis in the second section of the position of trade marks in key prescriptive models that seek to harmonise the relationship between international and intellectual property law. Prescriptive models moving beyond conflict and coexistence attempt to harmonise human rights law and intellectual property law, although they do not necessarily harmonise all parts of human rights law with all parts of intellectual property law. The chapter develops the role of trade marks in different harmonising prescriptive models and identifies tools used by those models that can guide the subsequent analysis of the case study findings.

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[12] Peter K Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property' (2016) 69(1) *SMU Law Review* 37, 85–95; Peter K Yu, 'Ten Common Questions about Intellectual Property and Human Rights' (2007) 23(4) *Georgia State University Law Review* 709, 726–730.

[13] Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 661, 661–689. Helfer and Austin focus on trade marks in relation to freedom of expression and traditional knowledge in Helfer and Austin, above n 2, 283–312, 496–502. Rahmatian describes Article 15 as 'cryptic': Andreas Rahmatian, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 335, 344.

[14] See, eg, Helfer and Austin, above n 2, 283–312; Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 672.

[15] Grosse Ruse-Khan describes it as an alternative system: Henning Grosse Ruse-Khan, *Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 212. Rahmatian notes the lack of enforcement mechanisms is problematic for commercial lawyers: Rahmatian, above n 13, 344.

[16] See Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13(3) *European Journal of International Law* 621. See also Ernst-Ulrich Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes' (2015) 10 *Asian Journal of WTO & International Health Law and Policy* 27.

1.2 ISOLATIONISM, THE RIGHT TO BENEFIT FROM SCIENCE AND CULTURE, AND THE HUMAN RIGHT TO PROPERTY

This section considers the value of historical arguments that assert the fields should remain isolated. The section then considers the significance of provisions in human rights instruments that can be used to justify a human rights basis for intellectual property protection: Article 27 of the *Universal Declaration on Human Rights* ('*UDHR*'), Article 15 of the *International Covenant on Economic Social and Cultural Rights* ('*ICESCR*') and the right to property found in the *UDHR* and regional instruments.

1.2.1 Should the Fields remain Isolated?

Some theorists have argued that the fields of intellectual property and human rights should retain their traditional isolation[17] In practice, the greater interactions between the fields have unsurprisingly resulted in increasing analysis.[18] This analysis can be informed by an awareness of the concerns of isolationists: misperceptions between the fields, uncertainty about the impact of the interactions on states' legal obligations, and the need to recognise historical differences between the theoretical approaches taken by each field.[19] These concerns are useful for understanding the relationship between human rights and intellectual property. However, growing interactions between the fields of human rights and intellectual property suggest that it is not feasible for each field to retain their traditional isolation.[20] Historically, significant misunderstandings by advocates of each group about the other body of law have impeded effective interaction.[21] Misunderstanding is unlikely to be resolved by continued isolation of the fields.[22] The growing scholarship in the specific area of intellectual property and human rights continues to identify and address tangible overlaps between the fields.[23] Isolationists suggest that the increasing introduction of human rights concepts into intellectual property disputes

[17] Helfer and Austin, above n 2, 31–34.
[18] Helfer, 'Mapping the Interface between Human Rights and Intellectual Property', above n 6, 9–10.
[19] Ibid.
[20] Ibid 6–10.
[21] Ibid 9.
[22] Analogously, the development of the concept of sustainable development in environmental law through soft law and research focused non-governmental organisations has influenced international investment law, despite the previous isolation of international environmental law and international investment law. See Kate Miles, 'Soft Law Instruments in Environmental Law: Models for International Investment Law?' in Andrea K Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar, 2012) 82, 100–102.
[23] A comprehensive survey of relevant literature is found in Laurence R Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' in Rochelle C Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, 2018) 117.

could potentially create uncertainty.[24] This chapter considers models that address this uncertainty and the extent to which intellectual property objectives are already embedded in human rights agreements.[25]

The question of whether the different analytical approaches taken by each regime makes it difficult for them to harmonise will be considered in the following chapter.[26] Human rights law identifies the largely immutable negative and positive obligations held by states to protect and respect fundamental freedoms for all individuals.[27] These should not be subordinated to utilitarianism and welfare economics, which are primarily used to consider whether intellectual property strikes an appropriate balance at domestic and international levels.[28] An approach that permits greater theoretical synthesis of human rights and trade marks will be explored. This analysis is important because theoretical justifications differ between trade mark law and copyright and patent laws, which emphasise incentivising scientific and cultural innovation. The balance for trade marks is differently nuanced as creators and owners of trade marks are traditionally granted trade mark protection as an incentive to reduce consumer search costs and maintain consistent quality.[29]

1.2.2 Article 15: A Bridge between the Fields?

Although there is little direct consideration of human rights in intellectual property law, there are clear examples of common interests. Chapter 6 will consider how human rights are relevant to the text of *TRIPS*, the agreement that structures international intellectual property law in the context of trade. The clearest binding obligation broadly linking the two fields in international law is found in Article 15 of the *ICESCR*, which is based on Article 27 of the *UDHR*.[30]

Article 15 provides:

1. The States Parties to the present Covenant recognize the right of everyone:
    (a) To take part in cultural life;

[24] Helfer, 'Mapping the Interface between Human Rights and Intellectual Property', above n 6, 9.
[25] Christine T Phan, 'Can the Intellectual Property-Human Rights Framework Bridge the Gap Between Vietnam's Legal Reality and Rhetoric?' (2008) 22(1) *Columbia Journal of Asian Law* 143, 156–159.
[26] Helfer, 'Mapping the Interface between Human Rights and Intellectual Property', above n 6, 9–10.
[27] Ibid.
[28] See William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168, 169; William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) 173.
[29] Thomas D Drescher, 'The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth' (1992) 82(3) *Trademark Reporter* 301.
[30] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 15 ('*ICESCR*'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 27 ('*UDHR*').

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

This chapter will consider the extent to which Article 15 can be used to justify protection for intellectual property generally and trade marks specifically. To varying extents, Article 15 guides the proposals for integration between the fields.[31]

The origins of Article 15(1)(c) are found in Article 27(2) of the *UDHR*.[32] Shaver reviews the historical context and development of the right and argues that ideological differences influence the final form of Article 27(2).[33] Despite this, Shaver suggests that tensions between the different parts of Article 27 were not apparent at the time of drafting in relation to copyright.[34] There was little debate about the need to support access to science and cultural life contained in Article 27 and remuneration rewarding authors for their labour was already separately protected.[35] Moral rights were often protected in civil law countries, but their inclusion was opposed, unsuccessfully, by common law countries.[36]

General Comment 17, made by the Committee on Economic, Social and Cultural Rights (CESCR), provides guidance on the nature of human rights protection provided for trade marks by Article 15(1)(c). While human rights protection for trade marks may not have been explicitly

[31] Yu demonstrates how some protection can be provided by patent and copyright law for scientific productions: Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 70–84. In contrast, Plomer and Shaver use their historical analysis of Article 27 to argue a very narrow role for moral and material interests that is clearly distinct from international intellectual property laws: Shaver, above n 10, 122–124, 151; Plomer, above n 2.

[32] Shaver's analysis of Article 27 shows the numerous links between the two provisions: Shaver, above n 10, 121.

[33] Ibid 132–133.

[34] Shaver suggests this is because registration requirements were more prevalent: ibid 121. Green suggests *ICESCR* drafters did not contemplate potential conflicts resulting from modern issues such as the HIV/AIDS epidemic: Maria Green, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Drafting History of Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights. Background Paper*, UN ESCOR, 24th sess, Agenda Item 3, UN Doc E/C.12/2000/15 (9 October 2000) 44.

[35] Shaver, above n 10, 145.

[36] Ibid 144–151.

excluded by *General Comment 17*, the comment clearly states that the rights protected by Article 15 are not necessarily the same as those protected by patent, copyright and other intellectual property regimes.[37] The analysis emphasises copyright and patent protection and does not directly refer to any instrument that protects trade mark law in isolation, although general reference is made to both the *Paris Convention* and *TRIPS*, which do recognise protection for trade mark law.[38] The examples provided for literary and artistic productions (poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions) are closely analogous to copyright works in Australian law.[39]

Trade marks do not clearly correspond to the *General Comment 17* examples, although some marks could qualify for copyright protection where they comprise copyright works.[40] Copyright can protect a trade mark that contains an element of artistic work (composite mark) or is completely comprised of artistic work (device mark).[41] Obtaining literary protection for most trade marks is more complex because there is no copyright protection available for a single word, even if invented, and authors are unlikely to find protection in a phrase.[42] This does not mean that trade marks must not be protected pursuant to Article 15. Although Carpenter interprets *General Comment 17* to exclude trade marks,[43] an alternative reading is possible. Article 15(1)(c) protects creations of the mind.[44] It does not identify trade marks in its examples explaining what literary and artistic productions include. [45] However, the use of 'inter alia' in that explanation suggests that these could include creations other than the provided examples.[46]

CESCR interprets Article 15(1)(c)'s rationale for protection as one that 'encourage[s] the active contribution of creators to the arts and sciences and to the progress of society as a whole.'[47] This is clearly linked to underlying rationales for patent and copyright protection, which incentivise

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[37] Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15, Para 1(c) of the Covenant)*, UN ESCOR, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) ('*General Comment 17*').
[38] Ibid 14 [2] n 1.
[39] Ibid [9].
[40] *Advantage-Rent-A-Car Inc v Advantage Car Rental Pty Ltd* (2001) 52 IPR 24, (Madgwick J) ('*Advantage-Rent-A-Car*').
[41] Ibid.
[42] *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109, (Bennett J).
[43] Carpenter, above n 11, 903–904.
[44] *General Comment 17*, UN Doc E/C.12/GC/17, [9].
[45] Ibid.
[46] Ibid; J Janewa Osei Tutu, 'Corporate "Human Rights" to Intellectual Property Protection?' (2015) 55 *Santa Clara Law Review* 1, 47.
[47] *General Comment 17*, UN Doc E/C.12/GC/17, [4].

innovation and cultural development.[48] Human rights protection for copyright reflects the emphasis in *General Comment 17* on the close relationship between the protections provided in Article 15(1)(c) and the 'mutually reinforcing and reciprocally limitative' rights to take part in cultural life,[49] to enjoy the benefits of scientific progress and its applications,[50] and the freedom indispensable for scientific research and creative activity.[51] Steps to achieve the right should address the conservation, development and diffusion of science and culture.[52] In contrast, trade marks have an economic function and, more traditionally, promote consumer protection as an identifier of source of origin and consequently a reliable indicator of quality.[53] In contrast to copyright, authorship of trade marks involves linking a word or an image or a combination of those things to certain goods or services. Effectively doing this increases the chances that the public will attribute meaning to those words or images, which could contribute new signifiers to society's cultural lexicon.[54] Protecting material interests can incentivise the creation of these new symbols.

Increasingly, certain marks are recognised for their cultural significance.[55] Sometimes significance is so great that the sign is directly protected by legislation, such as protection of the Olympic rings symbols or protection of the ANZAC mark in Australia.[56] Although the relationship between copyright works and the marketplace of ideas means that it is important that copyright protection remains content neutral,[57] there is already a recognition that states can have more involvement in identifying which trade marks are acceptable for registration by excluding, for example, scandalous marks.[58] Registration of signs used by Indigenous groups as marks can be a concern for the protection of culture[59] or engage other complex concerns of

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[48] Ibid.
[49] *ICESCR* art 15(1)(a).
[50] Ibid art 15(1)(b).
[51] Ibid art 15(3); *General Comment 17*, UN Doc E/C.12/GC/17, [4].
[52] *ICESCR* art 15(2).
[53] Nicholas S Economides, 'The Economics of Trademarks' (1988) 78 *Trademark Reporter* 523; Elmer William Hanak, III, 'The Quality Assurance Function of Trademarks' (1974) 43(3) *Fordham Law Review* 301, 363–364.
[54] William M Landes and Richard A Posner, 'Trademark Law: An Economic Perspective' (1987) 30(2) *Journal of Law and Economics* 265, 271; Landes and Posner, above n 28, 168–169.
[55] Megan Richardson, 'Trade Marks and Language' (2004) 26(2) *Sydney Law Review* 193, 194–197; Helfer and Austin, above n 2, 307–309.
[56] *Protection of the Word 'Anzac' Act 1920* (Cth). See Catherine Bond, *ANZAC: The Landing, the Legend, the Law* (Australian Scholarly Publishing, 2016).
[57] Marc J Randazza, 'Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights' (2015) 16(1) *Nevada Law Journal* 107, 134–138.
[58] See Christophe Geiger and Leonardo Machado Pontes, 'Trade Mark Registration, Public Policy, Morality and Fundamental Rights' (Centre for International Intellectual Property Studies (CEIPI) Research Paper No 2017-01, 2017).
[59] Susy Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' in Graeme B Dinwoodie and Marc D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 433, 446–447.

human dignity.[60] This is relevant to the recent United States Supreme Court decision to uphold registration of 'The Slants' on the basis of freedom of expression protection, despite the negative racial stereotypes associated with the sign.[61] *ICESCR* Article 15 protection might confer moral rights on trade creators that need to be balanced against protection for freedom of expression for the owner of the mark in a human rights framework for trade marks.[62] Moral rights include the rights of authors to attribution and to object against negative modifications or derogatory treatment of their productions 'which would be prejudicial to their honour and reputation.'[63] A creator's ongoing moral rights to control a mark might be relevant to well-known tobacco marks that encourage initiation and continuation of tobacco consumption. Using the example of the Marlboro mark, the creator of that mark might have objected to its continued use once it became clear that tobacco was addictive and consumption contributed to serious illness and preventable death. Moral rights might also be relevant where a mark is registered in one category, and the registration and use of the mark in another category might, in fact, be so derogatory that it offends the moral interests of the author. Applications by Siemens to register the sign Zyklon for gas ovens generated protest because Zyklon B was the name for deadly gas used in Nazi concentration camps.[64] Hypothetically, if Zyklon were an invented word and the creator was still living, it is possible to see how the proposed trade mark registration could be considered so derogatory that it would be inconsistent with the moral interests of the creator.

Arguably, human rights protection for some marks could encourage creators of trade marks to develop culturally significant marks.[65] It would justify moral rights protection for those creators, which does not currently exist in trade mark law. These moral rights would be relevant in circumstances where the use and protection of marks with strong cultural significance generates complex legal issues.[66] Moral rights could also endure once a mark becomes generic. The forthcoming analysis of each of the prescriptive models will address the implications of

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[60] See Victoria Phillips, 'Beyond Trademark: The Washington Redskins Case and the Search for Dignity' (2017) 92 *Chicago-Kent Law Review* 1061. Note Coombe's concerns about the impact of trade marks on Native Americans: Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke University Press, 1999) 185–207.

[61] *Matal v Tam* (No 15-1293, 19 June 2017).

[62] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19 ('*ICCPR*'). Compare to Halabi's argument that human right to property should be granted to trade mark owners as a balance against freedom of expression arguments: Halabi, above n 11.

[63] *General Comment 17*, UN Doc E/C.12/GC/17, [13]. See also *General Comment 17* at [30]-[31], [39], [44]-[45].

[64] 'Siemens Retreats over Nazi Name' *BBC News (online)*, 5 September 2002 <http://news.bbc.co.uk/2/hi/business/2233890.stm>.

[65] See Richardson, above n 55, 194–196.

[66] For example, the Barbie decisions discussed in Patricia Loughlan, 'Protecting Culturally Significant Uses of Trade Marks (Without a First Amendment)' (2000) 22(7) *European Intellectual Property Review* 328. The protection of the Waltzing Matilda mark has generated controversy: see, eg, *Winton Shire Council v Lomas* (2002) 56 IPR 243.

accepting that some marks could be protected pursuant to the right to benefit from science and culture. Chapter 2 will use the decision in the South African Constitutional Court case *Laugh It Off Promotions CC v South African Breweries International (Finance) BV* to consider the way Article 15(1)(c) rights might be relevant to conflicts between human rights and intellectual property.

1.2.3 Right to Property

Human rights protection for trade marks is increasingly linked to the human right to property but the relationship is not straightforward.[67] The right is articulated in *UDHR* Article 17 as providing everyone with 'the right to own property alone as well as in association with others' and the right that 'no one shall be arbitrarily deprived of his property.' Although the *UDHR* provides for protection for a right to property, this right is underdeveloped. It was not protected by either the *ICESCR* or the *International Covenant on Civil and Political Rights* ('*ICCPR*').[68] A primary issue limiting human rights protection of trade marks as property is that they are frequently owned by corporations. Article 15 protection is not available for corporations.[69] As human rights derive from 'the dignity and worth inherent in the human person,' the human person is the central subject and principal beneficiary of human rights.[70]

The human right to property receives regional protection.[71] The European Court of Human Rights (ECtHR) linked trade mark rights to this human right to property in *Anheuser-Busch Inc v Portugal* ('*Anheuser-Busch*').[72] This Court affirmed the principle that trade marks could be protected pursuant to the protections provided under Article 1 of the *First Protocol to the European Convention on Human Rights* ('*First Protocol*').[73] This Article provides for entitlements for natural or legal persons for peaceful enjoyment of their possessions, and protection against deprivation of possessions 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'[74] This is

[67] Helfer and Austin, above n 2, 62–63.
[68] Ibid 61–64.
[69] *General Comment 17*, UN Doc E/C.12/GC/17, [8].
[70] *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights*, UN GAOR, UN Doc A/CONF.157/23 (25 June 1993) Preamble para 2.
[71] *American Declaration on the Rights and Duties of Man: Adopted by the Ninth International Conference of American States, Bogotá, Colombia 1948* art 28; *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954) art 1 ('*First Protocol*').
[72] *Anheuser-Busch*.
[73] Ibid.
[74] *First Protocol* art 1.

modified by the provision for government control of use of property such that obligations such as tax duties can be attached to property, consistent with the public interest.[75]

The decision of the ECtHR in *Anheuser-Busch* considered whether Portugal had illegally expropriated or confiscated a trade mark owned by Anheuser-Busch.[76] In *Anheuser-Busch*, the Court established that human rights protection is possible for corporate entities seeking to protect their trade mark rights pursuant to the right to property.[77] Yu notes concern that the decision in *Anheuser-Busch* permits corporate actors to bring human rights claims.[78] The concern has been described as the 'human rights ratchet' of intellectual property rights, whereby granting human rights status to some or all intellectual property rights enables intellectual property rights owners to capture human rights forums and manipulate them for their own protection. This further excludes the other human rights considerations that may be implicated by expansive intellectual property protection.[79] There has long been concern that affording human rights protection to corporations in relation to intellectual property will result in abuse of those rights and domination of the space of human rights by corporate entities for economic gain, rather than for protection of the fundamental values underpinning human rights.[80] Extensive resources available to these parties may mean that they can use these rights to limit the protection of other human rights that may conflict with the human rights used to invoke intellectual property protection.[81] In contrast, Halabi argues that protection of those rights through rights to property might appropriately balance the strong protection that freedom of expression might offer against the interests of trademark owners.[82] Reiss criticises the Court's lack of engagement with the intellectual property elements of the case, particularly the theoretical underpinnings of trade mark law as distinctly commercial property, which make trade marks especially unsuitable for treatment in a human rights context.[83]

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[75] Ibid; Committee on Economic, Social and Cultural Rights, *Views: Communication No 5/2015*, 61st sess, UN Doc E/C.12/61/D/5/2015 (20 February 2015, views adopted on 20 June 2017) [13.2]-[13.4] ('*López Rodríguez v Spain*').
[76] *Anheuser-Busch*.
[77] Ibid; Laurence R Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights' (2008) 49(1) *Harvard International Law Journal* 1.
[78] Peter K Yu, 'Challenges to the Development of a Human Rights Framework for Intellectual Property' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 3rd ed, 2015) 95–97.
[79] Yu, 'Ten Common Questions about Intellectual Property and Human Rights', above n 12, 730.
[80] See ibid 726–730. See also Osei Tutu, above n 46, 11–17.
[81] See Yu, 'Ten Common Questions about Intellectual Property and Human Rights', above n 12, 730.
[82] Halabi, above n 11. See discussion of need to recognise relevance of fundamental rights (specifically freedom of expression and protection from unfair competition) in European trade mark law, and for new trade mark directives to incorporate specific and flexible exceptions to trade mark rights that reflect this in Martin RF Senftleben et al, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trademark Law* (Kooijmans Institute for Law and Governance, 2014).
[83] Jennifer W Reiss, 'Commercializing Human Rights: Trademarks in Europe After Anheuser-Busch v Portugal' (2011) 14(2) *The Journal of World Intellectual Property* 176, 177.

Models conceptualising the relationship between human rights and intellectual property recognise human rights to property and the extent to which they can protect intellectual property differently. Examples of this are evident from the prescriptive models analysed in this chapter. The limited protection for a human right to property recognised by Helfer and Austin in their model is much more narrow than broad property rights asserted in intellectual property law.[84] Yu notes that protection for the right to own private property in the *UDHR* is not unambiguous.[85] The potential interpretation of the right to own property in association with others could support a 'rich public domain.'[86] Yu concludes that it is ambiguous whether Article 17(1) 'provides the basis for the right to protection of material interests resulting from intellectual productions in Article 27(2).'[87] Chapters 2 and 6 of this thesis will consider the role of property rights as a justification for trade marks separate from the more narrow human rights protection for property.

Although some jurisdictions support protection of the human right to property, including protection for intellectual property, the basis for this in international law remains contested.[88] The protection given to trade marks by the ECtHR as a consequence of the right to property remains relevant to the weight that trade mark rights will be given where attempts are made to harmonise them with intellectual property.[89] The nature of human rights protection for property within domestic jurisdictions and regions is relevant to the role a right to property should play in the models.[90] No regional instruments binding Australia explicitly recognise a human right to property.[91] In the absence of regional instruments enshrining a human right to property, any fundamental rights are those found in the *Australian Constitution*.[92] The right asserted in *Anheuser-Busch* can support claims similar to those for the right to just compensation for unjustified appropriation of property by the government, which was asserted in *JT International SA v Commonwealth of Australia* before the Australian High Court in relation to the tobacco

[84] Helfer and Austin, above n 2, 515–516.
[85] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 93.
[86] Ibid 94.
[87] Ibid.
[88] Ibid.
[89] See *Anheuser-Busch*; Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights', above n 77. The use of the term 'property' in relation to trade marks will be further considered in Chapters 2 and 6.
[90] Dean highlights differences between this protection and South African protection: Owen H Dean, 'Trademarks and Human Rights: The Issue of Plain Packaging' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 590–599.
[91] Bernadette McSherry and Lisa Waddington, 'Treat with Care: The Right to Informed Consent for Medical Treatment of Persons with Mental Impairments in Australia' (2017) 23(1) *Australian Journal of Human Rights* 109, 113.
[92] See, eg, *Australian Constitution* s 51(xxxi), considered in *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v Commonwealth of Australia* (2012) 250 CLR 1. This will be examined in further detail in the plain packaging case study.

plain packaging legislation.[93] This will be considered in the plain packaging case study in Chapter 8 of this thesis, which recognises that this constitutional protection could support limited human rights protection for the right to property in Australia. Resolving the exact basis for claims of international protection for a human right to property is beyond the scope of this thesis. Human rights-based protection for trade marks is relevant to models conceptualising the relationship between human rights and intellectual property, even if it is limited in the ways that have been considered in this chapter. Both rights to property and rights derived from the right to benefit from science and culture will be considered in the following section and the case studies.

1.3 MODELS CONCEPTUALISING THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY AND HUMAN RIGHTS

This section provides further information about the historical and contemporary relationship between human rights and intellectual property. Conflict, coexistence and harmonising approaches to conceptualising the relationship between human rights and intellectual property give insight into that relationship.[94]

The conflict and coexistence models were first conceptualised by Helfer in 2003.[95] Helfer describes how the field then developed to include:

- proposals to integrate the human rights regime and the intellectual property regime;[96]
- rediscovery of the historical record to understand the relationship between the regimes;[97]
- mobilisation strategies to create, contest and implement legal norms;[98] and
- empirical studies of intellectual property law in action.[99]

Subsequently, Helfer identifies 'deep enmeshment' between the human rights and intellectual property regimes and an expanding range of engaging diverse agendas, moving beyond the traditional focus on access to medicines.[100] Yu has recently argued that debate about intellectual property and human rights has moved into more nuanced discussions.[101] This thesis engages in those discussions. Harmonising models are broadly characterised as models moving beyond

[93] Marco Ricolfi, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 453, 472–473.
[94] Helfer and Austin, above n 2, 64–89.
[95] Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence', above n 3.
[96] Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship', above n 23, 130–131.
[97] Ibid 131–132.
[98] Ibid 132–133.
[99] Ibid 133–135.
[100] Ibid 141–142.
[101] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 68.

conflict and coexistence.[102] There are a number of similarities between harmonising models considered in this chapter. They all accept the existence of conflict between human rights, as embodied in international law through United Nations agreements and customary law, and intellectual property as embodied in *TRIPS*. They all propose frameworks for understanding and resolving the conflict. The frameworks are all grounded in human rights and they are prescriptive rather than descriptive of existing interactions between human rights and intellectual property.[103] Despite the potential human rights-based protection for trade marks identified in the previous section, little emphasis has been given to trade marks in these approaches.[104] This chapter will consider how harmonising models are relevant to trade marks. It considers how proposals to integrate the human rights and intellectual property system apply to trade marks, focusing on the legal mechanisms used to achieve integration and address fragmentation between the two fields of law and the normative concerns underpinning the proposals.

1.3.1 Conflict Models

The conflict model focuses on the difficulties that the intellectual property regime imposed by *TRIPS* presents for a number of different human rights, such as the right to health, the right to education and the right to food, particularly in developing countries.[105] The conflict model draws largely on the output of human rights institutions in the 2000s,[106] in which actual and potential conflicts between *TRIPS* and numerous human rights are identified in non-binding reports and resolutions describing the conflict.[107] The approach to resolving the conflict was to assert the primacy of human rights over international trade law.[108] The protection for human rights (and health) provided for in Article 55 of the *Charter of the United Nations*, and the

[102] Helfer and Austin, above n 2, 81.
[103] Plomer, above n 2, 150–153.
[104] See Laurence Helfer, Karen J Alter and Florencia Guerzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103(1) *American Journal of International Law* 1.
[105] Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property Rights and Human Rights*, ESC Res 2000/7, ESCOR, 52nd sess, 25th mtg, UN Doc E/CN.4/Sub.2/RES/2000/7 (17 August 2000) Preamble para 11; Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights - Report of the High Commissioner*, UN ESCOR, 54th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2002/9 (25 June 2002); Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Human Rights, Trade and Investment - Report of the High Commissioner for Human Rights*, UN ESCOR, 55th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/9 (2 July 2003); Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property and Human Rights*, ESC Res 2001/21, ESCOR, 53rd sess, 26th mtg, UN Doc E/CN.4/Sub.2/RES/2001/21 (16 August 2001).
[106] See David Weissbrodt and Kell Schott, 'Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7' (2003) 5(1) *Minnesota Intellectual Property Review* 1; Helfer and Austin, above n 2, 52–57.
[107] Helfer and Austin, above n 2, 53–56.
[108] Ibid 65–71.

obligation on states to cooperate to protect human rights further provided in Articles 55 and 56, arguably supported primacy. This is because the *Charter of the United Nations* prevails to the extent that it conflicts with other international laws.[109] This doctrinal basis for primacy will be further analysed in Chapter 3.

Soon after *TRIPS* was agreed, developing countries expressed dissatisfaction with intellectual property harmonisation and its impact on human rights. A key focus of this dissatisfaction was the impact of patent law on access to essential medicines.[110] This prompted an emphasis on conflicts between intellectual property and human rights.[111] Providing essential medicines is interpreted as a core minimum obligation of the human right to health, which has been linked to other human rights such as the right to life.[112] *TRIPS* required WTO members to apply patent laws to all fields of technology without discrimination (with some limited exceptions).[113] Many developing countries had previously refused to issue pharmaceutical patents.[114] This enabled them to develop generic medicines that addressed the health needs of their population cost-effectively as they did not pay royalties to originators who could hold patents in other jurisdictions.[115] *TRIPS* provisions permitted compulsory use without authorisation of the patent holder for adequate remuneration where a voluntary licence on reasonable commercial terms could not be negotiated.[116] However, there was strong criticism about the extent to which the flexibilities of *TRIPS* could be utilised to justify authorisation of such compulsory licensing.[117] The wording of the agreement permitted each authorisation to be justified on its individual merits, and domestic production requirements presented difficulties for countries that lacked sufficient infrastructure to manufacture compulsory licensed products.[118] Dissatisfaction with

[109] *Charter of the United Nations* art 103.
[110] Susan K Sell, 'TRIPS and The Access to Medicines Campaign' (2001) 20(2) *Wisconsin International Law Journal* 481; Peter Drahos, 'Developing Countries and International Intellectual Property Standard Setting' (2002) 5(5) *Journal of World Intellectual Property* 765, 769–770; Sisule F Musungu, 'The TRIPS Agreement and Public Health' in Carlos María Correa and Abdulqawi Yusuf (eds), *Intellectual Property and International Trade: The TRIPS Agreement* (Kluwer Law International, 2nd ed, 2008) 421, 421–423, 446–449; Daniel J Gervais, 'IP Calibration' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 86, 87.
[111] Sell, above n 110, 513.
[112] John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012); Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) para 43 ('*General Comment 14*'). See recognition of this link in the Indian Supreme Court decision: *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42.
[113] *TRIPS* art 27(1); Musungu, above n 110, 432.
[114] Musungu, above n 110, 422.
[115] Robert Weissman, 'A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonise Global Intellectual Property Rules and the Remaining WTO Legal Alternatives Available to Third World Countries' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 1069, 1096.
[116] *TRIPS* art 31.
[117] Musungu, above n 110, 446–450.
[118] Ibid 436–437; *TRIPS* art 31.

these difficulties and resulting discussion prompted the WTO *Doha Declaration on Public Health*, which emphasised the importance of interpreting *TRIPS* in a manner consistent with health concerns.[119] This resulted in an amendment of *TRIPS* being agreed to by the TRIPS Council to permit states to manufacture compulsorily licensed products for other countries.[120] However, this 2003 *TRIPS* amendment was not ratified until 2017.[121] Even with ratification, significant problems remain with the inclusion of human rights in the *TRIPS* system.[122] This is demonstrated by the continued absence of direct reference to human rights in *TRIPS*[123] and controversy about the extent to which the dispute settlement body implements the flexibilities of *TRIPS*.[124]

The conflict narrative influences part of the work by Shaver and Plomer on the historical origins of Article 27.[125] Plomer draws on the drafting history of Article 27(2) to suggest that there is 'little support for the view that intellectual property rights are fundamental human rights, although the modalities of national and international intellectual property and patent laws may certainly, and indeed, should be deployed in the service of human rights.'[126] Shaver develops the work of Chapman, emphasising an integrated approach to a functioning intellectual property system that emphasises all of the elements of Article 15.[127] This approach emphasises social

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[119] Musungu, above n 110, 446–450; *Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration). See discussion of broader dissatisfaction with *TRIPS* in Gervais, above n 110, 87.

[120] Musungu, above n 110, 450–465.

[121] World Trade Organization News, *WTO IP Rules Amended to Ease Poor Countries' Access to Affordable Medicines* (23 January 2017) World Trade Organization <https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm>; *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (2 September 2003) (Decision of 30 August 2003); *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540/Corr.1 (29 July 2005) (Decision of 30 August 2003: Corrigendum); *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (8 December 2005) (Decision of 6 December 2005).

[122] Musungu, above n 110, 464–466. See also Molly Land, 'Rebalancing TRIPS' (2011) 33(3) *Michigan Journal of International Law* 433; Juan He, 'Developing Countries' Pursuit of an Intellectual Property Law Balance under the WTO TRIPS Agreement Comment' (2011) 10 *Chinese Journal of International Law* 827, 850–851.

[123] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Adverse Human Rights Impact of International Investment Agreements and Multilateral Free Trade Agreements, Including the Human Rights Impacts of WTO Law and Practice*, UN GAOR, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/40 (12 July 2016) 29, 34.

[124] He, above n 122, 848–851.

[125] Shaver notes frequent direct conflicts between the right to science and culture and the intellectual property approach: Shaver, above n 10, 154.

[126] Aurora Plomer, *Pardox, Human Rights and Access to Science* (Edward Elgar, 2010) 93.

[127] Shaver argues that the framers of Article 27 were primarily concerned with 'ensuring universal access to the fruits of science and technology as well as to the realm of cultural and artistic life, broadly understood.' History suggests that the interests protected are limited to the creator's right to obtain a decent standard of living from their work and to preserve their moral rights of attribution and integrity: Shaver, above n 10, 150. See also Audrey R Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2009) 8(1) *Journal of Human Rights* 1. However, Chapman does not ignore trade marks and argues that human rights should be incorporated into

welfare and the need to benefit from science, fostering and defending human dignity and the common good and, to this end, limiting the protection provided for creators and authors.[128] Shaver recommends championing Article 27 in areas of state flexibility still available under *TRIPS*, including expanding the WTO to consider additional sources of law and members' public policy priorities.[129] Shaver suggests that it may be possible in the future for national courts to recognise Article 27 to the extent that it can challenge the existing intellectual property regime, but that this could take a long time.[130] This approach recognises the potential benefits of intellectual property when protection is framed to recognise its function to benefit social welfare. It is relevant to the constitutional model suggested by Geiger and the emphasis on the benefits of intellectual property in the Helfer and Austin model. These will be considered later in this section.

The utility of the conflict model that emphasises the primacy of human rights in favour of intellectual property obligations has been criticised. Chapter 2 will consider the theoretical basis for asserting human rights primacy. Chapter 3 will assess the rules available in international law for asserting the primacy of human rights over intellectual property law. In practice, states place importance on trade obligations, including *TRIPS*.[131] Chapter 8 will use the plain packaging case study to explore how states are deterred from breaching intellectual property obligations that may impact negatively on human rights. One reason for this is that WTO enforcement mechanisms available for *TRIPS* breaches include powerful deterrents, including trade sanctions.[132] These remain stronger deterrents than the consensus-based mechanisms available for human rights institutions.[133] Progressive realisation of economic, social and cultural rights

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assessment of trade mark applications: Audrey R Chapman, *Approaching Intellectual Property Rights as a Human Right: Obligations Related to Article 15 (1) (c). Commission on Economic Social and Cultural Rights Discussion* Paper, 24th sess, Agenda Item 3, UN Doc E/C.12/2000/12 (3 October 2000).

[128] Shaver, above n 10, 150. See also Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications', above n 127.

[129] Shaver, above n 10, 182. Petersmann also takes a fundamental rights approach in his analysis of the WTO disputes involving tobacco plain packaging. He advocates for constitutionalisation and integration of human rights law and international economic law. He applies this model to the plain packaging disputes currently before the World Trade Organisation and argues that this is the best approach for constitutional democracies like Australia, but he does not provide a detailed explanation of how this might occur: Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes', above n 16, 62. See also Ernst-Ulrich Petersmann, 'Human Rights and International Economic Law' (2012) 4(2) *Trade Law and Development* 283.

[130] Shaver, above n 10, 182–183. See approach proposed by Geiger in Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 661.

[131] Samuel Murumba, 'Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property' (2012) 38(1) *Monash University Law Review* 119, 133–134.

[132] Ibid; Matthew Kennedy, *WTO Dispute Settlement and the TRIPS Agreement* (Cambridge University Press, 2016).

[133] See Murumba, above n 131, 135–136; Rhona KM Smith, *Textbook on International Human Rights Law* (Oxford University Press, 7th ed, 2016) 51.

can make it more difficult to demonstrate how compliance with trade laws compels breaches of human rights, such as the right to health.[134] The complex nature of state obligations pursuant to the right to health will be considered further in Chapters 4 and 5. These criticisms suggest that alternative models considered in this section may be more useful to understanding interactions between intellectual property and human rights.

1.3.2 Coexistence Models

The coexistence model asserts that there is little or no conflict between international intellectual property law and international human rights law.[135] According to this model, intellectual property and human rights are two fields that can operate harmoniously. This is because both fields fundamentally question the balance between private individual rights to receive limited monopolies as an incentive to create and innovate on one hand, and public rights to access and consume the results of creation and innovation on the other.[136] This emphasises the flexibilities provided by Articles 7 and 8 of *TRIPS*, as it situates the tension between the fields in the balance between incentives to innovate and access to innovation.[137] Dreyfuss argues that *TRIPS* provides the framework to resolve that tension.[138] Despite both fields utilising the concept of a balancing of interests and rights, the balance sought for each is based on critically different foundational principles, which influence the balancing exercise.[139] Human rights law balances competing human rights and focuses on the interests of the individual and the obligations of states to individuals and each other. While intellectual property traditionally balances the need to incentivise innovation and reward private innovators against the social welfare concerns of the public, there is an increasing trend towards the protection of property interests in intellectual property.[140] Chapters 2, 6 and 10 of this thesis will address the way that expanding protection

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[134] Helfer, 'Mapping the Interface between Human Rights and Intellectual Property', above n 6, 11–12.
[135] Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship', above n 23, 130.
[136] Helfer and Austin, above n 2, 73. *General Comment 17*, UN Doc E/C.12/GC/17, [2] emphasises that 'the scope of protection of the moral and material interests of the author provided for by article 15, paragraph (c) , does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements'.
[137] Helfer and Austin, above n 2, 73; Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence', above n 3, 48–49.
[138] Dreyfuss, above n 5; Rochelle Cooper Dreyfuss, 'Patents and Human Rights: The Paradox Reexamined' in Christophe Geiger (ed), *Intellectual Property and Access to Science and Culture: Convergence or Conflict?* (Global Perspectives for the Intellectual Property System, CEIPI-ICTSD, Issue 3, 2016) 54; Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship', above n 23, 130.
[139] Plomer, above n 2, 150.
[140] Dev Gangjee and Robert Burrell, 'Because You're Worth It: L'Oreal and the Prohibition on Free Riding' (2010) 73(2) *Modern Law Review* 282; Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights', above n 77; Dominic Scott, Alex Oliver and Miguel Ley-Pineda, 'Trade Marks as Property: A Philosophical Perspective' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University

for property interests in intellectual property can restrict instrumental functions of intellectual property to protect the public interest.

Attempts to synthesise the fields are desirable but they engage many different concerns. Although the 2003 *TRIPS* amendment indicated promise for coexistence, slow ratification and significant implementation problems suggest that the inclusion of human rights in the *TRIPS* system remains difficult.[141] Chapter 6 will address the potential for a robust implementation of the flexibilities of *TRIPS* to enable a balance between incentives to innovate and access to innovation. However, even when such a balance is achieved, it does not engage key elements of human rights protection, elements that will be identified in Chapters 4 and 5 and applied in the case studies in this thesis.[142] Human rights arguments are not generally considered in the WTO.[143] Chapter 8 applies interpretive tools in international law identified in Chapter 3 to demonstrate that Article 7 of *TRIPS* can permit consideration of human rights. However, this interpretation has not yet been adopted in practice. This reflects the fact that *TRIPS* does not explicitly guarantee human rights protection.[144] Nor does the reference to public health in Article 8 of *TRIPS* directly guarantee protection for the human right to health as it is formulated by CESCR,[145] although it provides a much clearer basis for protecting that right than many other human rights that are also relevant to intellectual property.[146]

For a coexistence model to adequately reflect the interests of advocates of both intellectual property and human rights, the interests and concerns for balance in both fields need to be considered and directly addressed with strategies for harmonisation. In addition to the criticisms of conflict and coexistence models already identified, there are numerous reasons why a more

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Press, 2008) 285; Jennifer Davis, 'The Value of Trade Marks: Economic Assets and Cultural Icons' in Ysolde Gendreau (ed), *Intellectual Property: Bridging Aesthetics and Economics - Propriété Intellectuelle: Entre L'Art et L'Argent* (Editions Themis, 2006) 97.

[141] Donald P Harris, 'TRIPS After Fifteen Years: Success or Failure, as Measured by Compulsory Licensing' (2010) 18(2) *Journal of Intellectual Property Law* 367. See He, above n 122, 847–851.

[142] Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence', above n 3, 508–509. See also Rochelle Cooper Dreyfuss and Cesar Rodriguez-Garavito, 'Conclusion: Balancing Wealth and Health in a Transnational Regulatory Framework' in Rochelle C Dreyfuss and Cesar Rodriguez-Garavito (eds), *Balancing Wealth and Health: The Battle Over Intellectual Property and Access to Medicines in Latin America* (Oxford University Press, 2014) 323.

[143] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Adverse Human Rights Impact of International Investment Agreements and Multilateral Free Trade Agreements, Including the Human Rights Impacts of WTO Law and Practice*, UN GAOR, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/40 (12 July 2016) 33-34.

[144] *TRIPS*.

[145] See interpretation in *General Comment 14*, UN Doc E/C.12/2000/4.

[146] In contrast, freedom of expression is not adequately protected by *TRIPS*, despite its clear relevance to copyright and trade marks. Examples of the interaction between freedom of expression and intellectual property can be found in the European Court of Human Rights. An example from the South African Constitutional Court, *Laugh It Off,* will be considered in Chapter Two. See discussion generally in Ruth Okediji, 'Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations' in Margo E Salomon, Arne Tostensen and Wouter Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty Bearers* (Intersentia, 2007) 211.

nuanced approach than conflict or coexistence is appropriate. As previously discussed, the conflict model valuably uses the language of human rights to emphasise the importance of concerns such as health in various forums, for example, the WTO. However, emphasis on human rights primacy can fail to recognise the potential contribution of intellectual property to human flourishing, which can also support a range of other human rights.[147] One of the primary concerns of intellectual property is argued to be social welfare.[148] Chapter 2 explains that net social welfare is a dominant concern in utilitarian justifications for trade mark law and is also relevant to social planning theory. Mechanisms for protecting social welfare concerns include the flexibility provisions of *TRIPS* emphasised in coexistence models.[149] A harmonising approach can engage strategies to recognise the potential social welfare benefits of intellectual property while valuing human rights. Materials citing conflict also acknowledge significant areas of coexistence between the fields.[150] A harmonising approach is generally a feature of models moving beyond conflict and coexistence. Harmonising models incorporate prescriptive approaches to dealing with the conflict. They are more sophisticated than simply asserting human rights primacy or asserting that the present utilisation of flexibility mechanisms in *TRIPS* sufficiently addresses conflicts between intellectual property and human rights.

1.3.3 Harmonising Models

Harmonising models identify conflicts between the fields of human rights and intellectual property but also identify strategies for harmonisation or integration between the two fields, designed to facilitate coexistence. This chapter identifies three models proposed by leading scholars in the field and organises them based on the function that they propose. Yu's approach analyses human rights protection available for intellectual property rights, focusing on rights enshrined in Article 15(1)(c),[151] and addresses conflicts between those identified rights and other human rights.[152] Geiger considers ways in which providing *UDHR* Article 27 protection in regional and domestic constitutions can reframe protection for those intellectual property rights.[153] Helfer and Austin modify existing intellectual property systems to prevent impairment

[147] Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence', above n 3, 66–67; Helfer and Austin, above n 2.
[148] Gervais describes the importance of minimising welfare costs through domestic intellectual property calibration: Gervais, above n 110.
[149] See Land, above n 122, 468.
[150] Helfer and Austin, above n 2, 73; Murumba, above n 131, 121–122.
[151] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12.
[152] Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40(3) *University of California Davis Law Review* 1039.
[153] Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 685–689.

of a minimum standard of human rights, including but not limited to the minimum protections provided by Article 15(1)(c).[154]

Each model analysed permits different inclusion of trade marks. Noting Gervais' concern that, normatively, intellectual property is not a monolith, this thesis contributes to the field by focusing on understanding the relationship between trade marks and human rights.[155] Analysis of each model considers the position of trade marks in each approach.

1.3.3.1 Yu's model

This section considers Yu's framework for human rights. It focuses on his approach for explaining the relationship between human right and patents. Yu argues his structural model can also be used to explain how some productions protected by copyright can also be protected as human rights.[156] This chapter argues that the model can also support human rights protection for some trade marks as artistic or literary productions, although Yu excludes human rights protection for trade marks using Article 15 or human rights to property. If Yu's approach can justify protection for some trade marks using Article 15, his approach to addressing conflicts between intellectual property protected as a human right and other human rights will also be relevant.

Yu's model addresses arguments that patents are not eligible for human rights protection.[157] Although Yu acknowledges a potential role for trade marks in the protection of scientific publications,[158] he maintains the position, which he has adopted previously, that the basis for human rights protection of trade marks is questionable.[159] Many of the concerns Yu addresses about human rights protection for patents are also raised in relation to trade marks:

- The filing system for both fails to protect first creators adequately and complicates rights where there are subsequent or independent creators;
- There are no moral rights recognised internationally or domestically for either right;
- Patents and trade marks are often corporate owned; and

[154] Helfer and Austin, above n 2, 512–522. See also Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence', above n 3; Laurence R Helfer, 'Towards a Human Rights Framework for Intellectual Property' (2006) 40 *University of California Davis Law Review* 971.
[155] Daniel Gervais, 'Human Rights and the Philosophical Foundations of Intellectual Property' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 89, 90.
[156] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 53.
[157] Dreyfuss, above n 5.
[158] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 60.
[159] Ibid 55.

- Incentives for creation may be harmed by integration into a human rights system.[160]

Yu does not consider corporate trade mark rights to have human rights attributes, as corporations cannot possess human rights.[161] He cites Brinkhof's argument that trade marks are 'concerned not so much with the intellectual achievements of individuals, but rather with the regulation of competition through the prevention of confusion arising between participants in a market.'[162] The cultural significance of trade marks discussed in Section 1.2.2 of this chapter is relevant to this characterisation. Encouraging the cultural contribution made by these trade marks, separate to the contribution that trade marks make to regulation of competition, potentially justifies human rights protection.

Yu's approach to addressing arguments against protecting patents as human rights is to use the structural model and principles outlined above to understand Article 15(1)(c). Yu identifies the following organising principles for understanding the relationship between intellectual property and Article 15(1)(c), which are important for understanding the relationship between intellectual property and human rights generally:

1. Intellectual property rights and human rights that can be used to protect some rights associated with intangible property are not the same things.[163]
2. The moral and material interests protected by human rights law are not interchangeable, so protecting one interest will not usually satisfy protection of the other.[164]
3. Protection for intangible property that is required by human rights law is minimum essential protection, and extra protection found in intellectual property law should not harm other human rights.[165]
4. Different types of productions may require different forms of intellectual property. Yu suggests that this might involve trade mark protection in the case of scientific productions. [166]

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[160] Ibid 48–52.
[161] See ibid. See also Maria Green, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Drafting History of Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights. Background Paper*, UN ESCOR, 24th sess, Agenda Item 3, UN Doc E/C.12/2000/15 (9 October 2000) 45. Compare approach taken by OseiTutu to consider the possibility of corporate claims to intellectual property protection based on human rights principles: Osei Tutu, above n 46, 36.
[162] Jan Brinkhof, 'On Patents and Human Rights' in Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 140, 140. Yu also cites Chapman, noting that there is no 'basis in human rights to justify using intellectual property instruments as a means to protect economic investments': Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 55, citing Audrey R Chapman, 'Core Obligations Related to ICESCR Article 15(1)(C)' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) 316–317.
[163] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 54–55.
[164] Ibid 55–56.
[165] Ibid 57–60.
[166] Ibid 60.

5. Article 15(1)(c) provides sufficient flexibility to permit each state to protect the minimum requirements in a way that is locally appropriate. [167]
6. There is a wide range of protections that can satisfy the requirements of Article 15(1)(c) that do not necessarily originate in the intellectual property regime. [168]
7. Different types of intellectual property protection can satisfy the requirements of Article 15(1)(c).[169]

Yu then applies these principles to consider a structural approach to understanding Article 15(1)(c). This approach first considers what scientific, literary or artistic productions can include.[170] Yu considers scientific productions and analyses how Article 15(1)(c) protection can include patent protection. The second layer identifies separate moral and material interests that are relevant to the production, including endogenous limits internalised within the intellectual property system.[171] Yu then considers the nature of protection that can be accorded to scientific productions[172] and, finally, identifies the exogenous limitations on that protection.[173] He concludes that 'some aspects of intellectual property rights (including patent rights) can be recognized as human rights.'[174]

Arguably, the analysis mechanism used by Yu can show how some trade marks might qualify for Article 15(1)(c) protection. Different types of trade marks can be identified in the artistic or literary production layer. Utilising a bottom-up approach and examining individual trade marks, they can be understood as positively contributing to culture: they can contain artistic works and they can imbue certain existing or new words with cultural meaning. From the perspective of the interest layer, trade mark law can protect the material rights of creators of trade marks that constitute literary or artistic productions where they have some claim to ownership rights (that have not been modified by employment relationships or contractual agreements) and someone else tries to use their work.[175] In current legal practice, moral rights are protected only where trade mark creators qualify for copyright protection. Word trade marks are rarely considered to constitute literary works,[176] although device marks may contain artistic works protectable by copyright.[177] Just as patent monopolies are limited in time, trade mark monopolies are limited by

[167] Ibid 61–62.
[168] Ibid 62–63.
[169] Ibid 63–64.
[170] Ibid 64.
[171] Ibid 64–65.
[172] Ibid 65.
[173] Ibid 65–66.
[174] Ibid 95.
[175] In Australia, this can be protected in the grounds of opposition provided in *Trade Marks Act 1995* (Cth) ss 58, 58A.
[176] *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119, 143 (Stephenson LJ).
[177] *Advantage-Rent-A-Car.*

a use requirement.[178] This is an endogenous limitation that may be a problematic difference between trade marks and human rights, which are enduring rights.[179] However, the rights that Article 15(1)(c) confers on creators contemplate specific material remuneration, rather than continuing remuneration.[180] Recognition of moral rights for creators need not always be tied to continuing registration; a historical register might suffice for attribution. Using trade marks that constitute artistic productions as examples, they can be protected through Australian trade mark law if they are registered, but also through copyright law,[181] passing off[182] and misleading or deceptive conduct actions.[183] This analysis suggests potential support for protection of trade marks as artistic productions within Yu's framework. Chapter 2 will consider the normative basis of trade mark protection in greater detail.

The protection status of trade marks is important because Yu has developed a further model for resolving conflicts between human rights and intellectual property. This model balances the protection provided by these articles for the moral and material rights of creators and authors against other human rights. [184] Yu argues that rather than focusing on whether human rights and intellectual property conflict or coexist, it is better to accept that their overlapping human rights attributes (such as the protection of moral and material interests found in *ICESCR* Article 15) mean that they both conflict and coexist.[185] This perspective will assist consideration of 'how we can alleviate the tension and resolve the conflict between the human rights and the non-human-rights aspects of intellectual property protection.'[186] Using this approach, Yu divides the conflicts into internal conflicts, which engage Article 15 and can be characterised as disputes between competing human rights, and external conflicts.[187] Once an external conflict is identified, Yu applies the principle of human rights primacy to privilege human rights protection.[188] Where there is an internal conflict, Yu describes three possible approaches: a just remuneration approach that involves compulsory licensing to prevent human rights restrictions; a core minimum approach that protects minimum essential levels of protection to authors and inventors as well as core minimum obligations for other human rights; and a progressive realisation approach that focuses on asking what should be protected, with states using best

[178] Yu recognises endogenous limits in his model: Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 12, 76.
[179] See Carpenter, above n 11, 901. Cf J Janewa Osei Tutu, 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20(1) *Vanderbilt Journal of Entertainment and Technology Law* 207, 240–242.
[180] *General Comment 17*, UN Doc E/C.12/GC/17.
[181] See, eg, *Advantage-Rent-A-Car*.
[182] See, eg, *Christian v Société Des Produits Nestlé SA (No 2)* (2015) 327 ALR 630.
[183] See, eg, *Campomar Sociedad Limitada v Nike International Limited* (2000) 202 CLR 45, 67.
[184] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 152.
[185] Ibid 1078.
[186] Ibid.
[187] Ibid.
[188] Ibid.

measures to realise their human rights obligations, commensurate with available resources.[189] Yu argues that these approaches can be complementary and proposes a systematic method for addressing conflicts between internal rights beginning with conflicts within the right itself.[190] Ultimately, Yu's theory emphasises the primacy of human rights where there is an external conflict between intellectual property rights that can be protected as human rights and intellectual property rights that human rights does not protect.[191] This approach can be contrasted to the use of thresholds for human rights protection in Helfer and Austin and the emphasis on balancing fundamental rights in Geiger. Chapter 11 will consider how Yu's model applies to the case studies.

1.3.3.2 Geiger's model

The second model recognises intellectual property as both a cultural and economic right. It also focuses on the protection of intellectual property where it is protected as a human right or, in the European context, as a fundamental right. This protection would recognise that exclusive rights should be reconciled with the objective of promoting cultural or scientific progress, affirming the traditional balance of interests between the creator and the public.[192] A fundamental rights approach, significantly developed by Geiger, proposes the use of fundamental rights to correct excessive use of intellectual property and to guide reorganising intellectual property law, arguing for a 'fair and balanced intellectual property system.'[193] Geiger later develops this approach and reviews intellectual property provisions found in constitutions or similar human rights instruments.[194] He criticises a trend of integrating intellectual property protection into property protection. [195] According to Geiger, the implications of this trend are:

- unwarranted emphasis on rewarding owners rather than promoting scientific or cultural progress;
- failure to recognise the moral dimension of the right; and

[189] Ibid 1094-1123.
[190] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 152.
[191] Ibid 1092–1093.
[192] Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 664–665.
[193] Geiger considers the protection provided for trade marks as property in the *First Protocol*: Christophe Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (2004) 35(3) *International Review of Intellectual Property and Competition Law* 268; Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37(4) *International Review of Intellectual Property and Competition Law* 371.
[194] Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 665–672.
[195] Ibid 665. Cf Halabi, above n 11. Halabi argues that emphasising human rights protection for trade marks as a component of the human right to property is a useful mechanism so that there is a balancing mechanism against freedom of expression concerns.

- failure to acknowledge that not all economic interests might deserve protection.[196]

Geiger criticises the inclusion of intellectual property in many of the existing constitutional frameworks. He questions the emphasis placed on the material interests protection provided by Article 15(1)(c) without the recognition that intellectual property needs to ensure that the exclusive rights also fulfil their social function.[197] This is consistent with broader trends emphasising the nature of intellectual property as an investment mechanism.[198] Geiger argues that the consequent focus on corporate actors as the beneficiary of intellectual property contributes to the rejection of these rights by many users. He further contends that a maximalist approach to intellectual property protection threatens the overall legitimacy of intellectual property law.[199]

Geiger proposes an approach that emphasises the importance of each of the objectives contained in Article 27.[200] Geiger notes that some constitutions already situate explicit intellectual protection within a fundamental guarantee of freedom of arts and sciences.[201] He notes the utility of situating intellectual property within a constitutional or fundamental rights framework at either a domestic or regional level.[202] However, he criticises existing approaches for not providing balanced protection that regulates social values.[203] He argues that effective, balanced protection could address the problems with human rights legitimacy,[204] which result partly from multiple layers of protection for intellectual property and unclear rhetoric surrounding the nature of that intellectual property.[205] Chapter 11 of this thesis argues that widespread adoption of this type of clause could encourage interpretation of Articles 7 and 8 of *TRIPS* that is more consistent with human rights.

Widespread use of these clauses could support the interpretation of *TRIPS* objectives developed in Chapters 3 and 8. These chapters find that one objective of intellectual property protection and enforcement that is identified in Article 7 - to contribute to a balance of rights and obligations – can recognise human rights obligations. At a domestic level, widespread use of

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[196] Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 665.
[197] Ibid 667.
[198] Ibid 662–664.
[199] Ibid 664.
[200] Ibid 672–673, 685–688.
[201] Ibid 666–667, 674–675.
[202] Ibid 673. Geiger contrasts the recognition of moral and material interests of authors in African and American systems of regional human rights protection to the integration of intellectual property into protection for the right to property in the European system: at 668–672.
[203] Ibid 687.
[204] Ibid 689.
[205] Ibid 663–664.

these clauses could correct existing deficiencies for recognition of the human right contained in Article 27 in domestic law.

There are clear benefits to the way in which this makes protection of intellectual property more consistent with human rights objectives. The approach permits the balancing of intellectual property rights against other constitutional rights, which include civil and political rights enshrined in the *ICCPR* in the European context.[206] Unfortunately, this is also one of the limitations of the approach, as many constitutional frameworks do not offer comprehensive protection for economic, social and cultural rights.[207] A pertinent criticism is the failure of the *European Convention on Human Rights* to provide direct protection for the human right to health.[208] Although the *European Social Charter* provides protection for economic, social and cultural rights, this protection is separately considered by the European Committee of Human Rights.[209] This means that the ECtHR may not offer comparable fundamental protection for economic, social and cultural rights as it provides for civil rights.[210] In the absence of direct protection for all human rights, the benefits of a right that is integrated with other human rights concerns are diminished. The *European Charter of Fundamental Rights* does provide protection for the right to health, but that protection is not necessarily as robust or as extensive as the protection provided by *ICESCR*.[211] This is part of a broader problem with this model, where it does not adequately provide all the protections available through the international covenants.

Where would trade marks fit within a model of this sort? Geiger provides examples of how the *European Charter of Fundamental Rights* could be amended to include this type of approach. He alternatively proposes to integrate protection similar to that provided by *UDHR* Article 27 into either of the fundamental rights to: property; freedom of arts and sciences; or freedom of expression and information.[212] Article 17(2) currently provides that 'intellectual property shall

[206] Ibid 680–685.
[207] See Peggy Ducoulombier, 'Interaction between Human Rights: Are All Human Rights Equal?' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 39, 41. See also Aart Hendriks, 'The Council of Europe and Health and Human Rights' in Brigit Toebes et al (eds), *Health and Human Rights in Europe* (Intersentia, 2012) 21, 23–50.
[208] Ducoulombier, above n 207, 40–41. *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights'*).
[209] Ibid; *European Social Charter (Revised)*, opened for signature 3 May 1996, CETS 163 (entered into force 1 July 1999).
[210] Hendriks, above n 207, 23–50.
[211] See Ducoulombier, above n 207. See also Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009) 321–324; Hendriks, above n 207, 23–50; *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389, art 35.
[212] Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 686–688.

be protected'. This has been interpreted to include trade marks.[213] The alternative provisions proposed by Geiger reference protection for 'scientific, literary or artistic productions.'[214] Geiger does not address how this would apply to trade marks. Geiger recognises that trade marks have been included in the scope of protection available under Article 1 of the *First Protocol*.[215] He criticises 'unconditionally equating [intellectual property] protection with the constitutionally granted right to property'[216] and notes that multiple layers of protection available through intellectual property can be problematic in the way that they contribute to a maximalist approach to rights protection.[217] If the right to property is not amended and the right is integrated into the right to freedom of arts and sciences, or the right to freedom of expression and information, Geiger supports the continued protection of intellectual property as part of the right to property, as long as that protection remains limited to safeguarding the public interest and does not expand.[218]

In Geiger's model, constitutional courts would resolve the extent to which protection for intellectual property provided should be circumscribed by other rights to 'participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'[219] This integrated inclusion of Article 27 could address concerns that permitting property protection for intellectual property may unnecessarily elevate broad protection for intellectual property to the status of fundamental rights,[220] exceeding the protection the international human rights instruments provide and failing to recognise the close connection between protection for intellectual property and protection for the other rights articulated in Article 27 and Article 15. [221] Article 27-based constitutional protection is currently underdeveloped, even where the right already exists.[222]

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[213] See ibid 670–672. See also *L'Oréal SA v Bellure NV* (C-487/07) [2009] ECR I-5185.
[214] Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 686–688.
[215] Ibid 668–669.
[216] Ibid 666.
[217] Ibid 664.
[218] Ibid 668, 672, 680.
[219] Ibid 678–680.
[220] Marijn urges greater reflection on implications of integrating economic market freedoms into fundamental rights: John Morijn, 'Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies? An Analysis of Diverging Uses of "Fundamental Rights" in the Context of International and European Trade Law' in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008) 591, 616.
[221] See Petersmann, 'Human Rights and International Economic Law', above n 129.
[222] Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', above n 13, 667.

1.3.3.3 Helfer and Austin's model

Helfer and Austin's model does not argue that intellectual property rights are inherently inconsistent with human rights, but the authors recognise numerous difficulties that protection of intellectual property rights can provide for the protection of human rights.[223] In an earlier framework proposal, Helfer suggests a human rights framework for intellectual property that realises minimum entitlements required by human rights law, including the human right to health. [224] Helfer emphasises that intellectual property is not the only legal and policy approach that can be used to achieve the 'minimum entitlements of health, food, education and other economic and social rights that international law requires.'[225] He proposes that intellectual property rights be modified or even discarded, where necessary, to achieve that goal. [226] Derclaye criticises approaches that fail to clearly identify unity between the goal of both human rights and intellectual property, which relies on accepting intellectual property rights as types of human rights with a common goal of human welfare.[227] This normative relationship will be considered in Chapter 2.

Helfer and Austin's model ultimately concentrates on human rights, yet attempts to preserve the social welfare benefits of the intellectual property system by rejecting wholesale expansions or restrictions of intellectual property rights.[228] There are important welfare concerns at the heart of intellectual property and human rights, but whereas human rights are framed as essential to humanity and human dignity, the contribution of intellectual property rights to social welfare is, generally, of a different nature.[229] It is frequently understood in relation to promoting socially beneficial science and culture by providing the incentive to innovate, create and disseminate; as well as, in the case of trade marks, protecting consumers.[230] Yet it is generally accepted that the intellectual property system is not the only means available for incentivising innovation and creation,[231] nor the only means to protect consumers.[232] Where intellectual property is the relevant mechanism, Helfer and Austin's model attempts to harmonise both fields. Chapter 3

[223] See Helfer and Austin, above n 2.
[224] Helfer, 'Towards a Human Rights Framework for Intellectual Property', above n 154, 1018–1020.
[225] Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship', above n 23, 130.
[226] Helfer, 'Towards a Human Rights Framework for Intellectual Property', above n 154, 1018–1020.
[227] Derclaye, above n 5, 134, 136–138. Cf Gervais, above n 155, 92–93.
[228] Helfer and Austin, above n 2, 516–517.
[229] *General Comment 17*, UN Doc E/C.12/GC/17, [4].
[230] Osei Tutu, above n 180, 213–214.
[231] Thomas Pogge, 'Human Rights and Global Health: A Research Program' (2005) 36(1–2) *Metaphilosophy* 182, 184–194. See also Thomas Pogge, 'Access to Medicines' (2008) 1(2) *Public Health Ethics* 73.
[232] Michael D Pendleton, 'Excising Consumer Protection: The Key to Reforming Trade Mark Law' (1992) 3 *Australian Intellectual Property Journal* 110.

will identify doctrinal approaches for harmonious interpretation between separate fields of laws.[233]

Helfer and Austin identify both protective and restrictive human rights standards for intellectual property.[234] The full spectrum of human rights and freedoms impacted by intellectual property protection are relevant.[235] Helfer and Austin emphasise that the framework and protections contained therein are dynamic. [236] This is an important feature of human rights law.[237] Arguably, it could lead to future expansion of the content of existing protective and restrictive human rights standards for intellectual property. However, this would need to be consistent with general human rights principles and the protection of other human rights. The protective element preserves minimum standards of intellectual property protection in relation to Article 15(1)(c) of *ICESCR*, Article 27 of the *UDHR* and Article 1 of the *First Protocol*.[238] It requires that states 'recognize and respect the rights of individuals and groups to enjoy a modicum of economic and moral benefit from their creative and innovative activities' (Article 15 Protection) and 'refrain from bad faith and arbitrary interferences with intellectual property rights that the state itself has previously granted or recognized' (Property Interference Protection).[239] Article 15 Protection is consistent with the guidance provided by CESCR in *General Comment 17*.[240] Property Interference Protection is consistent with protection in the *First Protocol*.[241] Australia is obliged by its ratification of *ICESCR* to enforce the Article 15 Protection,[242] but this thesis will question the extent to which it is obliged by human rights obligations to enforce the Property Interference Protection.

Helfer and Austin's restrictive standard proposes that the ultimate focus should be the protection of a threshold of human rights, including 'non-interference with civil and political rights and guaranteeing minimum levels of economic and social well-being in areas such as health, food and education,' which can be protected by various means.[243] Although a key component of the model proposed by Helfer and Austin is the measurement of 'human rights ends' using the

[233] See Grosse Ruse-Khan, above n 15, 141–144.
[234] Helfer and Austin, above n 2, 513–522.
[235] Ibid 516.
[236] Ibid 512.
[237] Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607.
[238] Helfer and Austin, above n 2, 513–516.
[239] Ibid 512.
[240] *General Comment 17*, UN Doc E/C.12/GC/17.
[241] Helfer and Austin, above n 2, 515–516, 212–220.
[242] Occasional references are made to Article 15 in explanatory materials: Explanatory Memorandum, Intellectual Property Laws Amendment Bill 2014. See Genevieve Wilkinson, 'The Human Rights (Parliamentary Security) Act 2011 (Cth) and the Increasingly Visible Intersections between the Human Right to Health and Intellectual Property in Australia' (2016) 105 *Intellectual Property Forum* 46.
[243] Helfer and Austin, above n 2, 517.

standard of minimum rights, it is not clear exactly how the minimum levels for other economic, social and cultural rights can be measured. In 2007, Helfer used the language of 'core obligations'.[244] This approach is not clearly adopted by Helfer and Austin in 2011, when they articulate what a minimum standard comprises in relation to human rights protection for intellectual property.[245] In subsequent discussion of the model in 2015, Helfer does not focus on the language of core obligations.[246] He argues that the proposed framework requires states to specify the 'minimum entitlements relating to health, food, education and so forth that international human rights law requires and then [identify] the range of policy mechanisms available to achieve those outcomes.'[247] Intellectual property plays a supporting role to the extent that it assists these outcomes and should be modified or restricted to the extent that it hinders them. Helfer again refers to 'minimum levels of human well-being.'[248] One issue that will be considered in Chapter 11 is whether or not these 'minimum levels of human well-being' are the same for all states.

The framework is empirically grounded and recommends the use of measurement tools such as human rights impact assessments to determine the impact of intellectual property on human rights.[249] Both standards can apply to trade marks. The analysis in this chapter demonstrates that the protective standard could provide human rights protection for trade marks.[250] The restrictive approach preserves, where possible, the use of existing international intellectual property law standards by incorporating questions that emphasise the social value of intellectual property into human rights assessments (the Welfare Preservation Questions):[251]

1. Is intellectual property actually restrictive of the relevant human right or freedom or are other factors, such as structural limitations, causing the restriction?
2. What is the positive impact of intellectual property?
3. What is the negative impact of intellectual property?
4. What is the relative causal contribution of intellectual property in comparison to other factors?
5. What legal and policy measures can facilitate human rights outcomes?

The case studies presented in this thesis are both human rights-based assessments of Australian trade marks legislation. Chapter 11 will consider how the Welfare Preservation Questions help us to understand the relationship between trade marks and human rights. It will also explore the threshold of human rights protection used by Helfer and Austin in the protective and restrictive

[244] Helfer, 'Towards a Human Rights Framework for Intellectual Property', above n 154.
[245] Helfer and Austin, above n 2, 513–516.
[246] Helfer, 'Mapping the Interface between Human Rights and Intellectual Property', above n 6, 14.
[247] Ibid.
[248] Ibid.
[249] Helfer and Austin, above n 2, 518–520.
[250] Ibid 512–516.
[251] Ibid 520.

elements of the models. If possible, where intellectual property rights are implicated, and can protect these human rights ends, they should be protected. However, in circumstances where intellectual property rights conflict with human rights, they should be modified or, in some circumstances, discarded to protect human rights.[252] Accordingly, the model incorporates, where possible, international law that regulates trade marks.[253] Helfer and Austin prescribe that where restrictions on these laws are necessary, it is important to recognise trade mark law's common objective with human rights 'to encourage creativity and innovation that benefits society as a whole.'[254] Chapter 2 will explore the extent to which theory supports this common objective characterisation.

1.3.3.4 Analysis of prescriptive models

Within the prescriptive models, there are different emphases on human rights primacy, the extent to which intellectual property should be protected as a human right, and the approaches that should be taken to addressing conflicts between human rights and intellectual property. Yu's approach acknowledges that intellectual property can be protected as a human right to some extent, but limits that extent, and ultimately asserts the primacy of human rights over intellectual property rights that are not protected as human rights in the *International Bill of Rights*.[255] In Yu's model, the human rights protection afforded to trade marks is extremely limited, although this chapter has argued that the model could support a larger scope of protection than he recognises.

Other models also focus on the protection of intellectual property where it is protected as a constitutional right or, in the European context, as a fundamental right. Geiger's model suggests that intellectual property, including trade marks, could be protected. This could include right to property protection for intellectual property and, consequently, greater protection for trade marks than Yu's model provides. Helfer and Austin's approach recognises the potential conflict between intellectual property and human rights and the importance of human rights, yet emphasises greater integration between the two fields of law using the Welfare Preservation

[252] Ibid 1. See also Helfer, 'Mapping the Interface between Human Rights and Intellectual Property', above n 6, 14.
[253] Helfer and Austin, above n 2, 521.
[254] Ibid 520.
[255] The *International Bill of Rights* comprises the *ICESCR; the ICCPR; the UDHR*, UN Doc A/810; plus the *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991); *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted 10 December 2009, 869 UNTS 34 (entered into force 5 May 2013).

Questions. This approach places less emphasis on human rights primacy than the other two models.

Different characteristics of each integration model influence the way that each approaches the relationship between trade marks and human rights. Article 15 could provide very limited protection for trade marks. Each model recognises the relevance of Article 15 but interprets its significance for human rights protection for intellectual property differently. For Yu, it is the primary mechanism that permits claims for protection for intellectual property when that protection conflicts with human rights. Geiger, and Helfer and Austin, appear more willing to accept human rights to property-based protection for intellectual property, although both models indicate this should be limited. Yu's emphasis means that the tools he uses to resolve conflicts focus on how human rights-protected intellectual property should be protected in the case of a conflict with other human rights. If trade marks are not eligible for protection (although this chapter argues that they might be), Yu's conflict tools will have limited relevance.

Geiger's approach would permit constitutional courts to apply already developed approaches to resolving conflicts between fundamental rights. Trade marks could have some status and protection in this model. The mechanisms of using human rights assessment tools to identify conflicts for human rights, including the Welfare Preservation Questions recommended by Helfer and Austin, can provide the basis for assessing when and how intellectual property protection should be modified to protect human rights. A range of different actions could follow. The assessment could form a basis for independent national action that could be supported by human rights arguments if it is disputed by other states or multi-national corporations. It could also form the basis for attempts to change international law or prevent expansion of international law. The case study of plain packaging explores the way in which international law can be used to respond to restrictions of trade mark rights by states, which can be based on human rights justifications. The anti-counterfeiting case study uses human rights-based assessment to understand whether expansion of international law to protect anti-counterfeiting protects or restricts human rights. The instrumental importance of intellectual property is recognised differently between the models. Yu and Geiger focus on its importance to realising the other objectives of the right to benefit from science and culture. This is not disputed by Helfer and Austin, but they suggest that attempts to harmonise the fields should also acknowledge other social welfare benefits that intellectual property can provide. This weight on the instrumental benefits of intellectual property protection can be particularly important for trade marks.

In this thesis, the case studies will be used to explore the way in which the different human rights protection tools and thresholds for each model are relevant to domestic trade mark

legislation in a developed country. Empirical studies of industrial property have often focused on the implications of industrial property protection in developing countries.[256] This thesis considers industrial property law in action in a developed country and considers how proposals to integrate human rights and intellectual property apply in the respective contexts. It uses case studies of Australian law to interrogate Helfer's statement that 'more numerous, nuanced and sometimes contradictory' international rules regulating intellectual property and human rights permit 'greater leeway' for states to further national interests in implementation without challenges from other countries.[257] Australia is a party to the primary international human rights agreements and international intellectual property agreements that will be considered in this thesis. Very unusually for an economically developed state, Australia does not have a constitutionally entrenched bill of rights that protects human rights.[258] It protects human rights in a number of other ways, which will be identified in Chapter 5, but these protections are generally more limited than the enforceable human rights protections provided for individuals in other states that are considered to be comparable to Australia.

1.4 CONCLUSION

This chapter has considered the increasing interactions between the two fields of intellectual property and human rights. The right to benefit from science and culture plays an important role in understanding links between them. Although the extent to which this right protects trade marks is limited, it should not be ignored. The extent to which a human right to property can protect trade mark rights will be explored further in the case studies. Conflict and coexistence models are relevant to the history and nature of the relationship between the two fields, but prescriptive models that recognise conflicts and seek to understand ways to resolve them and harmonise the fields have significant utility.

There are strengths and weaknesses in exploring the relationship between trade marks and human rights for each of the models identified. The models do not have a common mechanism to harmonise the field, but there is compatibility between their underlying objectives. This may mean that each can provide useful tools to build a culture for trade marks that promotes and fosters human rights. The relevance of human rights primacy to each of the models indicates the importance of understanding the normative basis of this claim and whether international law

[256] See, eg, Robert L Ostergard Jr, 'Economic Growth and Intellectual Property Rights Protection' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 3, 3–40.
[257] Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship', above n 23, 134.
[258] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (Readhowyouwant.com Limited, 2017) 88.

recognises it in cases of conflict between intellectual property and human rights law. The following chapters will address this and consider broader normative and doctrinal implications of the relationship between human rights and intellectual property. The thesis will then use the key human rights agreements to establish a framework for its human rights analysis, using both international and domestic law, and consider the implications of this for the models. The framework will be applied to Australian trade mark law, particularly the plain packaging and counterfeiting case studies. The thesis will then explore the way in which the models apply to these case studies and will develop an approach that responds to these findings.

CHAPTER TWO THE NORMATIVE SIGNIFICANCE OF PROTECTION OF HUMAN RIGHTS AND TRADE MARKS

2.1 INTRODUCTION

Recognising both normative and positivist dimensions of trade mark law and human rights law is critical to conceptualising the relationship between them. This chapter identifies normative and positivist dimensions of human rights and intellectual property using a spectrum that recognises the importance of both. The spectrum equates an emphasis on normativity to considerations of justice and an emphasis on positivity to considerations of order.[1] This chapter explores reasons for the normative weight given to human rights by several frameworks for human rights and intellectual property, which were introduced in Chapter 1. Features central to a human rights culture, such as universality, inalienability and indivisibility, are linked to justice. Positivism is a very useful tool for resolving political, philosophical and religious disagreements between states that are parties to human rights agreements.[2] However, human rights justifications remain tied to normative origins in natural law that emphasise the inherent dignity of the individual and the universal and inalienable nature of individual rights. One basis for asserting the primacy of human rights is its normative value.

Normative justifications for bodies of law are often relevant to the legitimacy of law and can be used to consider whether the expansion of the scope of those laws is legitimate.[3] Trade mark interests have increasingly moved away from traditional normative justifications for protection of intangible property towards a property-based justification that emphasises positivism. Underlying theoretical justifications for trade marks are also important because similarities between the objectives of intellectual property and intellectual property laws are used to support coexistence models that dispute the significance of conflict between intellectual property and human rights.[4] By providing an in-depth analysis of normative justifications for trade mark law and recognising human rights considerations of justice, this chapter develops that debate,

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[1] Samuel Murumba, 'Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property' (2012) 38(1) *Monash University Law Review* 119, 140–141.
[2] See Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18(2) *Yale Journal of Law & the Humanities* 273, 304–305.
[3] Argyrous notes the importance of clearly articulating the theoretical principles that shape the framework for evidence based research in public policy: George Argyrous, 'Evidence Based Policy: Principles of Transparency and Accountability' (2012) 71(4) *Australian Journal of Public Administration* 457, 462.
[4] Estelle Derclaye, 'Intellectual Property and Human Rights: Coinciding and Cooperating' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 133, 134–140.

arguing that in cases of expanded trade marks protection, these normative similarities cannot be identified.

Section 2 of this chapter identifies theoretical justifications that support human rights. Natural rights justifications support the primary interest in human rights law: the protection of the inalienable human rights of individuals. The binding nature of both human rights and intellectual property obligations also means that positivist justifications can support them. Features of a positivist legal framework introduce important tools for bridging normative differences between intellectual property and human rights, which will be considered in Chapter 3 of this thesis. The continuum between normative and positivist justifications for law applied in this chapter suggests that the order created by this positivist framework needs to be grounded in justice.

Section 3 concentrates on the primary theoretical justifications for intellectual property, recognising that justifications for trade mark law support an understanding of their potential benefits. Helfer and Austin have suggested that it is important to recognise the beneficial aspects of intellectual property in considering its relationship with human rights.[5] Those benefits are not limited to intellectual property rights protected as human rights.[6] Natural rights can provide some support for intellectual property rights, but the dominant theoretical justification is utilitarianism. Interests protected by intellectual property also include personality and social planning theories and a broader range of classes of stakeholders.

Section 4 uses the South African Constitutional Court decision in *Laugh It Off Promotions v South African Breweries* (‘*Laugh It Off*’) to show the way in which conflicts between human rights and trade marks can still yield outcomes that are consistent with the normative justifications for each body of law. This analysis demonstrates that theory may not support expansion of trade mark law that restricts states’ abilities to respect, protect and fulfil human rights. In this context, theory may be useful to support arguments to reform law in a manner that is consistent with both human rights and the normative underpinnings of trade mark law.

[5] Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 511–522. See also Daniel J Gervais, ‘IP Calibration’ in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 86, 96.
[6] Helfer and Austin, above n 5, 511–522.

2.2 THEORETICAL JUSTIFICATIONS FOR HUMAN RIGHTS

2.2.1 Human Rights Justifications and Primacy

Justifications for human rights can be used to support normative arguments for human rights primacy when there are conflicts between intellectual property and human rights. In her analysis of the field, Dembour organises human rights scholars into four categories: natural scholars, deliberative scholars, protest scholars and discourse scholars.[7] The first two categories identified by Dembour directly engage the traditional justifications for human rights: natural law and positivism.[8] Natural scholars 'conceive of human rights as given,' which corresponds to natural law theory.[9] Deliberative scholars 'conceive of human rights as agreed upon,' which corresponds to positivism.[10] Natural law and positivism are relevant to understanding the role of primacy in the relationship between human rights and intellectual property.[11]

2.2.2 Natural Law and Positivism

Human rights protection is linked to both natural law and natural rights. Natural law is a higher law that is inherent in nature and determines what is right and wrong.[12] Key principles in modern human rights law, such as universality, indivisibility and inalienability, can be linked to natural law.[13] As terminology, these principles contribute to a language of human rights that asserts normative primacy.[14] Human rights is an articulation of rights inherent to all human beings. A natural rights approach adopts an absolute conception of human rights and posits that human rights are derived from a transcendental source, such as human reason or a religious basis.[15] Since Ancient Greek times, natural law has been contrasted to the law that is developed by society.[16] Plato developed theories of natural law.[17] Aristotle developed intersecting theories of natural right, 'which has everywhere the same power and does not owe its validity to human

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[7] Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) 32(1) *Human Rights Quarterly* 1, 2.
[8] See Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40(3) *University of California Davis Law Review* 1039, 1045, citing Richard Falk, 'Cultural Foundations for the International Protection of Human Rights' in Abdullahi Ahmed An-Naim (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, 1992) 44, 44.
[9] Dembour, above n 7, 2.
[10] Ibid.
[11] See Murumba, above n 1, 132.
[12] Leo Strauss, *Studies in Platonic Political Philosophy* (University of Chicago Press, 1983) 137.
[13] See Murumba, above n 1, 135–136. See also *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights*, UN GAOR, UN Doc A/CONF.157/23 (25 June 1993) ('*Vienna Declaration*').
[14] This is now emphasised in a body of soft law. See, eg, *Vienna Declaration*, UN Doc A/CONF.157/23. See also Murumba, above n 1, 135.
[15] Dembour, above n 7, 2–3.
[16] Strauss, above n 12, 138.
[17] Ibid 138–139.

enactment.'[18] Murumba characterises natural rights as the forerunner of the modern doctrine of human rights and argues that it privileged entitlement in natural law's universe of duty during the Enlightenment period and 17th and 18th century European and American revolutions.[19]

Although there are links between natural law, natural rights and human rights, they have each evolved differently. Douzinas argues that justice links natural law, natural rights and human rights.[20] However, for Locke, law moved away from justice and developed to serve the individual and 'his desire expressed through free will.'[21] The doctrines of both Locke and Rousseau derive not from a hierarchic order of man's natural ends, but the lowest of those ends – self-preservation.[22] Locke ties self-preservation to the right to property and develops his theory from this point.[23] This chapter will consider how Locke's emphasis on property rights potentially justifies intellectual property rights. Importantly, egalitarian social concerns in the 19th century balanced the strong individual and libertarian influence of the 18th century, and synthesis between these movements can be found in the modern human rights regime.[24] Gervais characterises intellectual property and human rights as natural law cousins.[25]

The connection between law and morality is contested by positivism, which developed in reaction to natural law to emphasise the importance of rules and authority to law.[26] Austin argued that law is command backed by sanction.[27] Hart developed positivist theory, arguing that law constitutes a system of rules that are given authority and meaning by social practices and conventions.[28] This contrasts to Strauss's argument, derived from Plato and Aristotle, that natural law provides validity for all positive law.[29] Positive law is invalid if it contradicts natural law. [30] The positivist separability theory, that there is 'no necessary connection between law and morality,' is also questioned by Murumba.[31] He uses the work of Eagleton and Dworkin to explain that facts cannot be completely separated from values but are grounded in a fact-value

[18] Ibid 140.
[19] Murumba, above n 1, 132. Natural law continued to influence part of Christian theology and was invoked in the American and French revolutions, which generated declarations of individual rights in the late 18th century: Strauss, above n 12, 141–146.
[20] Costas Douzinas, *The End of Human Rights* (Hart Publishing, 2000) 84.
[21] Ibid.
[22] Strauss, above n 12, 143–144.
[23] Ibid 145.
[24] Murumba, above n 1, 130, citing Louis Henkin, *The Age of Rights* (Columbia University Press, 1990).
[25] Daniel Gervais, 'Human Rights and the Philosophical Foundations of Intellectual Property' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 89, 92–93.
[26] Murumba, above n 1, 131–132.
[27] Ibid 132, citing John Austin, *The Province of Jurisprudence Determined* (John Murray Publishers, 1832).
[28] Murumba, above n 1, 132–133.
[29] Strauss, above n 12, 141.
[30] Ibid.
[31] Murumba, above n 1, 137.

complex encompassing extremities of legal order and justice.[32] Law is partly rooted in justice so concerns of justice cannot be ignored, but law also depends on order as it necessarily responds to the 'demands of justice in a systematic and orderly manner.'[33] The emphasis we place on certain facts reflects our values.[34] The tension between facts and values corresponds to the tension identified between legal positivism and traditional natural law.[35] If we conceive of '[l]aw as a fact-value complex,' we find a place for synthesis of legal positivism and moral concerns.[36] Murumba links 'facticity' to intellectual property law and 'normativity' to human rights law, but argues that it is a distortion to equate the fields to a dichotomy of positivism and normativism and contends that the fields lie on a spectrum between the dichotomies.[37]

2.2.3 The Continuum of Natural Rights and Positivism in Practice

A concern of this thesis is that the international legal order is moving towards an emphasis on order and away from concerns of justice.[38] This encourages a trend towards primacy of intellectual property law over human rights law, which is not justified by normative considerations of justice. This thesis will explore the need for a more positive culture to support and promote human rights in trade mark law. In current practice, Murumba suggests that global intellectual property law is a regression towards command-sanction legal positivism and human rights as a corrective has only been directly successful as a last resort.[39] Confining the role of human rights to a last resort to balance unjust intellectual property laws is problematic for building a harmonising relationship between human rights and intellectual property. Prescriptive models addressing the relationship between human rights and intellectual property need to comprehensively consider these legal trends. Murumba uses the nature of legality to show that normative concerns still have an important role in the international legal framework.[40] The dichotomy between positivism and natural law should be minimised by recognising an inclusive spectrum when assessing conflicts between the fields and the legitimacy of competing rights. [41]

Integrating natural rights and positivism for human rights justifications is also inclusive to the extent it permits recognition of the significance of protection of all civil and political rights and

[32] Ibid 139.
[33] Ibid 141.
[34] Ibid 139.
[35] Ibid 140–141.
[36] Ibid 140.
[37] Ibid 141.
[38] Ibid 134.
[39] Ibid; Noah Novogrodsky, 'After AIDS' (2013) 14(2) *Melbourne University Law Review* 643.
[40] Murumba, above n 1.
[41] Ibid 140–141.

economic, social and cultural rights.[42] A natural rights conception often focuses on protecting civil and political rights, which are characterised as negative rights.[43] A key focus in this thesis is on economic, social and cultural rights. This emphasis limits the utility of a theoretical approach focused on negative rights. Negative rights obligate states to refrain from certain practices that breach human rights.[44] Positive rights generally obligate states to devote resources to their realisation.[45] However, Landman gives evidence of both negative and positive dimensions of all types of human rights.[46] For example, states are obligated to respect, protect and fulfil the right to health.[47] Although states have negative obligations to respect the right to health, important state obligations to protect and fulfil the right to health are better characterised as positive obligations, conferring positive rights.[48] Importantly, many economic, social and cultural rights can also be linked to the civil right to life. Violation of the right to health, for example, can also engage the right to life.[49] This links economic, social and cultural rights more closely to natural law and natural rights origins although distinctions continue between the two types of rights.

Human rights standards used in this thesis are rights that have been agreed on and derive from societal agreement.[50] Key human rights instruments contain relevant human rights standards for analysis, particularly the *Universal Declaration of Human Rig*hts ('*UDHR*'),[51] the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[52] the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[53] and the *Convention on the Rights of the Child* ('*CRC*').[54] Where relevant, customary international law is considered. A significant advantage of a positivist approach is the way it permits states with diverse philosophical and religious

[42] See Andrew Byrnes, 'The Protection and Enjoyment of Economic Social and Cultural Rights' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2012) 125, 128–130; Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607.
[43] Dembour, above n 7, 2–3.
[44] Todd Landman, *Studying Human Rights* (Psychology Press, 2006) 9.
[45] Byrnes, above n 42, 130–131;ibid 11.
[46] Landman, above n 44, 11.
[47] Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000).
[48] Landman gives the example that states should not discriminate against individuals in the provision of health care but will need to provide access to medical services: Landman, above n 44, 11.
[49] See Jonathan Mann et al, 'Health and Human Rights' (1994) 1(1) *Health and Human Rights* 7.
[50] Dembour, above n 7, 3.
[51] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').
[52] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[53] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').
[54] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

backgrounds to agree, despite these differences.[55] However, these laws should be consistent with normative underpinnings of justice.[56] This is consistent with the pluralistic approach to developing the human rights culture for trade marks that is proposed in Chapter 11 of this thesis.

In recognising the moral importance of human rights, it is important to acknowledge broader criticisms of the legitimacy of human rights, which may undermine claims based on justice. Grear identifies a broad range of criticisms of international human rights law, describing theory and practice as 'riven with contradictions, disputations, rival framings and oppositional accounts.'[57] Criticisms include the expansion of the content of human rights through a proliferation of human rights treaties and agreements.[58] The potential danger of such an expansion has been identified by those who oppose the conceptualisation of intellectual property rights as human rights and argue that this will permit cynical use of this characterisation to further corporate economic interests.[59] This thesis addresses human rights expansion concerns by using a framework for human rights analysis derived from very widely accepted agreements in international human rights law and authoritative interpretations of those agreements. Although they are important considerations, this thesis does not engage with broader critical debates about the relationship between human rights, neo-liberalism and capitalism, which can be addressed by the protest and discourse scholars identified by Dembour.[60] It accepts the specific human rights standards it applies as normatively sound checking mechanisms on unfettered commercial interests.

Both human rights law and intellectual property law have normative and positivist dimensions. A deliberative or positivist conception of human rights law is much closer to the instrumentalist approach taken in international intellectual property law than a natural law conception.[61] Positivist conceptions are recognised by the inclusion of 'what law is' at one end of Murumba's spectrum.[62] However, normative legitimacy means that it is also important to understand what law ought to be, and human rights law remains much more closely linked to normative considerations of justice.[63] This chapter argues that it is important to understand normative justifications for both human rights and trade marks, in order to appreciate the problems of a

[55] See Ruger, above n 2, 304–305.
[56] Murumba, above n 1, 140–141.
[57] Anna Grear, ''Framing the Project' of International Human Rights Law' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press, 2012) 24.
[58] Landman, above n 44, 13–18. See Stephen P Marks, 'Normative Expansion of the Right to Health and the Proliferation of Human Rights' (2016) 49(1) *George Washington International Law Review* 101.
[59] See Yu, above n 8, 1124–1141; Peter K Yu, 'Ten Common Questions about Intellectual Property and Human Rights' (2007) 23(4) *Georgia State University Law Review* 709, 730.
[60] Dembour, above n 7, 1.
[61] Murumba, above n 1, 133–134.
[62] Ibid 136–137.
[63] Ibid.

legal order where intellectual property rights that expand beyond normative justifications for its protection have increasing primacy over human rights. The following section will consider the normative influences identifiable in the theoretical foundations for intellectual property law and interests that are relevant to trade mark laws.

2.3 THEORETICAL UNDERPINNINGS OF TRADE MARK LAW

This section identifies different theoretical justifications for trade mark law. Theoretical justifications assist in the understanding of the beneficial aspects of these laws and the different stakeholders, whose interests should be considered in assessing the function and value of trade mark law.[64] Protection of these interests shapes the development of domestic intellectual property legislation, which is a focus of the case studies. Theoretical justifications for intellectual property protection are also relevant to the legitimacy of property protection for intangible knowledge products that are also considered to be public goods.[65] Intellectual property permits exclusion of certain uses of some material expressions or formulations of knowledge and ideas, such as copyright or patents. Fisher identifies four main theoretical approaches to intellectual property: the utilitarian approach, the Lockean approach, personality theory and social planning theory.[66] Each theory can be blended in intellectual property legislation, explanatory materials and decisions.[67] This section considers how the theories apply to trade marks. Trade marks have an auxiliary function in protecting intangible knowledge goods but can also constitute culturally significant expressions of ideas. However, the dominant modern justifications emphasise a different function for trade marks based in economic efficiency.

2.3.1 Influence of Trade Mark Function

Trade marks are justified by protecting interests that facilitate economic efficiency: private interests in commercial reputation;[68] public consumer interests in identifying source and facilitating choice; and public interests in permitting efficient competition between producers in

[64] Fisher explains the way that theoretical justifications can be used to contest laws that are inconsistent with them: William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168, 194–199. Patricia Loughlan explains that these interests are often in contest in Australian trade mark law: Patricia Loughlan, 'The Campomar Model of Competing Interests' (2005) 27(8) *European Intellectual Property Review* 289, 292.
[65] Keith E Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century* (Peterson Institute for International Economics, 2012) 16.
[66] Fisher, above n 64, 169–173.
[67] See ibid 175, 194–199.
[68] Catherine Colston, *Principles of Intellectual Property Law* (Cavendish Publishing, 1999) 31.

the market.[69] By protecting distinguishing signs, trade mark laws can be linked to justice as they incentivise consistent quality and the development of goodwill by protecting against freeriding. The function of trade marks strongly influences the underlying rationale and theoretical justifications for trade mark law.[70] Trade marks operate to distinguish goods and services from other goods and services in trade.[71] Colston contrasts the function of trade marks to the function of other intellectual property rights.[72] While other intellectual property rights stimulate the production of commodities, trade marks are signs that attach to the product themselves.[73] Intellectual property theory recognises this stimulation function. Machlup and Penrose identify rationales for patents underpinning a utilitarian approach that emphasises the benefits for society of innovation, which becomes public but is protected by patents.[74] Inventors are rewarded for their innovation with a limited patent monopoly; patents provide a monopoly, which enables inventors to profit from their work; or patents are granted in exchange for the disclosure of secrets.[75] Copyright protection similarly encourages creators to share their cultural contributions through publication of work, by protecting creators against copying.[76]

Trade marks can support other intellectual property rights and stimulate innovation and creativity by continuing to protect the associated products after the expiry of other intellectual property rights.[77] Creators are incentivised to develop products that are capable of both trade mark protection, which can be unlimited, and other forms of intellectual property protection that are limited in duration.[78] The auxiliary function can also beneficially protect innovative contributions to science and culture that may not easily obtain protection using the mechanisms of copyright and patent protection. One example of this is the protection of traditional indigenous knowledge.[79] Significant human rights implications result from deficiencies for protection of this knowledge in traditional patent and copyright mechanisms.[80] Trade marks can

[69] Ibid 31–32.
[70] *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v Commonwealth of Australia* (2012) 250 CLR 1, 27-28 (French CJ).
[71] *Trade Marks Act 1995* (Cth) s 17.
[72] Colston, above n 68, 30.
[73] Ibid.
[74] Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10(1) *Journal of Economic History* 1, 10.
[75] Ibid.
[76] Fisher, above n 64, 169, citing William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) *Journal of Legal Studies* 325. See also Gervais, above n 25, 94–95.
[77] Colston, above n 68, 31.
[78] See Brian Fitzgerald, 'Theoretical Underpinning of Intellectual Property: "I Am a Pragmatist But Theory Is My Rhetoric"' (2003) 16(2) *Canadian Journal of Law & Jurisprudence* 179, 184; Colston, above n 68, 31.
[79] Helfer and Austin, above n 5, 496–502.
[80] See Laurence R Helfer, 'Towards a Human Rights Framework for Intellectual Property' (2006) 40 *University of California Davis Law Review* 971, 982–984; Yu, above n 8, 1141–1148.

be useful to facilitate the economic exploitation of traditional knowledge,[81] although Frankel emphasises that systemic changes would be necessary for this to be more effective.[82]

Concurrently, however, the auxiliary role of trade marks in expanding the material interests of creators can potentially interfere with a balance of interests provided by other regimes such as copyright and patent law.[83] This can be amplified by the role of trade marks in perception advertising, which can reduce competition because consumers are influenced to select a branded product resulting from unfounded perceived differences between that product and its competitors.[84] Trade marks can entrench higher prices for originator pharmaceutical brands after the expiration of patent protection, which arguably interferes with the bargain inherent in the patent monopoly that the public will benefit from the innovation once the monopoly expires.[85] This bargain often justifies the conferral of intellectual property monopolies.[86] Further, the rationales for protection for scientific production found in Article 15 are closely linked to public access to the benefits of science.

2.3.2 Economic Theory

In economic theory, the social welfare benefits attributed to trade mark law frequently focus on reducing search costs, protecting consumers and providing an incentive for maintaining consistent quality.[87] Economic theory justifying trade marks corresponds to utilitarian justifications for intellectual property. Fisher argues that the utilitarian approach is the most popular.[88] This approach uses the end guideline that net social welfare should be maximised and this 'requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the

[81] See the discussion of the use of Toi Iho trade marks by indigenous groups in Helfer and Austin, above n 5, 498. See also Chidi Oguananam, 'Indigenous Peoples' Rights at the Intersection of Human Rights and Intellectual Property Rights' (2014) 18(2) *Marquette Intellectual Property Law Review* 261.
[82] Susy Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' in Graeme B Dinwoodie and Marc D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 433, 462–463.
[83] In relation to patents and trade marks, see Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Knowledge' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan, 2002) 161, 174–175, citing Joe Staten Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Harvard University Press, 1956). For a pertinent discussion of the impact of trade marking materials previously protected by copyright, see Martin Senftleben, 'Vigeland and the Status of Cultural Concerns in Trade Mark Law – The EFTA Court Develops More Effective Tools for the Preservation of the Public Domain' 48(6) *IIC - International Review of Intellectual Property and Competition Law* 683.
[84] Andrew Griffiths, 'A Law-and-Economics Perspective on Trade Marks' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press, 2008) 241, 242–245.
[85] Drahos, above n 83, 174–175, citing Bain, above n 83.
[86] For example, in relation to patents, see Machlup and Penrose, above n 74, 27.
[87] William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) 173.
[88] Fisher, above n 64, 169.

partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.'[89] Trade mark rights reward investment and the production of quality products and are justifiable in economic theory where their role in increasing market efficiency improves social welfare.[90] Trade marks function to permit variety by ensuring that products from different sources can be efficiently and effectively identified, reducing search costs.[91] Trade marks also constitute an incentive for consistent quality: a lack of consistent quality can impair goodwill associated with a product.[92]

Trade marks can also have a semiotic value by increasing the number of words that efficiently describe things, reducing communication and information costs.[93] They can contribute to the development of generic words, as well as culturally significant terms that enrich the language with their 'intrinsic pleasingness.'[94] Griffiths emphasises the 'capacity [of a trade mark] to perform its essential function of guaranteeing a specific origin,' which enables goodwill and reputation to develop around the mark so that consumer search costs are reduced.[95] Landes and Posner assess the efficiency rationale of trade mark protection as 'more secure than that for patent or copyright protection.'[96] The strength of the model relies on the efficiency of trade marks as a naming function of things, provided that it is quicker to use trade marks and the products that are named by those trade marks are of consistent quality.[97]

Expansion of trade mark rights is controversial in economic theory, particularly where it expands protection for well-known marks or provides protection from blurring or tarnishment for trade marks.[98] Protection for trade mark owners should be limited where it is justified by a search costs theory.[99] Although there can be some economic benefits to protecting such marks from blurring or diluting their distinctive nature or tarnishing their image, Griffiths criticises the

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[89] Ibid.
[90] Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th ed, 2014) 816; Stacey L Dogan and Mark A Lemley, 'A Search-Costs Theory of Limiting Doctrines in Trademark Law' (2007) 97(6) *Trademark Reporter* 1223.
[91] Landes and Posner, above n 87, 173.
[92] Elmer William Hanak, III, 'The Quality Assurance Function of Trademarks' (1974) 43(3) *Fordham Law Review* 301, 363–364, citing Frank I Schechter, 'The Rational Basis of Trademark Protection' (1927) 40(6) *Harvard Law Review* 813, 818.
[93] Landes and Posner, above n 87, 167–168.
[94] William M Landes and Richard A Posner, 'Trademark Law: An Economic Perspective' (1987) 30(2) *Journal of Law and Economics* 265, 271; Landes and Posner, above n 87, 168–169. See Drescher for discussion of the evolving significance of trade marks to culture: Thomas D Drescher, 'The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth' (1992) 82(3) *Trademark Reporter* 301, 339.
[95] Griffiths, above n 84, 265.
[96] Landes and Posner, above n 87, 166.
[97] Ibid 167–168.
[98] See Michael Handler, 'What Can Harm the Reputation of a Trademark? A Critical Re-Evaluation of Dilution by Tarnishment' (2016) 106(3) *Trade Mark Reporter* 639, 639.
[99] Bently and Sherman, above n 90, 818.

economic justification of providing broad rights to trade mark owners to exclude 'any activity that can be viewed as taking advantage of the familiarity of [stronger] trademarks and, in effect, free riding upon them.'[100] Similarly, the potential for marks to contribute towards perception advertising, in which trade marks cause consumers to perceive differences that do not exist between the product and other products, has been questioned because of its potential to promote monopolistic competition.[101] Economides notes the potential anti-competitive effects of the perception advertising function of trade marks, but concludes that the efficient provision of variety and quality features should outweigh any welfare loss these distortions create. [102] Discussions of the economic function of trade marks and their economic justification reflect the impact of the increased economic value of trade marks and branding.[103] The way in which this has encouraged trade mark owners to protect their property interests assertively will be considered in the synthesis of concepts in this section.[104]

2.3.3 Natural Rights Theory

The relationship between trade marks and language is important to understanding the application of natural rights theory to trade marks. Locke's labour theory is frequently used to argue that natural rights support grants of intellectual property.[105] Where there is sufficient labour exerted in the creation of intellectual products, the labourer is arguably entitled to property rights, where these rights do not unjustifiably deplete the public domain or commons.[106] Fitzgerald argues that for this to apply to copyright, creators must add labour to available information to produce an intellectual product.[107] To the extent that trade marks constitute new names for specific things, labour theory may analogously apply to trade mark protection.[108] Considerable efforts employed to invent new word marks, such as the Exxon trade

[100] Griffiths, above n 84, 265. See also Dev Gangjee and Robert Burrell, 'Because You're Worth It: L'Oreal and the Prohibition on Free Riding' (2010) 73(2) *Modern Law Review* 282.
[101] Blair and Cotter note that this argument is no longer very popular: Roger D Blair and Thomas F Cotter, *Intellectual Property: Economic and Legal Dimensions of Rights and Remedies* (Cambridge University Press, 2005) 38.
[102] Nicholas S Economides, 'The Economics of Trademarks' (1988) 78 *Trademark Reporter* 523, 538–539.
[103] See Jennifer Davis, 'The Value of Trade Marks: Economic Assets and Cultural Icons' in Ysolde Gendreau (ed), *Intellectual Property: Bridging Aesthetics and Economics - Propriété Intellectuelle: Entre L'Art et L'Argent* (Editions Themis, 2006) 97.
[104] See ibid.
[105] Fisher, above n 64, 170.
[106] Fisher identifies several problems with the application of Lockean theory to intellectual property generally: ibid 170, 184–189.
[107] Fitzgerald suggests that Lockean theory has been better received in Australian and Canadian copyright law than in American copyright law: Fitzgerald, above n 78, 181.
[108] Landes and Posner identify the value of trade marks in encouraging the creation of new names for specific things, creating cultural significance for words and adding generic words to the language: Landes and Posner, above n 87, 168–169.

mark, exemplify the way in which the creation of trade marks can engage significant labour.[109] However, Bently and Sherman suggest that characterising trade marks as creations in their own right is problematic as this ignores the role of consumers and the public in the associations between a mark and a source of goodwill. [110] The labour that results in trade marks obtaining value is not limited to the labour exerted by the creator of a trade mark in identifying or creating an effective mark.[111] The owner (often a different party) also exerts labour in establishing reputation in the mark and labour is exerted by the public in attaching significance to the mark.[112] The modern disconnection between the creator and owner of a trade mark is also relevant to the justifications of trade mark law based in personality theory, as considered below.

Concerns that applying labour theory justifications to copyright can result in excessive monopolisation of language are also relevant to trade marks.[113] Cluttering of a trade mark register can occur where registrations are permitted that are much broader than the actual use of the relevant signs.[114] Concerns about trade marks not depleting the public commons remain a relevant concern,[115] as can be seen from the exceptions permitted by international law, such as the exception for registration of descriptive marks in the *Paris Convention for the Protection of Industrial Property* and the World Trade Organization *Agreement on Trade Related Aspects of Intellectual Property Law* ('*TRIPS*').[116] In trade mark law, the nature of the registration system is critical to these types of concerns. This includes the approach of many jurisdictions of restricting registration to specifically identified goods and services for inherently distinctive signs, or signs that are somewhat adapted to distinguish their goods and services and have acquired reputation in that respect of those goods and services.[117] The requirements of intention

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[109] See *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119, 136-137 (Stephenson LJ).
[110] Bently and Sherman, above n 90, 815. Bently and Sherman focus on the contribution of trade marks to creating goodwill rather than their cultural significance.
[111] Ibid.
[112] Although it can be argued that the public contributes to the cultural significance of a copyright work, Wilf argues that '[p]eculiar to trademarks, the communicative sign is a placeholder for a robust but intangible cultural relationship between producer and consumer.' See Steven Wilf, 'Who Authors Trademarks?' (1999) 17(1) *Cardozo Art and Entertainment Law Journal* 1, 2.
[113] Barrett concludes that 'words are not owned by anyone.' See Jonathan Barrett, 'Copyright and the Sound Bite Society' (2010) 10(1) *Queensland University of Technology Law and Justice Journal* 1, 7.
[114] Australian Government Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No 78 (2016) 377–388 ('*Productivity Commission Report*').
[115] For a recent Australian case recognising the importance of common language heritage, see *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* (2014) 254 CLR 337. See Jennifer Davis, 'Protecting the Common: Delineating a Public Domain in Trade Mark Law' in Graeme B Dinwoodie and Marc D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 345.
[116] *Paris Convention for the Protection of Industrial Property*, opened for signature 20 March 1883, 828 UNTS 305 (entered into force 6 July 1884, revised at Stockholm 14 July 1967, amended 28 September 1979) art 6, quinquies B; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') art 15 ('*TRIPS*').
[117] *Productivity Commission Report*, above n 114, 377–386.

to use a mark and continued use of a mark are important to restrict the potential depletion of the public commons inherent to allowing the registration of literary and artistic signs or marks.[118]

2.3.4 Personality Theory

Personality theory characterises intellectual creations as an extension of a person and a means of recognising their significance to personhood, justifying grants of attribution and integrity. The theory is best demonstrated in copyright. Fitzgerald links rights of attribution and integrity for authors to the *Berne Convention for the Protection of Literary and Artistic Works* protecting copyright.[119] In considering the role of personality theory in copyright, Barrett and Fitzgerald emphasise the importance of moral rights.[120] However, personality rights for trade marks are little recognised in domestic or international practice. Trade mark legislation focuses on identification of the 'owner' of the mark.[121] Authorship may be relevant to a determination of the true ownership of the mark, as a ground for opposing the registration of the mark or applying for the revocation of the mark, but the focus of the act is on ownership.[122] Although trade marks created by an employee in the course of employment will be owned by the employer, creators often transfer rights and the emphasis in determining ownership is adoption and use rather than creation.[123] This contrasts with the justification that personality theory provides for intellectual property as a vehicle for the actualisation of the individual.[124] Unlike the protection provided for designation of inventors for patented works[125] and the moral rights of authors of copyright works,[126] there is no analogous protection for authors of trade mark works in Australia.[127]

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[118] See discussion of problems with clutter on the register in ibid 386.
[119] Fitzgerald, above n 78, 182–183. See *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 2186 UNTS 203 (entered into force 4 May 1896, revised at Stockholm 14 July 1967 and Paris 24 July 1971, amended 28 September 1979) art 6bis.
[120] Fitzgerald, above n 78, 182–183. See also Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15, Para 1(c) of the Covenant)*, UN ESCOR, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [13], [30]–[31], [39], [44]–[45] ('*General Comment 17*').
[121] *Trade Marks Act 1995* (Cth) s 58.
[122] Ibid.
[123] Andrew Stewart et al, *Intellectual Property in Australia* (LexisNexis Butterworths, 5th ed, 2014) 640–641; *Anderson v Natala Investments Pty Ltd* [1996] ATMO 66, 91–300; *Cranbrook School v Wylie* [2004] ATMO 49, [39]-[42]. A trade mark creator can still retain copyright that is relevant to determination of whether use of a trade mark without authorisation of the copyright owner would be contrary to law: ibid [43]-[55].
[124] Fisher, above n 64, 171–172.
[125] *Patents Act 1990* (Cth) s 15 recognises the inventor.
[126] *Copyright Act 1968* (Cth) pt IX.
[127] There is provision for objection to registration for an author where the mark has not been used: *Trade Marks Act 1995* (Cth) s 58; *Shahin Enterprises Pty Ltd v Exxonmobil Oil Corporation* [2005] AIPC ¶92-132 [63]-[64] (Lander J).

The explicit protection that Article 15(1)(c) of *ICESCR* provides for the moral interests of authors is not generally recognised for the authors of trade marks, who frequently create trade marks and assign their interests in those marks to corporations (through specific contract or employment contract).[128] If moral rights were to be acknowledged for trade mark owners, the provisions of the *Copyright Act 1968* (Cth) regarding moral rights suggest that it is likely that there would be a defence where providing attribution for trade mark owners was impractical, and a waiver of moral rights would generally form part of employment.[129] Waiver may not be consistent with human rights if creators later assert enduring entitlements of moral rights conferred by Article 15(1)(c) and seek to rescind their waiver.[130] Returning to the Marlboro example used in Chapter 1, the creator of the Marlboro mark might wish to exercise moral rights if they opposed continuing use of their sign on tobacco once its negative health impacts became apparent.

Recent theories using natural rights and labour theory to justify expansive property rights should also be questioned. In a theory that draws on Locke, Kant and Rawls, Merges argues that the logic of Lockean theory applies to intellectual products for several reasons.[131] '[C]laiming intellectual property rights out of the public domain follows the same logic as the emergence of property rights from the state of nature.'[132] Labour plays a crucial role in this, justifying and defining intellectual property rights.[133] Locke recognised research and writing as forms of labour by describing his own work as labour, which Merges argues implicitly justifies a labour-based claim to the end product for this kind of work.[134] Merges includes trade marks in his assessment and argues that trade mark creators play a role in the creative community that should be rewarded through intellectual property protection.[135] Merges use his analysis to support broad grants of intellectual property rights, 'except where doing so would trample heavily on matters affecting other individuals or society as a whole.'[136] However, broad grants of this nature

[128] See Gustavo Ghidini, *Rethinking Intellectual Property: Balancing Conflicts of Interest in the Constitutional Paradigm* (Edward Elgar, 2018).
[129] *Copyright Act 1968* (Cth) 195AR provides for no infringement of right of attribution of authorship if it was reasonable not to identify the author and *Copyright Act 1968* (Cth) s 195AWA(4) provides that consent may be given by an employee for the benefit of his or her employer in relation to all or any acts or omissions (whether occurring before or after the consent is given) and in relation to all works made or to be made by the employee in the course of his or her employment. See discussion regarding debate about waiver in Leanne Wiseman, 'Moral Rights in the Australian Academy: Where to Now?' (2005) 28(1) *UNSW Law Journal* 98, 117–121.
[130] *General Comment 17*, UN Doc E/C.12/GC/17, para 2.
[131] Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011) 33.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid 215.
[136] Ibid 308.

inappropriately diminish the emphasis on the individual in the work of Locke, Kant and Rawls.[137]

2.3.5 Social Planning Theory

Social planning theory recognises the role of intellectual property in achieving 'a just and attractive culture.'[138] Fitzgerald and Barrett emphasise the association between social planning theory and 'cultural enhancement theory.'[139] In the context of copyright, this approach emphasises the cultural significance of a work by characterising expressive work as 'a collection of culturally imbued facts.'[140] Fitzgerald emphasises the significance of information as the basis for economy, culture and society, such that the process of propertising information must accommodate cultural and social issues as well as economic issues.[141] This is consistent with the recognition of the cultural significance of trade marks.[142] Being able to use a trade mark in an expressive manner that reflects this cultural and social significance is accordingly in the public interest.[143]

Trade marks also have a significant role in communicating information.[144] Naser argues that social planning theory requires that the trade mark system be structured to achieve a just and attractive culture by balancing the rights of trade mark owners, other traders and competitors 'stressing the cultural and expressive rights of the public in trade marks.'[145] This acknowledges the public role in the creation of a trade mark. Although the owner associates the sign with a product, the public must acknowledge that association so that reputation can be established.[146] These arguments support limiting expansive rights for trade mark owners, as there is a public interest in being able to use culturally significant marks.[147] Alternatively, if creators of culturally

[137] See discussion in Osei Tutu of a variety of approaches to balancing the rights of the individual against the group and the role of human rights in recognising the individual in the context of intellectual property: J Janewa Osei Tutu, 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20(1) *Vanderbilt Journal of Entertainment and Technology Law* 207.
[138] Fisher, above n 64, 172–173.
[139] Fitzgerald, above n 78, 183. Barrett argues that the way in which 'society is imagined is a crucial consideration in an information based world': Barrett, above n 113, 8.
[140] Fitzgerald, above n 78, 184.
[141] Ibid.
[142] Megan Richardson, 'Trade Marks and Language' (2004) 26(2) *Sydney Law Review* 193, 194–197; Helfer and Austin, above n 5, 307–309.
[143] See Richardson, above n 142, 216–220.
[144] Naser associates the advertising function of trade marks with social planning theory: Mohammad Amin Naser, 'Re-Examining the Functions of Trademark Law' (2008) 8(1) *Chicago Kent Law Review* 99, 102.
[145] Ibid.
[146] Richardson, above n 142, 200–202; Bently and Sherman, above n 90, 815.
[147] Richardson discusses nuances of this argument: see Richardson, above n 142, 216–220.

significant marks merit human rights protection, such as moral rights, this could restrict public use of those marks.[148]

2.3.6 Synthesis

In contrast to the emphasis of human rights on the individual, theoretical analysis of trade mark law introduces several relevant stakeholders that could be considered by trade mark legislation. The primary stakeholders identified in this analysis are the owners of marks and consumers. However, broader public interests are identifiable from the perspective of utilitarian, natural rights and social planning theories. The rights of creators are relevant to natural rights and personality rights, although it is significant that authorship and ownership are increasingly disconnected for many forms of intellectual property, including trade marks.

Changing circumstances can influence the weight given to different theories and interests. The limited legal recognition for creators of trade marks suggests that natural law and personality theory justifications have limited modern relevance.[149] Social planning theory indicates more recently recognised public interests, which are arguably more consistent with human rights. The 20th century dominance of economic theory persists, but the extent to which it can be used to justify expansion of the rights of owners is controversial.[150] The impact of expanding trade mark protection beyond this justification is important to address in detail.

Criticisms of expansion of trade mark rights beyond search costs justifications are often linked to expansion of trade mark protection rights to protect owners against dilution and tarnishment.[151] Protection for trade mark owners against dilution and tarnishment occurs in a context of international economic trends that place higher value on branding and trade marks.[152] Dilution of a mark is alleged to occur if use on unrelated goods or services negatively impacts on the reputation and distinctiveness of the mark.[153] Tarnishment occurs when a mark is associated with another, usually unrelated, good or service, in a manner that invites negative associations with the original brand and negatively impacts on the reputation of the mark.[154] Griffiths argues that a law and economics approach (founded largely in the work of Landes and Posner) is primarily based on the essential function of a trade mark as a guarantee of a specific origin, so that it can simultaneously reduce search costs for consumers and become a focal point

[148] See discussion in Chapter 1, Section 1.2.2.
[149] See discussion of colonial influence in Amanda Scardamaglia, 'The Colonial Trade Mark Regime: Parallel Rationales, Theories and Frameworks' (2011) 22(3) *King's Law Journal* 259, 265–271.
[150] See Griffiths, above n 84; Bently and Sherman, above n 90, 816–818.
[151] Dogan and Lemley, above n 90, 1238; Handler, above n 98.
[152] Jennifer Files Beerline, 'Anti-Dilution Law, New and Improved: The Trademark Dilution Revision Act of 2006' (2008) 23(1) *Berkeley Technology Law Journal* 511, 514.
[153] Handler, above n 98, 639–640.
[154] Ibid 640.

for goodwill that can increase economic benefits associated with reputation.[155] An economic argument can be made that blurring or tarnishment protect the communicative function of a trade mark. However, these broader rights should be limited to cases where the expanded protection is a necessary incentive for production, which would improve social welfare sufficiently that it outweighed costs associated with adverse impacts on competition.[156] Griffiths notes that patent and copyright laws focus on balancing incentives against adverse impact, and suggests that overall contribution to social impact and trade mark law should be similarly balanced.[157] Even if trade mark rights are likened to tangible property, the economic justification for extending legal protection would be limited to ensuring 'their effectiveness and reliability as trade marks unless the resulting benefits would outweigh the costs.'[158]

Linking interests to theories underlying legal policy can enhance the legitimacy of the lawmaking exercise.[159] The emphasis of intellectual property on net social welfare encourages the identification of a common goal of human welfare between intellectual property and human rights, which can be linked to justice.[160] Although this chapter demonstrates that there is limited basis for identifying shared justifications between the fields, it is still important to recognise that rights that move beyond utilitarian justifications do not necessarily embody human welfare objectives. This is relevant to the legitimacy of such expansion, particularly if it is inconsistent with human rights protection.[161] Legitimacy supports concluding recommendations in this thesis to limit expansive rights for trade mark owners that are potentially inconsistent with human rights. Broader rights for trade marks owners may also be inconsistent with the underlying rationales for trade mark protection.[162] This link will be shown in the *Laugh It Off* analysis in the following section.

Criticism of the expansion of trade mark law in some jurisdictions is relevant to criticisms of attempts to expand these rights at a multilateral level by forum shifting and including them in plurilateral and bilateral agreements.[163] The anti-counterfeiting case study used in this thesis and the discussion in Chapter 10 will address this concern. Doubts raised in this section about the

[155] Griffiths, above n 84, 245–255.
[156] Ibid 264.
[157] Ibid.
[158] Ibid 266.
[159] Argyrous notes the importance of clearly articulating the theoretical principles that shape the framework for evidence-based research in public policy: Argyrous, above n 3, 462.
[160] See Derclaye, above n 4. However, an emphasis on social welfare need not explicitly link this to justice: Gervais, above n 5.
[161] Osei-Tutu considers theoretical dimensions of the use of human rights to balance expansion in intellectual property generally: Osei Tutu, above n 137.
[162] Fisher, above n 64, 194–199.
[163] Burton Ong, 'The Trademark Law Provisions of Bilateral Free Trade Agreements' in Graeme B Dinwoodie and Marc D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 229, 240–248.

theoretical basis for expanded trade marks protection in utilitarian or natural rights justifications for trade marks suggest the need for scrutiny of the justifications for expanded trade marks protection, both for legitimacy, and where they restrict the operation of human rights.

2.4 Normative Aspects of Conflicts between Intellectual Property Rights and Human Rights

This section uses an example of potential conflict between domestic trade mark law and the right to freedom of expression in order to consider normative aspects of human rights law and trade mark law in cases of apparent conflict. In the South African case of *Laugh It Off*, freedom of expression claims appeared to conflict with dilution and tarnishment claims.[164] The claimants sought protection for a registered word mark and two device marks against alleged trade mark dilution or tarnishment.[165] The protected word mark was 'Carling Black Label.'[166] The relevant device marks comprised composite marks and used the words Carling, Black Label and Beer and the phrases 'America's Lusty, Lively Beer' and 'Brewed in South Africa.'[167] The marks included somewhat distinctive geometric images and fancy lettering.[168] The defendants sold T-shirts that depicted parodies of well-known marks. The relevant parody for the Carling Black Label device mark substituted the phrases 'Black Labour White Guilt' for the trade marked 'Black Label' and 'Africa's Lusty Lively Exploitation Since 1652 – No regard given worldwide' for 'America's Lusty, Lively Beer – Brewed in South Africa.'[169] Although parody is not directly protected in South African trade mark law,[170] the Constitutional Court interpreted trade mark dilution protections through the lens of constitutional protection for freedom of expression.[171] In this context, the Constitutional Court identified no real evidence that South African Breweries was likely to experience financial loss and ruled in favour of Laugh It Off.[172] This reversed the findings of two lower courts in favour of South African Breweries.[173]

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[164] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV* (2006) 1 SA 144 (Constitutional Court) ('*Laugh It Off*').
[165] Ibid.
[166] South African Trade Mark No 1979/03675.
[167] South African Trade Mark No 1991/09236; South African Trade Mark No 1991/09237.
[168] South African Trade Mark No 1991/09236; South African Trade Mark No 1991/09237.
[169] *Laugh It Off* [9] (Moseneke J). The majority judgment was made by Moseneke J. Sachs J made a separate judgment.
[170] Ibid [64] (Moseneke J).
[171] Ibid [44], [51] (Moseneke J). The South African right differs from *ICESCR* limitations, but the right has been interpreted to be subject to other constitutional rights: at [47] (Moseneke J).
[172] Ibid [44], [51], [55]-[57] (Moseneke J). Despite this success, the company stopped further production of T-shirts. Gillian Jones, 'Laugh It Off Wins Case against SAB' *Mail & Guardian (online)*, 27 May 2005 <https://mg.co.za/article/2005-05-27-laugh-it-off-wins-case-against-sab/>.
[173] *Laugh It Off*; *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* (2005) (2) SA 46 (Supreme Court of Appeal); *SAB International t/a Sabmark International v Laugh It Off Promotions* (2003) 2 All SA 454 (Cape High Court).

2.4.1 Trade Marks and Freedom of Expression

Natural rights justify freedom of expression rights as 'inherent in human nature and republican citizenship,' yet restricted so that they cannot be used to violate other fundamental rights.[174] The legally binding obligation found in Article 19 of the *ICCPR* permits limitations on the right to freedom of expression

> such as are provided by law and are necessary:
>
> a) For respect of the rights or reputations of others;
> b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[175]

Trade mark rights are a limitation on the right to freedom of expression.[176] *Laugh It Off* suggests that some trade mark protection rights such as dilution could result in freedom of expression restrictions that exceed limitations justifiable pursuant to *ICCPR* Article 19(3).

2.4.2 Links to Theoretical Justifications

Is *Laugh It Off* consistent with the theoretical justifications for trade mark law identified in this chapter? For consumer search costs to be relevant, there would need to be some likelihood that the defendant's mark would cause a level of confusion or deception that would reduce the efficient and effective identification of the source of the relevant products.[177] Section 34(1)(c) of the *Trade Marks Act 1993* (South Africa) provides that infringement occurs where unauthorised use of a well-known registered trade mark 'would be likely to take unfair advantage of or be detrimental to the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception.'[178] The decision in *Laugh It Off* distinguished the function of section 34(1)(c) as protecting the 'unique identity and reputation of a registered trade mark… attributes [which] underpin the economic value that resides in the

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[174] Steven Heyman explains that a natural rights justification for free speech was accepted in eighteenth century America prior to the influence of legal positivism and utilitarianism: Steven J Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits' (1998) 78(5) *Boston University Law Review* 1275, 1279.
See also Jud Campbell, 'Natural Rights and the First Amendment' (2017) 127(2) *The Yale Law Journal* 246.

[175] *ICCPR* Article 19(3) translated the protection available in Article 19 of the *UDHR*, which proclaims that '[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

[176] See Andreas Rahmatian, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 335, 347–356. See also Jonathan Griffiths, 'Is There a Right to an Immoral Trademark?' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 425.

[177] See Landes and Posner, above n 87, 170.

[178] *Trade Marks Act 1993* (South Africa) s 34(1)(c).

mark's advertising prowess or selling power.' [179] No findings were made of confusion, deception or financial loss in the decision.[180]

Granting broad rights to prevent dilution or tarnishment of a mark can engage concerns about monopolisation of the English language.[181] Expansive rights mean that other traders are unable to use the relevant signs (or signs that might be considered to be substantially identical or deceptively similar to the registered mark), even though that use might not be detrimental to the public, as it would not confuse consumers.[182] Analogously, Barrett notes that both a utilitarian and Lockean approach to copyright protection are problematic for freedom of expression where they result in 'excessive monopolisation of the language.'[183] The registrations protect the language commons to the extent that the endorsement specifically precludes rights in the words 'black', 'lusty', 'American', 'enjoyed', 'men', 'world', 'brewed' and 'South Africa,' apart from their use in the mark.[184]

The decision does not clearly upset other interests protected by justifications for trade marks. It is assumed that the original creator of the marks is not the present owner of the marks. The relevant marks were acquired by Sabmark.[185] The present owner may have exerted labour in establishing or maintaining the reputation of the mark, but this would not justify natural rights protection for the trade mark itself as an intellectual product.[186] The parodist has also exerted labour in using the mark to comment on labour exploitation and may have a more relevant natural rights-based claim in the separate parody mark created.

The protection for attribution and integrity that personality theory potentially provides for trade marks also has limited application in this case. There is no recognition of the creator of the registered marks. This makes it difficult to assess whether that individual would consider the parody to be an attack on the integrity of the mark they created. Hypothetically, they might support the political message. As this is an individual right, barriers in accessing the opinions of the relevant creator present a significant limitation for this assessment.

The nature of the political message is also relevant to the way in which the case engages social planning theory. The use of the mark as a parody is consistent with the necessity to balance the rights of trade mark owners against the cultural and expressive rights of the public, as identified

[179] *Laugh It Off* [40] (Moseneke J).
[180] Ibid.
[181] See Richardson, above n 142.
[182] Sarah Lux, 'Evaluating Trade Mark Dilution from the Perspective of the Consumer' (2011) 34(3) *UNSW Law Journal* 1053, 1068–1074.
[183] Barrett, above n 113, 8.
[184] South African Trade Mark No 1991/09236; South African Trade Mark No 1991/09237.
[185] *Laugh It Off* [7] (Moseneke J).
[186] Bently and Sherman, above n 90, 815.

by Naser.[187] Drescher has argued that expansion of protection for trade marks can be linked to the significance of trade marks to culture, as a result of the successful usage of trade marks and branding.[188] The increasing importance of trade marks to culture increases public interest in having culturally significant marks available to public discourse,[189] although this is not a focus of many domestic legal systems.[190] Strong intellectual property protection may restrict freedom of expression to the extent that it restricts the use of culturally significant expressions.[191] This may also be relevant to the right to participate in cultural life enshrined in Article 15 of *ICESCR*.

2.4.3 Synthesis

In other domestic jurisdictions in which fundamental rights to freedom of expression are protected, there have been examples of expressive uses of signs that also constitute allegedly infringing use as a trade mark.[192] A number of European decisions have emphasised the importance of protecting freedom of expression in matters concerning trade marks.[193] Courts have been required to balance the competing interests. Ramsey argues that trade marks can engage freedom of expression concerns, which may be addressed through the use of flexibilities in the provisions of *TRIPS*.[194] Ramsey suggests that domestic legal regimes can better protect freedom of expression than additional *TRIPS* provisions.[195] Importantly, the protection offered to freedom of expression within domestic jurisdictions is likely to influence this approach and can vary considerably.[196] The use of freedom of expression in *Laugh It Off* and other cases has prompted some concerns that this is not the best approach to restraining inappropriate increases

[187] Naser, above n 144, 102.
[188] Drescher, above n 94, 339.
[189] Richardson, above n 142, 218–219.
[190] Loughlan argues that the 'use as a trade mark' requirement for infringement restricts the impact of this in Australia: Patricia Loughlan, 'Protecting Culturally Significant Uses of Trade Marks (Without a First Amendment)' (2000) 22(7) *European Intellectual Property Review* 328. Protection of culturally significant signs is largely limited to a small number of marks with strong national significance. See, eg, *Protection of the Word 'Anzac' Act 1920* (Cth); Catherine Bond, *ANZAC: The Landing, the Legend, the Law* (Australian Scholarly Publishing, 2016).
[191] Richardson, above n 142, 218–219.
[192] See Helfer and Austin, above n 5, 283–312; Handler, above n 98, 683–690.
[193] See examples in Griffiths, above n 176. Cf Robert Burrell and Dev Gangjee, 'Trade Marks and Freedom of Expression: A Call for Caution' (2010) 41(5) *IIC - International Review of Intellectual Property and Competition Law* 544, 559–564.
[194] Lisa P Ramsey, 'Free Speech and International Obligations to Protect Trademarks' (2010) 35 *Yale Journal of International Law* 405, 416. Cf Marco Ricolfi, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 453, 455–456.
[195] Ramsey, above n 194, 409, 416.
[196] The extensive protection provided in the United States against dilution and tarnishment, and the defences against those actions, is likely to influence the operation of protection for freedom of expression, despite strong constitutional protection for free speech that is in contrast to protection in Australia: Anthony Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41(2) *Common Law World Review* 167.

in rights for trade mark owners.[197] Halabi argues that trade marks should be protected pursuant to a human right to property in order to balance the impact of protection of freedom of expression against the rights of trade mark owners.[198] However, analysis in this chapter demonstrates that the use of freedom of expression is also largely consistent with traditional theoretical justifications for protection of trade marks.

How would Murumba's approach apply to *Laugh It Off?* A continuum of the nature proposed by Murumba permits acknowledgement of the natural rights origins of human rights, but recognises the modern relevance and practicality of positivism as a vehicle to recognise the panoply of human rights. [199] Accepting a fact-value complex, Murumba uses legal theory to address conflicts at the intersection of human rights and intellectual property and considers their application to disputes involving plain packaging.[200] Murumba uses an approach of formulating relevant conflicting human rights and intellectual property norms by determining the intensity of the detriment to the norm that is not preferred (Detriment Intensity).[201] He then considers the corresponding importance of the preferred principle to the corresponding principle, balancing whether the importance of the principle satisfied justifies the intensity of the detriment to the unrealised principle.[202]

If we apply the Detriment Intensity approach used by Murumba to balance conflicting interests in *Laugh It Off*, protection from tarnishment constitutes a claim-right that is restricted by a freedom of expression claim.[203] The intensity of the relevant detriment for the trade mark owners is limited. The Supreme Court could find no likely evidence of financial detriment.[204] Even if financial detriment was established, the Detriment Intensity outcome might still suggest that the finding favouring the defendants is normatively justifiable because the expressive use of trade marks is particularly relevant for culturally significant marks.[205]

One further consideration is relevant. Freedom of expression is a human right with an internal balancing mechanism so that rights can be limited where they restrict the human rights of others.[206] Could Article 15(1)(c) operate to protect the creator of the mark? This is more likely

[197] See Burrell and Gangjee, above n 193.
[198] Sam F Halabi, 'Reconciling International Obligations to Protect Health and Trademarks: A Defense of Trademarks as Property' in Daniel Gervais (ed), *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 389.
[199] Dembour, above n 7, 3.
[200] Murumba, above n 1, 142–143.
[201] Ibid 146–147.
[202] Ibid.
[203] See ibid.
[204] *Laugh It Off* [44], [51], [55]–[57].
[205] See Richardson, above n 142, 216–220.
[206] *ICCPR* art 19(3).

for the composite marks than the word marks.[207] Given that it was sufficiently well-known to be targeted by a parodist, the composite mark may have cultural significance for which protection is relevant to the objectives of Article 15. If so, the relevant rights engaged are moral and material rights. It is assumed that the parody marks in issue in *Laugh It Off* could not influence the material remuneration received by the creator of the right. The preceding personality theory analysis demonstrates the complexities of asserting that the moral rights of the creators have been breached. These uncertainties might not exist if there were a culture of attribution of trade mark owners, but this is not usual domestic practice for trade mark legislation. In the absence of knowledge about the individual creator, it is difficult to argue that restrictions on the freedom of expression rights of the parodist provided by Article 19(3) are justified.

2.5 CONCLUSION

Normative value is attributed to both human rights law and intellectual property law through justifications presented in this chapter. Natural law and natural rights theories provide the basis for assertions of normative primacy in human rights law. Although the historical development of human rights law can be closely linked to natural rights theory, positivist justifications for human rights law have become increasingly important.[208] Chapter 3 will consider the extent to which positivist approaches can also provide a basis for assertions of primacy in international law. Using interpretive rules of legal hierarchy to confer special status on human rights law can be relevant to understanding approaches to resolving fragmentation between international human rights law and international intellectual property law.[209]

Although theoretical justifications for trade marks have been identified, the theoretical justifications for expanded trade marks protection have been questioned in this chapter, engaging questions of normative legitimacy. Claims that the common objectives of intellectual property and human rights support recognition of coexistence should not extend to expanded trade mark protection. Chapters 10 and 11 of this thesis argue that the assertion of expanded trade mark owner interests can impair the realisation of human rights and should be addressed by a positive human rights culture, rather than by using justice-focused human rights claims as a last resort. Human rights justifications for modification of trade mark owners' rights may also

[207] See Chapter 1, Section 1.2.2.
[208] See Yu, above n 8, 1046–1047.
[209] See Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *European Journal of International Law* 753, 792; Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19(4) *European Journal of International Law* 749, 756–757, 761; Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5(1) *Minnesota Intellectual Property Review* 47, 48; Robert Howse and Makau Mutua, 'Protecting Human Rights in a Global Economy Challenges for the World Trade Organization' (1999) 6(1) *Human Rights in Development Online* 51, 82.

restore balance to other interests that are indicated by traditional justifications for trade mark law. This can strengthen the perceived legitimacy of the modifications and trade mark law generally.

The *Laugh It Off* example shows the way in which a balance that favours human rights protection over trade mark protection can be consistent with theoretical justifications for intellectual property law. This balancing can be consistent with Murumba's Detriment Intensity approach, as a way of applying the justice-order continuum he proposes to incorporate both normative and positivist concerns. This approach provides a role for norms that are supported for moral arguments, without ignoring the positivist concern that both intellectual property rights and human rights are enshrined in international agreements and need to be recognised in conflict resolution to support order.

Normatively, human rights are important to justice. Human rights primacy is recognised in several models conceptualising the relationship between human rights and intellectual property explored in Chapter 1. Accordingly, normative and positivist concerns will continue to be explored and addressed throughout this thesis.

CHAPTER THREE HUMAN RIGHTS AND INTELLECTUAL PROPERTY AS PARTS OF THE INTERNATIONAL LEGAL SYSTEM

3.1 INTRODUCTION

One of the reasons that the relationship between trade marks and human rights is important is that states are bound by international legal obligations for both fields.[1] These obligations limit the regulatory autonomy of states to make laws that focus on domestic interests. Chapter 2 has identified interests specifically relevant to trade marks and human rights that influence the content of international and domestic law. Another type of domestic interest is complying with international obligations. Realisation of this interest is problematic if two sets of obligations in international law cannot both be sensibly implemented into domestic legislation.

This chapter examines the international legal obligations relevant to the fields of human rights law and intellectual property law. It identifies the primary instruments that are relevant to the intersection between trade mark law and human rights law. These instruments are situated in two separate fields of international law: international human rights law and international intellectual property law. There is no clear recognition of doctrinal primacy for one field over the other, although there is a basis for claims of legal hierarchy for some or all of human rights law. Several international legal principles assist in understanding the relationship between separate fields of international law. The interpretative principles identified in this chapter are relevant to understanding the suitability of the theoretical models identified in the previous chapter. There are several linkages between positivist and normative approaches to synthesising these areas of law. For example, the object and purpose of a treaty often correspond to the theoretical justifications for a treaty, and are relevant to doctrinal analysis and to legal approaches resolving 'inter-systemic differences where disputes engage competing systems of international law.'[2]

Chapter 1 of this thesis identified a series of models that conceptualise the relationship between human rights and intellectual property. Within this spectrum of models, different emphasis is given to international law. Chapter 2 identified the theoretical justifications for each field, which are relevant to understanding whether one field of law can claim normative primacy over the

[1] *Pacta sunt servanda* is codified in *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ('*VCLT*').

[2] See Henning Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health' (2013) 9(2) *Journal of Private International Law* 308, 326–328.

other. This chapter explains the doctrinal tools that are relevant to the analysis of international laws commenced in the previous chapters. Serious concerns exist that the separation between different fields of international law has resulted in fragmentation: an international legal system that is not cohesive.[3] One characteristic of this fragmentation is difficulty in finding appropriate mechanisms for the interpretation of issues that engage multiple specialised bodies of international law.[4] Noting the importance of both context and framework to the interpretation of international law,[5] this chapter develops the existing literature by considering how these approaches are relevant in the specific context of interactions between intellectual property and human rights.[6] The laws and institutions identified in this chapter are relevant to the case studies that will be assessed in Chapters 8 and 9.

Sections 3.2 and 3.3 of this chapter note the key obligations imposed by the international legal frameworks for intellectual property and human rights law and identify flexibility mechanisms that are relevant where obligations conflict. However, an important difference between the two fields is their approach to enforcement. This can influence the attitude of states towards strict observance of legal obligations in domestic legislation. Section 3.2 will discuss important features of international agreements, institutions and enforcement mechanisms for intellectual property, recognising the overlapping relevance of trade law. Section 3.3 will discuss important features of the relevant international agreements, institutions and enforcement mechanisms for human rights. The rules and restrictions identified in this and the subsequent chapters on international trade mark law and the human right to health will influence the extent to which Australia is permitted to exercise domestic regulatory autonomy in relation to each of the case studies. This influences the type of recommendations appropriate for each case study regarding the relationship between trade mark law and the human right to health and, more generally, recommendations regarding the relationship between intellectual property and human rights in Australia. Section 3.4 identifies legal mechanisms governing interactions between overlapping

[3] See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. *Report of the Study Group of the International Law Commission, Finalized by the Chairman, Martti Koskenniemi,* UN GAOR, 58th sess, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1 (13 April 2006) ('*ILC Study Group Report*'); International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, UN GAOR, 58th sess, UN Doc A/CN.4/L.702 (18 July 2006) ('*ILC 2006 Report*').

[4] Ibid; Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2.

[5] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 64 [119-120].

[6] There is some analysis in Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2. Grosse Ruse-Khan also makes limited references to the intersection in the context of the plain packaging dispute: Henning Grosse Ruse-Khan, *Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 9–11, 47–48, 62–63.

fields of international law. It considers the relationship between these rules and the models identified in the previous chapter. Section 3.5 considers the appropriateness of relevant dispute resolution systems for resolving interactions between human rights and intellectual property when conflicts that engage both fields of law emerge.

3.2 INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM

When states join international intellectual property agreements, they agree to legal obligations that can subsequently constrain their ability to realise human rights.[7] This section outlines the agreements, institutions and enforcement mechanisms that are most relevant to international intellectual property law. Institutional mechanisms are important to administration, oversight and development of new agreements between states. The first international intellectual property institutions developed as a result of the agreements outlined in this section. The *Agreement on Trade Related Aspects of Intellectual Property Law* ('*TRIPS*') entrenched intellectual property into the international trade regime overseen by the World Trade Organization (WTO).[8] Earlier multilateral agreements influenced the content of *TRIPS* and continue to be administered by the World Intellectual Property Organisation (WIPO), the institution responsible for intellectual property in the United Nations (UN) system.[9] More recently, additional obligations form part of bilateral and regional investment and trade agreements. These agreements and the investor-state dispute mechanism that is included in many of them will be considered in more depth in Chapter 6, the case studies and related analysis in Chapter 10.

3.2.1 Multilateral Landscape Prior to TRIPS

3.2.1.1 Features of the Paris and Berne Conventions

International agreements regarding intellectual property in the late 19th century evolved from previous bilateral agreements on specific fields.[10] The 1883 *Paris Convention on Industrial Property* ('*Paris Convention*') codified protection standards for trade marks, patents and designs.[11] The substantive protection that this provides for trade marks will be detailed in

[7] *VCLT* art 30.
[8] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS*').
[9] Ibid art 2; Daniel J Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell, 4th ed, 2012) 10–11, 187–188.
[10] Lionel Bently, 'The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press, 2008) 3, 14–16.
[11] *Paris Convention for the Protection of Industrial Property*, opened for signature 20 March 1883, 828 UNTS 305 (entered into force 6 July 1884, revised at Stockholm 14 July 1967, amended 28 September 1979) ('*Paris Convention*').

Chapter 6. The 1886 *Berne Convention on Copyright* ('*Berne Convention*') provided protection for copyright.[12] Both agreements importantly enshrined the principle of national treatment.[13] This meant that each state party was required to protect the covered intellectual property rights of nationals of other members of the agreement with standards equivalent to protection provided to its own nationals.[14] This reduced barriers in international trade of goods protected by intellectual property where it protected traders against imitators in other member countries.[15] National treatment also permitted significant flexibility within national systems but there were a number of common rules for regulation.[16] The *Paris Convention* required recognition of priority dates for the registration of trade mark, patent and designs.[17] These standards provided the basis for subsequent procedural agreements and international registration systems developed.[18]

The *Paris Convention* established the Paris Union, which has an Assembly and Executive Committee.[19] The bureaus initially established to administer the *Paris Convention* and the *Berne Convention* joined to form the Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (BIRPI) in the late 19th century.[20] BIRPI's role was superseded by the International Bureau of WIPO, which is now primarily responsible for administration and oversight.[21] The *Paris Convention* has provided for the resolution of disputes in the International Court of Justice (ICJ) since 1967,[22] although this forum has not been used for the enforcement of the agreement.[23] The primary opportunity for multilateral discussion about enforcement had been in the revision conferences,[24] but a failure to agree further revisions in the early 1980s influenced the separate development of *TRIPS*.[25]

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[12] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 2186 UNTS 203 (entered into force 4 May 1896, revised at Stockholm 14 July 1967 and Paris 24 July 1971, amended 28 September 1979) ('*Berne Convention*').
[13] Ibid arts 5(1), 5(2); *Paris Convention* art 2(1).
[14] Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press, 2015) 336–339.
[15] Ricketson discusses the complaints of traders about inconsistent protection of trade marks and suggests that the justifications for protecting trade marks in the *Paris Convention* were not controversial: ibid 12–13.
[16] Ricketson describes the limitations of national treatment: ibid 345–346. Peter Yu describes enforcement provisions as 'rare and piecemeal': Peter K Yu, 'TRIPS and Its Achilles Heel' (2011) 18(2) *Journal of Intellectual Property Law* 479, 486–487.
[17] *Paris Convention* art 4(a).
[18] For a discussion of subsequent procedural agreements and international registration systems in relation to trade marks: see Ricketson, above n 14, 608–641.
[19] *Paris Convention* arts 1, 13, 14.
[20] Administration was largely first carried out by the Bureau of the International Union for the Protection of Industrial Property: Ricketson, above n 14, 225–228.
[21] Ibid; *Paris Convention* art 15(1)(a).
[22] *Paris Convention* art 28.
[23] Ricketson, above n 14, 323.
[24] Ibid 321; Matthew Kennedy, *WTO Dispute Settlement and the TRIPS Agreement* (Cambridge University Press, 2016) 4.
[25] Kennedy, above n 24, 5.

3.2.1.2 Further agreements and enforcement

Further multilateral agreements followed the *Paris* and *Berne Conventions*. Procedural agreements facilitated the international recognition and regulation of intellectual property rights. For example, the *Nice Agreement* established a classification system for goods and services that permitted more efficient and harmonised domestic trade mark registration systems.[26] There was an expansion of protected subject matter in subsequent intellectual property agreements such as the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (1961), which regulated copyright protection for subject matter other than works.[27] There were also some alternative multilateral agreements such as the *Universal Copyright Convention*.[28]

3.2.2 TRIPS

This sub-section considers the negotiation of the *TRIPS* agreement and circumstances prompting the shift in negotiations from WIPO to the WTO. It identifies key aspects of *TRIPS* that are relevant to interpretative flexibility available for member states. Interpretive flexibility influences the harmonisation of intellectual property law and human rights law. Although the effectiveness of these enforcement mechanisms remains controversial, the inclusion of effective enforcement mechanisms in *TRIPS* was a significant innovation.[29]

3.2.2.1 Circumstances prompting forum shift and negotiation

Several countries had serious concerns that, despite increasing agreement in intellectual property standards throughout the 20th century, intellectual property was not effectively protected in many states.[30] This was primarily a concern of developed countries, particularly net exporters of intellectual property.[31] In WIPO, developing countries increasingly sought recognition of the impact of increasing intellectual property standards on economic

[26] Ricketson discusses the general importance of national registration systems: Ricketson, above n 14, 110–111.
[27] *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, opened for signature 26 October 1961, 496 UNTS 43 (entered into force 18 May 1964).
[28] *Universal Copyright Convention*, opened for signature 6 September 1952, 943 UNTS 178 (entered into force 16 September 1955).
[29] Yu, 'Achilles Heel', above n 16, 486–487; Ruth Okediji, 'TRIPS and Its Methods: The Resilience of Developing Country Implementation of Intellectual Property Norms' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 241, 247.
[30] Kennedy, above n 24, 4–5; Yu, 'Achilles Heel', above n 16, 485–487; Gervais, *The TRIPS Agreement: Drafting History and Analysis*, above n 9, 11.
[31] Kennedy, above n 24, 4–5.

development, which frustrated countries seeking higher standards, such as the United States.[32] Developed countries like the United States had benefited from less stringent intellectual property standards and weak enforcement regimes during their own periods of economic development.[33] They became increasingly ineffective in arguing for greater or more effective intellectual property protection in WIPO.[34] Developed countries emphasised the problems of the national treatment paradigm underpinning the *Paris* and *Berne Conventions*.[35] For example, national exclusion for different types of intellectual property protection, such as intellectual property protection for pharmaceuticals, meant foreign nationals received no protection.[36]

Frustrations with WIPO's effectiveness encouraged countries seeking higher intellectual property standards to link intellectual property to the international trade regime.[37] This prompted the negotiation of the *TRIPS* Agreement through the auspices of the *General Agreement on Tariffs and Trade* ('*GATT*'), which transformed into the WTO in 1995. Bilateral enforcement measures were also taken.[38] The annual *Special 301 Report* of the Office of the United States Trade Representative identifies countries considered by that office to be in serious violation of intellectual property standards, sometimes prompting the United States to unilaterally sanction identified 'offenders'.[39] These reports and activities partly incentivised the agreement of harmonised minimum standards in *TRIPS*, as developing countries anticipated that this would alleviate the punitive approach of the United States to allegedly offending states.[40]

The forum shift for discussion of intellectual property standards from WIPO to the WTO changed the nature of the debate. Grosheide argues that the move towards *TRIPS* was influenced by growing interstate commercial interdependency, technological change 'offering new products bearing their properties on their face and simultaneously available everywhere and

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[32] Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 450.

[33] See, eg, American delays in adopting copyright protection for works of foreign origin detailed in Tyler T Ochoa, 'Copyright Protection for Works of Foreign Origin' in Jan Klabbers and Mortimer Sellers (eds), *The Internationalization of Law and Legal Education* (Springer, 2009) 167.

[34] Ricketson, above n 14, 98–106. Treaties, such as the *Trademark Law Treaty*, were negotiated but agreement was not reached until after the *TRIPS* negotiations were concluded: Gervais, *The TRIPS Agreement: Drafting History and Analysis*, above n 9, 11; Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP', above n 32, 450. See also Susan K Sell, 'Intellectual Property as a Trade Issue: From the Paris Convention to GATT' (1989) 13(4) *Legal Studies Forum* 407.

[35] Ricketson, above n 14, 345.

[36] Ibid.

[37] Ibid 9–10.

[38] Kennedy, above n 24, 9–18, 84–96.

[39] See, eg, Office of the United States Trade Representative, *2017 Special 301 Report* (April 2017) <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>. Kennedy provides detailed analysis of the use of this mechanism prior to the finalisation of *TRIPS*: Kennedy, above n 24, 9–16. Sell discusses development of the mechanism: Sell, 'Intellectual Property as a Trade Issue: From the Paris Convention to GATT', above n 34, 415–419.

[40] Kennedy, above n 24, 9–16. Kennedy also discusses the analogous but less frequently utilised *European Union New Commercial Policy Instrument*: at 16–18.

for everyone' and economic change favouring neo-liberalism.[41] Internationally, intellectual property protection was transformed from an incentive for knowledge development into a commodity.[42] As a commodity, its trade was liberalised as part of the international trade regime.[43] Agreements to increased intellectual property standards were linked to improved market access in developed countries, for developing countries.[44] Failures to adequately protect intellectual property were framed as a barrier to trade as there are disincentives to trade with a country where the intellectual property goods can be easily imitated.[45] Alternatively, very high levels of protection arguably create a barrier to trade. [46] They can restrict technological innovation such as follow-on innovation,[47] which can reduce investment in innovative activities in a state.

Development concerns were central to the negotiation of *TRIPS*.[48] An agreement was reached that was on balance perceived to benefit developed countries in exchange for other trade-related benefits for developing countries.[49] *TRIPS* implemented standards that were generally consistent with pre-existing protection regimes in developed countries.[50] Developed countries argued that protection of intellectual property would strengthen economic growth and technical competence in developing countries.[51] Developing countries resisted the perceived asymmetric benefits for foreign investors of increased and enforceable harmonised intellectual property standards, which would entail significant administrative costs.[52] This debate about relative advantage continues as it remains unclear the extent to which increased intellectual property standards

[41] Wilem Grosheide, 'General Introduction' in Wilem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 3, 10–11.
[42] Rochelle C Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property' (2015) 36(4) *Michigan Journal of International Law* 557, 559.
[43] Ibid. See also Keith E Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century* (Peterson Institute for International Economics, 2012) 318.
[44] Laurence R Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1, 3.
[45] Maskus, above n 43, 11.
[46] Ibid.
[47] See ibid 70.
[48] Yu, 'Achilles Heel', above n 16, 493–496.
[49] Daniel J Gervais, 'IP Calibration' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 86, 90.
[50] Yu, 'Achilles Heel', above n 16, 493.
[51] Mohamed R Hassanein, 'Bilateral WTO-Plus Free Trade Agreements in the Middle East: A Case Study of OFTA in the Post-TRIPS Era' (2007) 8(2) *Wake Forest Intellectual Property Law Journal* 161, 170, citing George Y Gonzalez, 'An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement' (1993) 34(2) *Harvard International Law Journal* 305, 310.
[52] Yu, 'Achilles Heel', above n 16, 487–488; Hassanein, above n 51, 170–171.

have benefited economic development in developing countries.[53] The Preamble of *TRIPS* recognises inter alia 'the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.'[54] Most of the empirical studies that address the impact of TRIPS focus on the impact of harmonisation of patent laws on innovation and the impact of this on economic development.[55] Maskus argues that one reason for the focus on patents in empirical studies about the impact of *TRIPS* is that changes to patent law were generally more dramatic than changes to trade mark law and copyright law.[56] However, he also identifies a clear relationship between trade marks, economic development and trade liberalisation.[57]

3.2.2.2 A human rights view of development

There is growing recognition of a human rights-based approach to development. It was recognised in the 1986 *United Nations Declaration on the Right to Development* as an entitlement of all 'to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'[58] A human right to development is not found in the *Universal Declaration of Human Rights* or any key multilateral human rights agreement. A United Nations declaration can become customary international law, but Uvin suggests that the right was deliberately agreed in a non-binding declaration.[59] Consequently, the declaration itself may not constitute *opinio juris*. The declaration can influence international law actors.[60] More recent multilateral declarations and commitments recognising development rights affirm the relevance of human rights.[61] Clear

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[53] Robert L Ostergard Jr, 'Economic Growth and Intellectual Property Rights Protection' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 3, 3–40.
[54] *TRIPS* Preamble.
[55] See, eg, Anselm Kamperman Sanders and Dalindyebo Shabalala, 'Intellectual Property Treaties and Development' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 41, 41–72.
[56] Maskus, above n 43, 30–31.
[57] Keith E Maskus, 'Intellectual Property Rights and Economic Development' (2000) 32(3) *Case Western Reserve Journal of International Law* 471, 478–481, 502. See also Maskus, above n 43, 65, 71–72.
[58] *United Nations Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st sess, 97th plen mtg, UN Doc 41/128 (4 December 1986).
[59] Uvin questions the value of the declaration: Peter Uvin, 'From The Right To Development To The Rights-Based Approach: How "Human Rights" Entered Development' (2007) 17(4/5) *Development in Practice* 597, 598.
[60] See ibid 603–604.
[61] United Nations, *The Millennium Development Goals Report 2015* (United Nations, 2015) 9. Broad international consensus on development objectives is evident from the Sustainable Development Goals that replaced the Millennium Development Goals on 1 January 2016: United Nations, *The Sustainable Development Agenda* (2018) United Nations Sustainable Development Goals <https://www.un.org/sustainabledevelopment/development-agenda/>.

links have been made between Sustainable Development Goals objectives and a significant number of related human rights.[62]

Discussions regarding the 'right to development' increasingly focus on a human rights-based approach to development, which is relevant to a broader understanding of the significance of economic, social and cultural rights to development cooperation.[63] A human rights-based approach to development recognises that realisation of human rights, particularly economic, social and cultural rights, should be integrated with any sustainable planning for development, as development concerns are not limited to economic planning and objectives.[64] This approach is also relevant to the references to development in *TRIPS*, which are relevant to understanding the object and purpose of the agreement, and references to development in the World Trade Organization Preamble.[65] The impact of intellectual property on development remains an important consideration for both international and domestic law.[66]

3.2.2.3 TRIPS features relevant to intellectual property and human rights

3.2.2.3.1 Institutional oversight

The TRIPS Council oversees *TRIPS* and is composed of representatives of all WTO Member States.[67] It addresses important issues raised by states regarding implementation of the agreements, and it can amend *TRIPS* through agreement, as demonstrated by the compulsory licensing amendments.[68] WIPO continues to administer the other primary agreements. WIPO

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[62] Danish Institute for Human Rights, *The Human Rights Guide to the Sustainable Development Goals* <http://sdg.humanrights.dk/>.

[63] Michael Windfuhr, 'Economic, Social and Cultural Rights and Development Cooperation' in Andre Frankovits and Patrick Earle (eds), *Working Together: The Human Rights Based Approach to Development Cooperation. Report of the NGO Workshop, Stockholm* (2000) 24, 25 <http://www.hrca.org.au/wp-content/uploads/2008/05/part1.pdf>.

[64] Uvin, above n 59.

[65] *TRIPS* Preamble; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Preamble; Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford University Press, 2011); Henning Grosse Ruse-Khan, 'The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO' (Max Planck Institute for Intellectual Property and Competition Law Research Paper No 11-15, 28 September 2011) 9–14 <https://papers.ssrn.com/abstract=1939859>.

[66] Toebes notes its relevance to the tobacco plain packaging dispute: Brigit Toebes, 'Human Rights and Public Health: Towards a Balanced Relationship' (2015) 19(4) *The International Journal of Human Rights* 488, 495. For broader analysis on the relationship between development and intellectual property that is not focused on a human rights approach to development, see generally, Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014).

[67] *TRIPS* art 68.

[68] *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (2 September 2003) (Decision of 30 August 2003); *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540/Corr.1 (29 July 2005) (Decision of 30 August 2003: Corrigendum); *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (8 December 2005) (Decision of 6 December 2005).

does not have a permanent observer role on the TRIPS Council but the two bodies cooperate on some activities.[69] There is limited direct engagement between the TRIPS Council and human rights institutions.[70]

3.2.2.3.2 Minimum standards

TRIPS contains minimum not maximum standards.[71] *TRIPS* incorporated standards established by the *Paris Convention* and the *Berne Convention* but also increased certain protection standards beyond those agreements, and included various flexibilities for implementation. [72] These were characterised as minimum intellectual property standards, thereby acknowledging that higher standards had greater economic impacts, particularly for developing countries.[73] Developed countries that were dissatisfied with the agreed standard of protection have enshrined higher standards in bilateral and regional agreements.[74] These *TRIPS*-plus provisions have become increasingly widespread.[75] This has generated concern that the underlying economic development rationales for providing minimum standards have been undermined, prompting suggestions that *TRIPS* could be reframed to incorporate maximum standards.[76]

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[69] Frederick M Abbott, 'Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance' (2000) 3(1) *Journal of International Economic Law* 63. Dinwoodie and Dreyfuss discuss the potential for cooperation: Graeme B Dinwoodie and Rochelle C Dreyfuss, 'Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO and Beyond' (2009) 46(4) *Houston Law Review* 1187, 1234. Cf Okediji, who argues 'the WTO, in a hierarchical division of labor with WIPO, should be promoted as the locus of IP norm-setting, particularly with respect to those norms that affect the regulation and supply of global public goods': Ruth L Okediji, 'WIPO-WTO Relations and the Future of Global Intellectual Property Norms' (2008) 39 *Netherlands Yearbook of International Law* 69, 69.

[70] Beiter suggests this interaction could be very valuable: Klaus D Beiter, 'Establishing Conformity Between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights' in Hanns Ullrich et al (eds), *TRIPS Plus 20: From Trade Rules to Market Principles* (Springer, 2016) 445, 497–498.

[71] *TRIPS* art 1(1); Annette Kur and Henning Grosse Ruse-Khan, 'Enough Is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection' in Annette Kur and Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) 359, 360–376.

[72] Yu, 'Achilles Heel', above n 16, 492–493.

[73] Ibid 487–491.

[74] Susan K Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play' (Program on Information Justice and Intellectual Property Research Paper Series No 15, American University Washington College of Law, October 2010) 2–4 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>; Kamperman Sanders and Shabalala, above n 55, 68.

[75] Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play', above n 74, 3–4; Kamperman Sanders and Shabalala, above n 55, 68.

[76] See Kur and Grosse Ruse-Khan, above n 71; Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2.

3.2.2.3.3 National treatment and most favoured nation requirements

The combination of national treatment and most favoured nation principles in *TRIPS* with explicit standards has meant that intellectual property standards have increased for many states.[77] The national treatment requirements were retained and extended to all areas of intellectual property covered by *TRIPS*.[78] Most favoured nation obligations are characteristic of other trade agreements covered by the WTO regime.[79] This restricts discrimination between trading partners by requiring the benefits agreed between WTO members and other countries to be extended by those members to all other WTO members.[80] The provisions of *TRIPS* require this to be the case for all benefits agreed that are relevant to the areas of intellectual property covered by the agreement.[81] There are certain exceptions, such as agreements made prior to the conclusion of *TRIPS*.[82] Consequently, the increase in intellectual property obligations through trade agreements means that states that agree to them must offer the same protection to all foreign nationals.[83] Including these standards in future trade agreements with other parties becomes advantageous: it increases foreign protection for their own nationals, which *TRIPS* requires them to provide to all nationals of WTO member states.[84] The incorporation of intellectual property provisions into free trade agreements between developing countries and developed countries has frequently increased standards as a result of the operation of national treatment and most favoured nation principles in *TRIPS*.[85]

3.2.2.3.4 Flexibility

Flexibility mechanisms in *TRIPS* reflect difficult compromises between states during treaty negotiation.[86] They can mediate between the competing ideas of countries in different stages of economic development as to what intellectual property standards are appropriate.[87] Flexibility mechanisms can also increase domestic regulatory autonomy to integrate international

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[77] See Osei Tutu, who argues that this combination is more restrictive than other WTO agreements: J Janewa Osei Tutu, 'Value Divergence in Global Intellectual Property Law' (2012) 87(4) *Indiana Law Journal* 1640, 1654–1656.
[78] *TRIPS* art 3.
[79] Kennedy, above n 24, 207–212.
[80] Gervais, *The TRIPS Agreement: Drafting History and Analysis*, above n 9, 209–211.
[81] *TRIPS* art 4.
[82] Ibid art 4(d).
[83] Kamperman Sanders and Shabalala, above n 55, 68.
[84] *TRIPS* arts 3, 4. Kamperman Sanders and Shabalala argue that many developing countries have resisted this: Kamperman Sanders and Shabalala, above n 55, 68.
[85] Kamperman Sanders and Shabalala, above n 55, 68.
[86] Compromise between the interests of developed, developing and least developed countries influenced the negotiations surrounding the introduction of *TRIPS*. See Yu, 'Achilles Heel', above n 16, 492–497; Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (Taylor and Francis, 2002) 66.
[87] Gervais, 'IP Calibration', above n 49, 89; Molly Land, 'Rebalancing TRIPS' (2011) 33(3) *Michigan Journal of International Law* 433, 437; Peter K Yu, 'The Objectives and Principles of the TRIPS Agreement' (2009) 46(4) *Houston Law Review* 979.

obligations and national interests into intellectual property legislation.[88] This can be important for integration of human rights standards into domestic intellectual property law.

A range of mechanisms can strengthen domestic flexibility in developing intellectual property policy. Land usefully identifies five types of flexibility mechanisms: balancing provisions, explicit exemptions, standards provisions, textual silence and procedural flexibilities.[89] Article 7 and Article 8 of *TRIPS* provide balancing provisions '[identifying] general purposes that states may seek to achieve in implementing their obligations under the treaty.'[90] Explicit exemptions include the permission for countries to exclude inventions from patentability that 'protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment,'[91] and the authority for states to provide limited exceptions for trade mark rights for fair use of descriptive terms in Article 17.[92] Article 17 also exemplifies standards provisions that guide limited exceptions to rights for copyright, trade marks and patents. Standards norms are also evident in relation to enforcement.[93] For example, the provisions in Article 41 for states leave the terms 'effective' and 'expeditious' undefined.[94] Textual silence is also important to the extent that it leaves key terms such as 'inventive step' or 'industrial application' open to domestic interpretation.[95] The implementation timetable for developing and least developed countries has provided and continues to provide procedural flexibilities, which were exploited by a number of countries such as India and Brazil.[96]

Articles 7 and 8 are important to understanding the object and purpose of TRIPS.[97] The relevance of the object and purpose of a treaty to treaty interpretation is found in Article 31 of the *Vienna Convention on the Law of Treaties*, which provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

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[88] Land, above n 87, 469–474.
[89] Ibid 438–442. Grosse Ruse-Khan notes that flexibility provisions are broader than exceptions and limitations: Henning Grosse Ruse-Khan, 'The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?' (2010) 18(2) *Journal of Intellectual Property Law* 325, 359.
[90] Land, above n 87, 440.
[91] *TRIPS* art 27(2).
[92] Provided exceptions take account of rights of owners and third parties: ibid art 15.
[93] Land, above n 87, 440–441.
[94] Ibid.
[95] Ibid 441–442.
[96] Sisule F Musungu, 'The TRIPS Agreement and Public Health' in Carlos María Correa and Abdulqawi Yusuf (eds), *Intellectual Property and International Trade: The TRIPS Agreement* (Kluwer Law International, 2nd ed, 2008) 421, 421–469.
[97] *Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration).

treaty in their context and in the light of its object and purpose.'[98] Articles 7 and 8 were introduced into *TRIPS* as a result of proposals by developing countries.[99] Article 7 provides:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

This clause most closely articulates a traditional concern of intellectual property – that it should promote a balance of interests between different stakeholders.[100] Article 8(1), the principles provision of *TRIPS*, identifies interests that are relevant considerations for states in the implementation of *TRIPS*, many of which are related to human rights concerns. These include public health and nutrition and public interest in sectors of vital importance to Member States' socio-economic and technological development. The final part of Article 8(1) states: 'provided such measures are consistent with the provisions of this Agreement.' The extent to which this restricts the ability of Member States to rely on this article in developing intellectual property policy that emphasises national interests is contested but other provisions of *TRIPS* include the Preamble and Article 7.[101] The significance of Articles 7 and 8 as expressions of the object and purpose of *TRIPS* was emphasised in the debate about compulsory licensing that prompted the *Doha Declaration on TRIPS and Public Health ('Doha Declaration*'), which has been recognised as a subsequent agreement by the WTO Panel in *Australia – Plain Packaging Measures*.[102] Article 8(2) also provides for further balancing exercises to occur in circumstances

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[98] *VCLT* art 31. The VCLT is used to guide treaty interpretation in the WTO: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*DSU*') art 3(2).

[99] Yu, 'The Objectives and Principles of the TRIPS Agreement', above n 87, 1000–1008.

[100] Andrea Wechsler, 'Spotlight on China: Piracy, Enforcement, and the Balance Dilemma in Intellectual Property Law' in Annette Kur (ed), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) 61. See Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 661, 664–665; Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018) [7.2680] ('*Australia – Plain Packaging Measures*').

[101] Susy Frankel and Daniel Gervais, 'Plain Packaging and the Interpretation of the TRIPS Agreement' (2013) 46(5) *Vanderbilt Journal of Transnational Law* 1149, 1202–1203; Yu, 'The Objectives and Principles of the TRIPS Agreement', above n 87, 1014–1015.

[102] *Australia – Plain Packaging Measures* [7.2409]. See *Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration); Tania Voon and Andrew D Mitchell, 'Implications of WTO Law for Plain Packaging of Tobacco Products' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) 109, 121–123. The *VCLT* accords interpretative significance to subsequent agreements: *VCLT* art 31(3)(a). See further interpretation of the *VCLT* in Section 3.4.1 below. See also discussion of *TRIPS* compulsory licensing debates in Chapter 1, Section 1.3.1

restraining trade or technology transfer that constitute an abuse of rights.[103] Chapter 8 of this thesis considers how Articles 7 and 8 guide our understanding of the relevant object and purpose in the WTO dispute regarding plain packaging.

The focus of much of the analysis of these flexibility mechanisms has been on their actual and potential use that can be made of them developing countries.[104] However, the WTO decision in *Australia – Plain Packaging Measures* shows that they can be used to support the public policy objectives of developed countries.[105] The object and purpose of *TRIPS* suggest that these mechanisms are not solely for the use of developing countries.[106] The Preamble also provides context to treaty interpretation.[107] The explicit preambular recognition for all Member States of 'the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives,'[108] indicates that public policy objectives include but are not restricted to developmental and technological objectives.[109] This supports a broad interpretation of Article 7 that implementation of intellectual property laws should contribute to a balance of rights and obligations not limited to those promoting technological innovation and the transfer and dissemination of technology.[110] In considering trade mark protections, the WTO Panel has interpreted the balance to be between the rights of trade mark owners and 'societal interests', which could be broadly defined.[111]

The use of *TRIPS* flexibilities should not be limited to developing countries. Chapter 8 will argue that there needs to be greater emphasis by WTO Members on using flexibilities to assert the relevance of human rights obligations in future dispute settlement decisions involving *TRIPS*.

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[103] *TRIPS* art 8(2).
[104] See, eg, Yu, 'The Objectives and Principles of the TRIPS Agreement', above n 87.
[105] *Australia – Plain Packaging Measures* [7.2429].
[106] See approach taken in Henning Grosse Ruse-Khan, 'Proportionality and Balancing within the Objectives for Intellectual Property Protection' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 161, 161–193.
[107] *VCLT* art 31(2).
[108] *TRIPS* Preamble.
[109] Grosse Ruse-Khan, 'Proportionality and Balancing within the Objectives for Intellectual Property Protection', above n 106, 172.
[110] Yu, 'The Objectives and Principles of the TRIPS Agreement', above n 87, 1000. Cf de Carvalho who argues that the relevance of Article 7 is confined to the first three objectives set out in the provision, and emphasises the relevance of paragraphs 1 and 4 of the Preamble to understanding the overall objectives of the *TRIPS* agreement: Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs* (Kluwer Law International, 3rd ed, 2014) 152–153.
[111] *Australia – Plain Packaging Measures* [7.2429]

3.2.2.4 Enforcement

Enforcement remains a complex issue within the international intellectual property regime, as it does for the human rights regime. The linking of intellectual property to the WTO through *TRIPS* was perceived as extremely important for the enforcement and effectiveness of intellectual property standards and prompted a strong initial emphasis on the importance of compliance with *TRIPS*.[112] This was because *TRIPS* was linked to the WTO *Dispute Settlement Understanding* ('*DSU*'), which permitted a range of remedies, including retaliatory trade sanctions, to be used in circumstances where states were found to be non-compliant with *TRIPS*.[113] However, Yu argues that enforcement remains problematic for *TRIPS*.[114] The failure of the United States to achieve an interpretation of *TRIPS* in favour of strong enforcement requirements in its 2009 WTO dispute against China remains significant.[115] Another related reason that the effectiveness of this linkage has not yet been proven is the small number of proceedings that have actually been finally decided using the *DSU*.[116] A number of other disputes have been initiated but resolved through negotiation.[117] This small number of decisions limits interpretations of *TRIPS* available to guide WTO Member States as they interpret the agreement to develop national laws.[118] This can contribute to a chilling regulatory environment in which states are unwilling to test whether policy can be shaped to use the flexibility mechanisms of *TRIPS* to privilege justifiable domestic interests.[119] This may be reduced as a result of the recent explicit recognition by the WTO Panel of Australia's ability to use Articles 7 and 8 to support plain packaging measures.[120] However, it is important to note that the United States and the European Community have both recently initiated actions against China alleging breaches of *TRIPS*, which will be relevant to future assessment of these enforcement issues.[121]

International compliance has become an increasingly relevant consideration for states developing intellectual property law. Chapter 7 of this thesis maps this for Australian trade mark

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[112] Kennedy, above n 24, 41–42.
[113] Kennedy describes actual use of remedies: ibid 288–350.
[114] See generally Yu, 'Achilles Heel', above n 16. See further discussion in Chapter 6.
[115] Ibid 508–511.
[116] Kennedy describes the number as declining: Kennedy, above n 24, 41–42.
[117] Ibid xxxiv–xxxvi.
[118] Antony Taubman, 'Australia's Interests Under TRIPS Dispute Settlement: Trade Negotiations by Other Means, Multilateral Defense of Domestic Policy Choice, or Safeguarding Market Access' (2008) 9(1) *Melbourne Journal of International Law* 217, 234.
[119] Land, above n 87, 446. See Lukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigation and Regulatory Chilling Effect' (2014) 5(2) *European Journal of Risk Regulation* 242. Kennedy describes the way in which ambiguity can be a disincentive for the initiation of disputes: Kennedy, above n 24, 54–55.
[120] *Australia – Plain Packaging Measures* [7.2429].
[121] See *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc WT/DS542/1, IP/D/38 (26 March 2018) (Request for consultations by the United States); *China – Certain Measures on the Transfer of Technology*, WTO Doc WT/DS549/1, G/L/1244, (6 June 2018) (Request for consultations by the European Union).

law. Deere provides numerous examples of over-compliance with *TRIPS*.[122] This deepens a culture in which states are failing to use the flexibility mechanisms that are available to them through *TRIPS*.[123] The impact of these factors may mean that states are either unable or unwilling to conduct balancing exercises that emphasise national interests or other obligations in international law where it is not clear that these are consistent with *TRIPS*.[124] This raises human rights concerns when it is unclear if legislation that implements human rights obligations is also consistent with *TRIPS*. [125] Uncertainties with enforcement and interpretation can also encourage regime shifts in which intellectual property provisions are addressed in bilateral and plurilateral instruments, potentially undermining the authority and effectiveness of *TRIPS*.[126]

3.2.3 Synthesis

Following their introduction in 1995, *TRIPS* and its associated institutions dominated international intellectual property law administration and development. A feature of *TRIPS* is its flexibility mechanisms. These were emphasised by the *Doha Declaration*, although there is concern that these mechanisms subsequently remain underutilised.[127] Dissatisfaction with the scope and effectiveness of the agreement has been part of the impetus for the inclusion of intellectual property provisions and chapters in bilateral and regional trade agreements, which have proliferated following *TRIPS*.[128] Chapters 6 and 10 of this thesis will consider the way in which the regime focus appears to be shifting away from *TRIPS*, as increased emphasis is placed on bilateral and plurilateral trade agreements containing *TRIPS*-plus provisions and

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[122] Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, 2009) 64–112. For example, Deere discusses a survey of laws in least developed and developing countries, which found that only 15 specifically provided for a Bolar exception, whereas 39 did not provide one or prohibited its use (at 79); and most developing countries failed to incorporate the full range of permissible exceptions to copyright (at 91). Deere lists 31 developing countries with a broad range of *TRIPS*-plus standards (at 101). See also Land, above n 87, 442.

[123] See Grosse Ruse-Khan, 'The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO', above n 65.

[124] Taubman, above n 118, 234–235.

[125] The analysis of Australia's plain packaging legislation in the case study suggests an absence of direct engagement with *TRIPS* in the legislation itself and the surrounding explanatory material, despite relevance of public health justifications to Australia's defence of the WTO actions pending against it: *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging. Integrated Executive Summary of Australia's Submissions*, WTO Doc WT/DS435/441/458/467 (23 March 2016); Andrew D Mitchell, 'Australia's Move to the Plain Packaging of Cigarettes and Its WTO Compatibility' (2010) 5 *Asian Journal of WTO and International Health Law and Policy* 405, 409–410.

[126] Judd considers this and suggests a returned focus to *TRIPS*: Patricia L Judd, 'The TRIPS Balloon Effect' (2014) 46(2) *New York University Journal of International Law & Politics* 471. Cf Ricketson's suggestion that a return to the *Paris Convention* may address some of the impact of these regime shifts: Ricketson, above n 14, 755–793.

[127] Land, above n 87, 433–444.

[128] Yu, 'Achilles Heel', above n 16, 511–514; Kamperman Sanders and Shabalala, above n 55, 69–71.

investor-state dispute settlement provisions.[129] This is relevant to both case studies discussed in this thesis. Related restrictions on domestic regulatory autonomy could limit the ability of states to maintain balanced intellectual property systems[130] and honour other obligations in international law, such as human rights obligations.[131] This potentially further complicates a harmonised resolution of inter-systemic differences, which will be examined in subsequent chapters.

3.3 HUMAN RIGHTS

3.3.1 Human Rights Institutions and the International Bill of Rights

The human rights legal system operates within the United Nations (UN), separately from the WTO. This exacerbates inter-systemic differences where there is a conflict between the regimes.[132] Articles 55 and 56 of the *Charter of the United Nations* ('*UN Charter*') refer to human rights and the need for international cooperation in relation to human rights, and provide the basis for the UN system of human rights law.[133] Recognising the references to human rights in the *UN Charter*,[134] the General Assembly of the UN adopted the *Universal Declaration of Human Rights* ('*UDHR*').[135] The *UDHR* is not a binding treaty but it is argued to be binding both as a statement of international customary law and an authoritative interpretation of the reference to human rights in the *UN Charter*.[136] Two binding human rights treaties were subsequently concluded: the *International Covenant on Civil and Political Rights* ('*ICCPR*')[137] and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[138] Together with their protocols and the *UDHR*, these treaties form the *International Bill of Rights*,

[129] Kamperman Sanders and Shabalala, above n 55, 65–71; Judd, above n 126; Burton Ong, 'The Trademark Law Provisions of Bilateral Free Trade Agreements' in Graeme B Dinwoodie and Marc D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 229, 240–248.
[130] Dreyfuss and Frankel, above n 42, 557–560.
[131] See Peter K Yu, 'Six Secret (and Now Open) Fears of ACTA' (2011) 64(3) *SMU Law Review* 975, 1050–1059.
[132] Grosse Ruse-Khan, above n 6, 246–262.
[133] *Charter of the United Nations* arts 55, 56.
[134] Ibid Preamble, arts 1(3), 13(1)(b), 55, 56, 62 (ECOSOC), 63 (ECOSOC), 76 (Trusteeship System).
[135] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').
[136] Khulekani Moyo and Sandra Liebenberg, 'The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability' (2015) 37(3) *Human Rights Quarterly* 707, citing Stephen C McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 *Georgetown International Environmental Law Review* 1, 8.
[137] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[138] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

and are the foundational documents for the international human rights system.[139] The object and purpose of these agreements are primarily to require the respect, protection and fulfilment by states of the human rights of individuals enshrined within the agreements.[140]

Enforcement of the system primarily depends on the activities of the Human Rights Council, the Office of the High Commissioner of Human Rights and relevant treaty bodies.[141] In situations of egregious human rights violations, matters of human rights law are addressed by the UN General Assembly and the Security Council.[142] The Human Rights Council and the Office of the High Commissioner of Human Rights (OHCHR) operate to promote human rights and encourage compliance with the international human rights system.[143] The OHCHR is a UN agency established in 1993 with a mandate of promoting international human rights.[144] The Human Rights Council is a subsidiary body of the UN General Assembly established in 2006 with responsibility for promoting and protecting human rights around the world.[145] It is an inter-governmental body of 47 member states periodically elected by the UN General Assembly.[146] Its predecessor, the Human Rights Commission, was established in 1946 as a subsidiary body of the United Nations Economic and Social Council (UNESCO)[147] but was replaced following extensive concerns about its effectiveness.[148] The Human Rights Council has a number of subsidiary bodies which are relevant to the enforcement approach taken within international human rights law: the Universal Periodic Review Working Group, the Advisory Committee and

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[139] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted 10 December 2009, 869 UNTS 34 (entered into force 5 May 2013). See Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32(1) *Human Rights Quarterly* 144.

[140] See *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights*, UN GAOR, UN Doc A/CONF.157/23 (25 June 1993).

[141] Rhona KM Smith, *Textbook on International Human Rights Law* (Oxford University Press, 7th ed, 2016) 54–58.

[142] Ibid.

[143] Ibid 61–66.

[144] *High Commissioner for the Promotion and Protection of All Human Rights: Resolution*, GA Res 48/141, UN GAOR, 48th sess, 85th pln mtg, UN Doc A/RES/48/141 (20 December 1993).

[145] *Human Rights Council: Resolution Adopted by the General Assembly*, GA Res 60/251, UN GAOR, 60th sess, 72nd pln mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006). Smith notes it is still yet to become a full organ of the UN, which would elevate it to the status of ECOSOC and the Security Council: Smith, above n 141, 62.

[146] *Human Rights Council: Resolution Adopted by the General Assembly*, GA Res 60/251, UN GAOR, 60th sess, 72nd pln mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006) para 7. In contrast to the Human Rights Commission, members serve three-year terms and may not serve more than two consecutive terms.

[147] *Commission on Human Rights: Resolution*, ESC Res 5(1), UN ESCOR, 1st sess, 19th pln mtg, UN Doc E/RES/5(1) (29 January 1946) Annex.

[148] Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 694–695; Kofi Annan, *In Larger Freedom: Towards Security, Development and Human Rights for All. Report of the Secretary General*, UN GAOR, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) 41 [182].

bodies to facilitate an individual complaints mechanism.[149] The Human Rights Council also engages in special procedures in relation to specific country situations or thematic issues relevant to human rights.[150]

Compliance is also encouraged by treaty-based bodies. These are committees of independent experts who monitor compliance with human rights obligations that result from international human rights treaties.[151] The output of these committees is extremely important to the interpretation of human rights agreements. However, in contrast to the General Assembly and Security Council, which can make resolutions on human rights matters with binding authority derived from section 103 of the *UN Charter*, the human rights institutions generally make declarations or non-binding resolutions, which are frequently characterised as soft law.[152] Two rights of primary relevance to this thesis, the right to health and the right to benefit from science and culture, are economic, social and cultural rights. The Committee on Economic Social and Cultural Rights (CESCR) was established by a resolution of UNESCO to undertake the functions of monitoring *ICESCR* that were originally assigned to UNESCO.[153] CESCR monitors compliance by states with *ICESCR*[154] and provides guidance on the interpretation and implementation of *ICESCR*.[155] The Committee on the Rights of the Child (COMRC) will also be considered in this thesis as the *Convention on the Rights of the Child* contains rights relevant to the case studies. Civil and political rights are also relevant to the interaction between human rights and trade marks, and reference will be made in this thesis to the Human Rights Committee, the treaty body responsible for interpretation and implementation of the *ICCPR*.[156]

3.3.2 Substantive Human Rights Obligations

Other than the right to development discussed earlier, and the right to property, which is found only in the *UDHR*, human rights relevant to this thesis are contained in the *UDHR* and either the *ICCPR* or the *ICESCR*. This thesis will firstly focus on rights as they are formulated in the *UDHR*, *ICESCR* and *ICCPR*: the human right to benefit from science and culture; the human

[149] The complaints mechanism is set out in *Institution-Building of the United Nations Human Rights Council,* HRC Res 5/1, UN HRC, 5th sess, 9th mtg, UN Doc A/HRC/RES/5/1 (18 June 2007).
[150] See ibid; *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, HRC Res 5/2, UN HRC, 5th sess, 9th mtg, UN Doc A/HRC/RES/5/2 (18 June 2007).
[151] Smith, above n 141, 70.
[152] Rhona KM Smith, 'Human Rights in International Law' in Michael Goodhart (ed), *Human Rights: Politics and Practice* (Oxford University Press, 3rd ed, 2016) 60, 68–69.
[153] *ICESCR* arts 16-22; *Resolutions and Decisions of the Economic and Social Council 1985*, UN ESCOR, 1st sess, Supp No 1, UN Doc E/1985/85 (1985); *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ESC Res 1985/17, UN ESCOR, UN Doc E/RES/1985/85 (28 May 1985).
[154] *ICESCR* arts 16-20.
[155] Ibid arts 21-22.
[156] The Human Rights Committee was established by *ICCPR* Article 28: *ICCPR* art 28.

right to property; the human right to health; and the human right to freedom of expression.[157] They are addressed in detail throughout the thesis. Australia is bound by human rights obligations found in these agreements. However, Australia has not currently ratified the optional protocol to *ICESCR* that would permit individuals to make complaints to CESCR about Australia's implementation of the *ICESCR*.[158]

Differences in the structure of the *ICCPR* and the *ICESCR* are important to understanding interrelationships between human rights. The *ICCPR* clearly identifies certain rights from which states must not derogate, and permits derogation from other rights only 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.'[159] The *ICESCR* does not make similar permissions yet requires the progressive realisation of rights by states, although realisation of core minimum economic, social and cultural rights has been interpreted as mandatory for all states.[160] The *General Comments* of the CESCR have identified core minimum obligations for individual economic, social and cultural rights.[161]

Several other human rights are potentially relevant to trade marks. Importantly, the right to health is linked to the right to life, which is a non-derogable civil right. This relationship will be developed further in Chapter 4. Other relevant civil and political rights implicated by criminal enforcement of intellectual property rights include the right to a fair trial.

The inalienable nature of human rights restricts domestic regulatory autonomy for states in their implementation of human rights agreements, such as *ICESCR* and *ICCPR*.[162] The *ICCPR* provides for extremely limited exceptions for implementation of civil and political rights.[163] There is greater scope for domestic regulatory autonomy in relation to economic, social and cultural rights. Recognising the resource dependent nature of economic, social and cultural rights, CESCR provides that rights are to be progressively realised.[164] However, core minimum

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[157] These rights are also protected to some extent in other key human rights instruments to which Australia is a party. Where appropriate to understanding Australia's human rights obligations, these obligations will be noted.
[158] Emily Howie, Human Rights Law Resource Centre, Submission to *Australia's Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, July 2009.
[159] *ICCPR* art 4. Non-derogable rights specified are right to life, freedom from torture, freedom from slavery and servitude, freedom from jail for failure to observe contractual obligations, freedom from conviction of retroactively declared criminal offences, the right to recognition as a person in law everywhere and freedom of thought, conscience and religion.
[160] See, eg, Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) paras 30-33 ('*General Comment 14*').
[161] See, eg, ibid paras 33-34.
[162] *UDHR* Preamble.
[163] *ICCPR* art 4.
[164] *ICESCR* art 1.

rights should not be progressively realised; they should be immediately implemented.[165] Concepts of progressive realisation and core minimum rights will be developed in Chapters 4 and 5.

Human rights are accordingly very difficult to balance against each other because inalienability suggests rights should not be taken away or limited, even by other rights, as human rights are indivisible.[166] The way that human rights should be balanced against each other is complex.[167] Certain human rights have internal balancing mechanisms, such as the right to freedom of expression.[168] The principle of progressive realisation of rights to the maximum of available resources can also guide balancing economic, social and cultural rights against each other.[169] The case studies will apply these approaches. However, it must be acknowledged that the way in which competing human rights can be balanced against each other is not always easily resolved by applying these mechanisms and principles. Addressing conflicts between human rights, Ducoulombier characterises interdependence and indivisibility as 'political ideals which do not stand the test of practice.'[170] Her argument that the European Court of Human Rights (ECtHR) treats rights found in the *European Convention on Human Rights* as more important than other human rights, such as excluded economic, social and cultural rights, is relevant to the feasibility of Geiger's model and the threshold for economic, social and cultural rights addressed by Helfer and Austin.[171] When balancing rights, an important distinction exists between partial conflicts and total conflicts. Partial conflicts may be addressed through regulation that enables both rights to be recognised.[172] In total conflicts, one right cannot be recognised without alienating the rights of another.[173] Zucca uses cases considered by the ECtHR to support the argument that it may not be possible to use legal reasoning to resolve all

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[165] *General Comment 14* para 43.
[166] *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights*, UN GAOR, UN Doc A/CONF.157/23 (25 June 1993) pt 1 para 5.
[167] James W Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' (2008) 30(4) *Human Rights Quarterly* 984, 987.
[168] *ICCPR* art 19(3). This permits the right to freedom of expression to be limited by states where it is limited by law, proportionately for the objective of necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals.
[169] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant)*, UN ESCOR, 5th sess, UN Doc E/1991/23 (14 December 1990) [9]-[13].
[170] Peggy Ducoulombier, 'Interaction between Human Rights: Are All Human Rights Equal?' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 39, 40.
[171] Ibid 42. See also Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009) 321–324.
[172] Lorenzo Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008) 19, 27.
[173] Ibid.

conflicts of rights.[174] He argues that it remains important to recognise and understand these conflicts.[175] Recognition that all conflicts may not be resolved can be relevant to understanding the need for flexibility in applying approaches from different prescriptive models in Chapter 11.

The continuing distinction made between economic, social and cultural rights and civil and political rights is also relevant to enforcement and the status of the respective obligations, in comparison to other systems of law such as international intellectual property law obligations. Historically, civil and political rights have been perceived to be of higher status and more enforceable than economic, social and cultural rights.[176] This may partly result from the relatively recent entry into force in 2013 of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ('ICESCR Protocol')*, which established complaint and inquiry mechanisms pursuant to *ICESCR*.[177] In contrast, the *First Optional Protocol to the International Covenant on Civil and Political Rights* permitting individuals to make complaints against states regarding compliance with the *ICCPR*, entered into force on 23 March 1976.[178] Although the majority of states are party to both the *ICESCR* and the *ICCPR*, in domestic jurisdictions civil and political rights are often accorded higher status than economic, social and cultural rights. The differences in structure between the two agreements regarding derogation can also influence the value accorded to them.[179] *Jus cogens* norms can be used to justify the primacy of human rights over intellectual property and are relevant to hierarchy between international laws, which will be considered in section 3.4.1.4.

3.3.3 Domestic Regulatory Autonomy and Enforcement of Human Rights

In contrast to the dispute settlement mechanisms available in relation to disputes pursuant to TRIPS, the focus of human rights law is on encouraging compliance by requiring self-assessment of human rights compliance by states.[180] There are some exceptions, such as the possibility of resolutions being made by the General Assembly or the Security Council to

[174] See Zucca, above n 172.
[175] Ibid 24.
[176] Alston and Goodman, above n 148, 277–278. This distinction is and should be questioned: see, eg, Andrew Byrnes, 'The Protection and Enjoyment of Economic Social and Cultural Rights' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2012) 125, 130–131; Ducoulombier, above n 170.
[177] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted 10 December 2009, 869 UNTS 34 (entered into force 5 May 2013). Byrnes identifies lack of justiciability of economic, social and cultural human rights as one of the bases for according them less status that civil and political rights: Byrnes, above n 176, 130–131.
[178] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).
[179] See Alston and Goodman, above n 148, 394. See also Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156, 216–219.
[180] Smith, above n 152, 71–72.

address human rights issues where there is the support of United Nations members.[181] However, these approaches often focus on egregious violations of civil and political rights and the Security Council can only act where the situation constitutes a threat to international peace and security.[182] For other compliance issues, the Human Rights Council relies greatly on the Universal Periodic Review.[183] This mechanism requires states to provide reports every four years regarding their compliance with human rights instruments, including the *UN Charter*, the *UDHR* and other human rights instruments to which the state is a party, as well as voluntary pledges and commitments made to human rights.[184] Accountability is enhanced by permitting other states to comment on the human rights record of those reporting states.[185] There is still significant debate about the effectiveness of this approach, introduced in response to criticisms of the effectiveness of the preceding Human Rights Commission.[186] Similarly, there are criticisms about the effectiveness of the reporting process employed by human rights treaty bodies.[187] Smith notes that effectiveness is also limited by numerous reservations and declarations made by states in relation to the *International Bill of Rights*.[188] The nature of enforcement mechanisms available for implementation of human rights is criticised as contributing to widespread failure to implement many human rights.[189] These concerns result in descriptions of human rights laws as lacking teeth.[190] This perception is relevant to understanding the relationship between intellectual property and human rights. It may influence states that are required to choose between competing obligations in international human rights law and international intellectual property law.

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[181] This can be strongly politically influenced. Smith discusses preference for keeping countries in the fold of the UN: Smith, above n 141, 171.

[182] *Resolution 2217 (2015): Adopted by the Security Council*, SC Res 2217, UN SCOR, 7434th mtg, UN Doc S/Res/2217 (28 April 2015) paras 15-19.

[183] See *Human Rights Council: Resolution Adopted by the General Assembly*, GA Res 60/251, UN GAOR, 60th sess, 72nd pln mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006); *Institution-Building of the United Nations Human Rights Council*, HRC Res 5/1, UN HRC, 5th sess, 9th mtg, UN Doc A/HRC/RES/5/1 (18 June 2007).

[184] Smith, above n 140, 63; *Institution-Building of the United Nations Human Rights Council*, HRC Res 5/1, UN HRC, 5th sess, 9th mtg, UN Doc A/HRC/RES/5/1 (18 June 2007).

[185] Smith, above n 141, 63.

[186] Smith suggests the second cycle is evidencing more rigour than the first cycle: ibid. See Tony Morris, '1 Year on - The New United Nations Human Rights Council' (2007) 16(2) *Human Rights Defender* 15; Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism' (2011) 9 *New Zealand Yearbook of International Law* 187, 187.

[187] Smith, above n 141, 174; Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhof, 2003) 254.

[188] Smith, above n 141, 50.

[189] See ibid 51; Emilie Hafner-Burton and Kiyteru Tsutsui, 'Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most' (2007) 44(4) *Journal of Peace Research* 414.

[190] Beth Goldblatt, 'Claiming Women's Social and Economic Rights in Australia' (2017) 23(2) *Australian Journal of Human Rights* 261, 267; Smith, above n 141, 51.

3.3.4 Synthesis

The international human rights system permits some flexibility for states regarding the implementation of their human rights obligations through structured exceptions, permissible derogations and doctrines such as progressive realisation. There is continued strong emphasis on the hierarchical significance of human rights norms, and this limits flexibility.[191] However, the impact of this emphasis is reduced by perceptions of weak enforcement mechanisms.[192] The mechanisms for resolving complaints regarding human rights breaches are very rarely tied to trade sanctions,[193] unlike the WTO resolution procedures. Although human rights institutions are enshrined within the UN system, the resolutions addressing human rights compliance that they adopt are soft laws, which lack concrete consequences for the non-compliant.[194] These features are important to understanding why states may privilege WTO compliance over compliance with human rights obligations where conflicts occur between them. This tendency is relevant to understanding and reconceptualising the relationship between human rights and intellectual property, although it is inconsistent with the traditional notion that human rights have primacy over all other values.

3.4 INTERACTIONS BETWEEN SEPARATE FIELDS OF INTERNATIONAL LAW

This section considers relevant legal approaches to addressing interactions between different fields of international law. In its report considering fragmentation of international law, the International Law Commission (ILC) Study Group identified several areas of conflict between norms.[195] This section considers approaches taken in public international law to resolving those conflicts, noting the relevant principles of the *Vienna Convention on the Law of Treaties* ('*VCLT*') and the principles of customary international law that the *VCLT* codifies. It notes potentially relevant additional principles that are utilised in private international law. These principles support a conflict-rule integration approach to inter-systemic conflicts. These concepts are relevant to understanding the implications in international law of the conflict, coexistence and harmonisation models considered in the previous chapter.

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[191] See *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights*, UN GAOR, UN Doc A/CONF.157/23 (25 June 1993).
[192] See Hafner-Burton and Tsutsui, above n 189, 422–423.
[193] In relation to human rights violations in South Sudan, see *Resolution 2206 (2015): Adopted by the Security Council*, SC Res 2206, UN SCOR, 7396th mtg, UN Doc S/RES/2206 (3 March 2015).
[194] Smith notes the 'consensual diplomacy' benefits of self-enforcement in the system: Smith, above n 152, 69.
[195] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 15-16 [18].

The structure of this section recognises a distinction between public international law, which generally regulates dealings primarily between states and other actors, and private international law, which generally regulates 'nonpolitical matters… involving individuals and private association.'[196] However, this distinction is increasingly academic.[197] Although *TRIPS* is an agreement between states, it characterises intellectual property rights as private rights.[198] The substantive provisions of *TRIPS* influence domestic laws that are potentially enforceable between individuals using private international law.[199] In contrast, human rights are characterised as public rights, and enforcement of human rights remains predominantly a matter between individuals and states.[200] These overlaps suggest that principles of both public international law and private international law can be instructive to resolving disputes engaging international human rights and international intellectual property laws. Ultimately, however, public international law rules apply to conflicts between the two agreements.

3.4.1 Public International Law Approach

3.4.1.1 Vienna Convention on the Law of Treaties

International treaties provide clear sources of agreement between states regarding both intellectual property law and human rights law. Sources of public international law are set out in Article 38 of the *Statute of the International Court of Justice* and include treaties, custom and general principles of law.[201] Interpretation of these treaties is guided by the *VCLT*. Articles 30, 31 and 32 of the agreement are considered to codify principles of customary international law regarding the interpretation of treaties.[202] These rules are extremely important for interpreting obligations. However, where there appear to be conflicts between obligations in different agreements, applying treaty interpretation rules can be complex.[203] The approach taken in public international law is to attempt to interpret the different agreements so that they are as consistent with each other as possible.[204] This emphasis on consistent treaty interpretation supports the

[196] A Claire Cutler, *Private Power And Global Authority: Transnational Merchant Law In The Global Political Economy* (Cambridge University Press, 2003) 33.
[197] Donald Rothwell et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2014) 26.
[198] *TRIPS* Preamble. Kennedy describes the distinction as confused: Kennedy, above n 24, 218–220.
[199] See Kennedy, above n 24, 181-182.
[200] See discussion of exceptions in Alston and Goodman, above n 148, 191–193.
[201] Article 38 of the *Statute of the International Court of Justice* declares that treaties, custom and general principles of law constitute the primary sources of international law applicable before the International Court of Justice (ICJ). See *Statute of the International Court of Justice* art 38 para 1 ('*ICJ Statute*').
[202] *VCLT* arts 30, 31, 32.
[203] Grosse Ruse-Khan, above n 6, 34–44.
[204] Grosse Ruse-Khan discusses associated principles of harmonious interpretation and systemic integration: ibid 34–36.

approach of the coexistence model, which suggests that the provisions of *TRIPS* permit coexistence with human rights laws.[205]

3.4.1.2 Prior and subsequent law

Although the *VCLT* provides valuable rules guiding interpretation of agreements between states, its guidance for inter-systemic incompatibilities has limitations.[206] The principle of international law that *lex posterior derogat legi priori* favours obligations agreed by states in subsequent laws over prior laws.[207] Article 30 of the *VCLT* addresses rules for successive treaties relating to the same subject matter.[208] A treaty can specifically provide that it is subject to or not inconsistent with an earlier or later treaty.[209] In cases where the relevant states are party to all of the treaties being considered, the later treaty generally applies.[210] Where treaty party membership does not correlate, the applicable treaty will vary. The later treaty applies to states that are members of both treaties but does not apply to states that are not members of that treaty.[211] The underlying principle that states will be aware of the changes that they are agreeing to in the subsequent treaty and consent to them is arguably less applicable where the treaties are not clearly regarding the same subject matter.[212] Two agreements not clearly regarding the same subject matter that will be considered in the plain packaging case study are *TRIPS* and the *Framework Convention on Tobacco Control*.[213]

3.4.1.3 Special law

Lex specialis derogat legi generali favours interpretation based on a determination of which system of law is specialised to deal with the relevant problems. Special law then overrides general law, unless the general law has superior hierarchy. A special rule is a 'rule with a more precisely delimited scope of application.'[214] Arguably, there are circumstances involving the overlap between human rights law and intellectual property law where identifying which law is more 'special', such as the overlap between trade mark rights and regulation of tobacco, is

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[205] See Chapter 1, Section 1.3.2.
[206] Grosse Ruse-Khan, above n 6, 34–44. See also *ILC Study Group Report,* UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1. But see *ILC 2006 Report*, UN Doc A/CN.4/L.702, 6 [11].
[207] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 116 [225-227]; Grosse Ruse-Khan, above n 6, 39-42.
[208] *VCLT* art 30.
[209] Ibid art 30(2).
[210] Ibid art 30(3).
[211] Ibid art 30(4).
[212] See *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 17-20 [21-26].
[213] *TRIPS*; *World Health Organization Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) ('*FCTC*').
[214] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 35 [57].

problematic.[215] A further principle that clarifies how this interacts with *lex posteri derogat legi priori* suggests that later general laws do not override earlier special laws: *lex posterior generalis non derogat legi priori speciali.*[216]

3.4.1.4 Hierarchy

Hierarchy between international laws provides some guidance to understanding inter-systemic incompatibilities. There is no clear hierarchy among primary sources of international law.[217] Some hierarchical rules privilege *jus cogens* principles, obligations made by states pursuant to the UN Charter and obligations *erga omnes*. These are relevant to understanding the doctrinal basis for arguing human rights primacy and state responsibility to ensure that other states observe their obligations. The conflict model argument that human rights laws have primacy over intellectual property laws could have either a moral or normative basis or a positivist basis that human rights constitute *jus cogens* principles.[218]

Jus cogens principles are principles that are argued to be so fundamental that in no circumstances should they be breached.[219] However, it is very difficult to determine which principles might qualify as *jus cogens* principles.[220] The ILC has argued that this content is a matter for determination by international courts.[221] The *VCLT* introduces an equivalent concept – that a treaty is invalid if, at the time of its conclusion, it is inconsistent with a peremptory norm of general international law.[222] Peremptory norms, or *jus cogens* principles, are norms 'accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[223] Tasioulos argues that, although there is

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[215] Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2, 310–316.

[216] Marceau cites EC Hormones as an example of the use of this principle in the WTO: Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *European Journal of International Law* 753, 794–795.

[217] *ICJ Statute* art 38; *ILC April 2006 Report*, UN Doc A/CN.4/L.702.

[218] See Samuel Murumba, 'Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property' (2012) 38(1) *Monash University Law Review* 119.

[219] See *ICJ Statute* art 38.

[220] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Bloomsbury Publishing, 2007) 58–59.

[221] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 190 [376].

[222] *VCLT* art 53. See also *VCLT* art 64 on hierarchy of new peremptory norms over existing conflicting treaties.

[223] *VCLT* art 53 provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

a moral dimension to *jus cogens* principles, they are a form of positive law.[224] It is rarely asserted that all human rights, such as the protection for intellectual property, constitute *jus cogens* principles.[225] Examples commonly given are of civil and political rights.[226] Relevantly for the analysis in this thesis, the right to life has been characterised as a *jus cogens* principle[227] and the right to life has been closely linked to the right to health.[228]

Article 103 of the *UN Charter* could also be used as a positivist basis to assert human rights primacy.[229] It provides for the prevalence of obligations made by states pursuant to the *UN Charter* in the event of conflicts between the obligations it confers and obligations under any other international agreement.[230] As 'promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination' is a purpose of the UN,[231] and states are bound to contribute to this objective,[232] international obligations conflicting with that purpose can be argued to be superseded by human rights obligations. However, Article 103 refers to both *UN Charter* obligations and binding resolutions of UN bodies, such as the General Assembly and the Security Council. In a number of decisions interpreting state obligations pursuant to resolutions of this nature, the resolutions have prevailed over apparently inconsistent human rights obligations.[233] An exception can occur where the relevant human rights obligations are of a *jus cogens* character.[234]

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[224] John Tasioulas, 'Custom, Jus Cogens, and Human Rights' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016) 95, 96.
[225] See Alston and Goodman, above n 148, 78, citing. Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 7th ed, 1997).
[226] Ibid.
[227] Inter-American Commission on Human Rights, *Victims of the Tugboat '13 de Marzo' vs. Cuba. Report No 47/96* (1996) [79]; Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman, 2003) 61.
[228] Lisa Forman, 'An Elementary Consideration of Humanity? Linking Trade-Related Intellectual Property Rights to the Human Right to Health in International Law' (2011) 14(2) *The Journal of World Intellectual Property* 155, 158–160. But see John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012) 187–190.
[229] Emezat H Mengesha, 'Reconciling the Need for Advancing Women's Right in Africa and the Dictates of International Trade Norms: The Position of the Protocol on the Rights of Women in Africa' (2006) 6(1) *African Human Rights Law Journal* 208, 220; Destaw A Yigzaw, 'Where the Real Issue Lies: Normative Conflict between the WTO System and Human Rights' (2015) 18 *International Trade and Business Law Review* 31, 38, 62–63; Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40(3) *University of California Davis Law Review* 1039, 1092–1093; Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property Rights and Human Rights*, ESC Res 2000/7, ESCOR, 52nd sess, 25th mtg, UN Doc E/CN.4/Sub.2/RES/2000/7 (17 August 2000).
[230] *Charter of the United Nations* art 103.
[231] Ibid art 1(3).
[232] Ibid art 56.
[233] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 168-173 [328-340].
[234] See ibid 173 [340].

If an obligation is owed to the international community as a whole, it constitutes an *erga omnes* obligation.[235] Arguably, the *UN Charter* gives human rights *erga omnes* characteristics, which provide states standing to require other states to observe such obligations.[236] Provisions within individual human rights treaties, such as obligations of international assistance and cooperation toward the realisation of economic, social and cultural rights in *ICESCR*, also suggest this *erga omnes* character.[237] However, not all *erga omnes* obligation have *jus cogens* status and consequently claims to hierarchy will differ.[238] Consequently, an obligation to protect the human right to health through international cooperation and assistance may not be automatically interpreted to have doctrinal hierarchy over TRIPS obligations,[239] even if it is considered to include *erga omnes* obligations.[240]

This analysis suggests that international law rules of hierarchy do not provide incontestable justification for asserting the primacy of human rights regimes over intellectual property regimes. The implications of this will be developed in the analysis of the case studies in Chapters 10 and 11.

3.4.1.5 Limitations of public international law principles

The approaches outlined in this section do not provide definitive resolution where there is unforeseen overlapping subject matter between two areas of specialised law. Agreements relevant to the plain packaging case study demonstrate how the law can overlap: *ICESCR* followed the *Paris Convention*, *TRIPS* followed *ICESCR* and reaffirmed the application of substantive obligations in the *Paris Convention*. However, the *Framework Convention on Tobacco Control* (‘*FCTC*’) was agreed after *TRIPS*.[241] There appear to be three separate specialised areas of subject matter: intellectual property; economic, social and cultural human rights; and tobacco control. Although there is considerable overlap between the parties of each of these agreements, not all parties involved in the WTO plain packaging disputes are party to

[235] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2nd ed, 2014) 113–115.
[236] Article 55 provides that the UN shall promote universal respect for human rights and Article 56 requires all members to cooperate with the UN jointly and separately to achieve this purpose. De Schutter argues that not all human rights have *erga omnes* qualities: ibid.
[237] Margot E Salomon, ‘Deprivation, Causation and the Law of International Cooperation’ in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013) 259, 278–280.
[238] De Schutter, above n 235, 115.
[239] *General Comment 14* para 51. These obligations will be further explored in Chapter 4 and the case studies.
[240] See *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 193 [380].
[241] See *ICESCR, TRIPS, FCTC.*

each of these agreements.[242] There is no clear hierarchical rank between these agreements, although arguably some of the norms contained within them have a *jus cogens* character. There are clear differences between the normative environments of the WTO and the UN, which potentially influences fragmentation in treaty interpretation.

3.4.1.6 Systemic Integration

Importantly, the approach taken within public international law to competing systems emphasises interpretation.[243] The systemic integration approach to interpretation considers any relevant rules of international law applicable between all of the parties.[244] The rules of treaty interpretation provided in Article 31 of the *VCLT* are important for doctrinal analysis in international law. These require treaties to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty.[245] Treaties are interpreted in their context, which includes the text, preamble and annexes; agreements made between parties in connection with the conclusion of the treaty; and instruments made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the party.[246] An example of the application of these rules in *Australia – Plain Packaging* was the recognition that the *Doha Declaration* constituted a subsequent agreement to *TRIPS*.[247] Terms within the treaty are given special meaning where it is established that this was intended by the parties.[248] Article 32 of the *VCLT* further provides that the preparatory work of the treaty and the circumstances of its conclusion can be used to confirm the meaning resulting from the application of Article 31, or where the approach taken in Article 31 results in ambiguous or obscure meanings of terms or manifestly absurd or unreasonable outcomes.[249] These principles will be relevant to doctrinal analysis in each of the case studies.

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[242] Chapter 8 notes that, although the *FCTC* was interpreted to give weight to Australia's argument that plain packaging measures did not unjustifiably encumber use of the trade mark in the course of trade, there was no suggestion that the provisions of the *FCTC* should be preferred to the provisions of *TRIPS*: *Australia – Plain Packaging Measures* [7.2589], [7.2595]-[7.2596].
[243] Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2, 310–311; *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 207 [412].
[244] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 205-206 [408].
[245] *VCLT* art 31(1).
[246] Ibid arts 31(2), 31(3).
[247] *Australia – Plain Packaging Measures* [7.2409].
[248] *VCLT* art 31(4).
[249] Ibid art 32.

3.4.2 Private International Law

Private international law incorporates other principles guiding interpretation of international law, which can be relevant to conflicts between intellectual property and human rights and could be used to guide interpretation in disputes, given the difficulties outlined in the previous section regarding resolving two specialised areas of law. Grosse Ruse-Khan argues that '[t]he pluralistic character of inter-systemic relations justifies, if not mandates, approaches which try to accommodate the views and perspectives of all relevant systems involved.'[250] A number of these approaches can be found in private international law, although they have their own limitations for systemic integration, such as the potential that forum favouritism will influence application of government interest doctrine and dépeçage.[251] The comity doctrine is used by governments to consider when foreign law is applicable to address legal pluralism.[252] It functions as 'a call for reciprocal acceptance directed to the competing regimes and for mutual recognition of the other's rules, also directed to the tribunals applying them.'[253] Comity and integration underlie Grosse Ruse-Khan's proposal for 'conflict-rule of integration.'[254] This approach applies to potentially conflicting systems, such as human rights and intellectual property. Where there are 'two or more valid and applicable rules which point to an incompatible decision' and one approach needs to be selected, '[t]he underlying rule system which is more able to integrate the other system's rules [applies].'[255] This values the ability of a rule system 'to integrate the objectives and interests represented by other rules as a connecting factor,' which can be linked to 'the public international law principle of integration.'[256] A pluralistic approach is also consistent with the approach taken by Helfer and Austin, which attempts to accommodate both intellectual property and human rights law inclusively, while recognising conflicts between the fields and ultimate limits.[257]

The emphasis of this approach on pluralism encourages systemic harmonisation without requiring integration. It acknowledges the fact that there is a difference between determining jurisdiction and applicable laws.[258] Both sets of law may be relevant and applicable but choosing the best forum to integrate them, and making reference to expert evidence, if applying the rules

[250] Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2, 328.
[251] Ibid.
[252] Ibid 330.
[253] Ibid.
[254] Ibid 331.
[255] Ibid.
[256] Ibid.
[257] Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 512–522.
[258] *ILC Study Group Report*, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1, 28-30 [44-45].

of the other forum, limits systemic bias.[259] Conflict rule integration also values the object and purpose of different relevant systems by recognising that the exercise should not result in outcomes 'manifestly incompatible with the core interests and rationale of the forum's system.'[260] It recognises legal pluralism by favouring mechanisms that can integrate objectives and interests and harmonise them.[261] It is flexible as it does not consistently prefer one system over another system, as the relevant conflict influences the assessment of the appropriate regime.[262] Analysis of the case studies will further investigate conflict rule integration and consider the objectives and interests of each system, and how international law can accommodate potential conflicts posed by each system.

3.5 HUMAN RIGHTS, INTELLECTUAL PROPERTY AND CONFLICT RULE INTEGRATION

Noting the potential conflicts between human rights and intellectual property identified in the previous chapter, this section will analyse the potential approach of each regime to inter-systemic rule conflicts. Conflict rule integration favours the forum best able to integrate the rules of the other system. This section will consider the approaches for human rights and intellectual property dispute resolution systems respectively, noting limitations for both systems.

These approaches are relevant to assessment of the models analysed in Chapter 1. Some models appear to give unbalanced consideration to the international legal obligations for both human rights law and intellectual property law, preferring to concentrate on one body of law. In some cases, international law can support that approach. Models asserting the primacy of human rights support this approach by making references to hierarchical legal arguments, such as characterising human rights as *jus cogens* principles, but also arguments emphasising the normative importance of human rights protection.[263] Models that emphasise the conflict between human rights and intellectual property often focus on the relevant human rights obligations that

[259] Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2, 335–337.
[260] Ibid 333–335.
[261] See Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health', above n 2.
[262] Ibid 333.
[263] See Destaw A Yigzaw, 'Hierarchy of Norms: The Case for the Primacy of Human Rights over WTO Law' (2015) 38(1) *Suffolk Transnational Law Review* 33; Lea Shaver, 'The Right to Science and Culture' (2010) 1 *Wisconsin Law Review* 121, 150. See also Audrey R Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2009) 8(1) *Journal of Human Rights* 1.

intellectual property laws can restrict, without giving weight to the corresponding obligations in intellectual property law and their justification.[264] In contrast, a coexistence model emphasises intellectual property laws and the flexibilities within intellectual property law, which permit states to observe human rights obligations while they observe their intellectual property obligations.[265] These arguments rarely engage with the complexities of human rights analysis and the many different types of human rights concerns the operation of intellectual property laws can engage.

These models can also be limited by emphasis on multilateral intellectual property law when, increasingly, bilateral and regional arrangements restrict the ability of states to recognise human rights. Subsequent chapters will consider the impact of bilateral and regional arrangements.

3.5.1 Approach of Human Rights Fora

Mechanisms exist for the resolution of complaints of human rights breaches brought by individuals against states in relation to the *ICCPR* and *ICESCR*.[266] The *ICESCR* mechanism remains nascent and many states who are parties to *ICESCR*, including Australia, are yet to ratify the *ICESCR Protocol*.[267] Cases that have been ruled admissible and determined on substantive grounds to date have not considered conflicts between human rights laws and other international laws.[268] However, CESCR has emphasised that its role is to consider whether the facts communicated reveal a violation pursuant to the *ICESCR*. The permissible exceptions or limitations considered are those prescribed in *ICESCR* and the General Comments interpreting the relevant rights or consistent with the objectives of *ICESCR*.[269] The latter has included recognition of the need to protect public resources so that they can be appropriately allocated for protection of all of the rights contained in the *ICESCR*.[270] Decisions pursuant to this mechanism will provide valuable guidance about the scope of economic, social and cultural rights in practice,[271] although states have not consistently recognised analogous decisions of the Human

[264] Yigzaw, above n 263. See also Shaver, above n 263, 150; Chapman, above n 263.
[265] See Estelle Derclaye, 'Intellectual Property and Human Rights: Coinciding and Cooperating' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 133, 133.
[266] For the Human Rights Committee, see *ICCPR* arts 41 and 42; *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).
[267] Howie, above n 158.
[268] Committee on Economic, Social and Cultural Rights, *Views: Communication No 1/2013*, 57th sess, UN Doc E/C.12/57/D/1/2013 (20 April 2016) ('*López Rodríguez v Spain*'); Committee on Economic, Social and Cultural Rights, *Views: Communication No 2/2014*, 55th sess, UN Doc E/C.12/55/D/2/2014 (13 October 2015) ('*IDG v Spain*').
[269] See, eg, *López Rodríguez v Spain*, UN Doc E/C.12/57/D/1/2013, [13.2]-[13.4].
[270] See ibid.
[271] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014) 10.

Rights Committee during its considerably lengthier operation.[272] Significantly, the approach of treaty bodies is to emphasise breaches of human rights rather than resolve conflicts between competing legal systems.[273]

The ICJ may be able to address inter-systemic conflicts involving the *Paris Convention*, but it does not have jurisdiction over WTO agreements and disputes.[274] Conflict rule integration appears less likely in the treaty-making bodies, which frequently focus on human rights violations and the limited exceptions to human rights obligations that may apply. Unfortunately, this limits effective conflict rule integration. The extent to which human rights primacy could interface with international legal pluralism with respect to economic, social and cultural rights may become more apparent as the jurisprudence pursuant to the *ICESCR Protocol* develops. Protocol determinations could provide further interpretive guidance for other fora engaging with *ICESCR*.[275] This may better define the scope of economic, social and cultural rights in circumstances of conflict.

There are a number of relevant approaches to determining the extent to which a conflict engaging both intellectual property rights and human rights would be resolved in a human rights forum. In his prescriptive model, Yu divides the conflicts into internal conflicts, which engage Article 15 of *ICESCR* and can be characterised as disputes between competing human rights and external conflicts.[276] Once an external conflict is identified, Yu applies the principle of human rights primacy to privilege human rights protection.[277] Where there is an internal conflict, Yu describes three possible approaches: a just remuneration approach, which involves compulsory licensing to prevent human rights restrictions; a core minimum approach, which protects minimum essential levels of protection to authors and inventors as well as core minimum obligations for other human rights; and a progressive realisation approach, which focuses on asking what should be protected and states undertaking their best efforts based on the availability of resources to comply with all of their obligations under human rights instruments.[278] Yu favours the progressive realisation approach.[279] He argues that Article 15 of

[272] For analysis of inconsistent compliance by Australia, see: Julie Cassidy, 'Hollow Avowals of Human Rights Protection - Time for an Australian Federal Bill of Rights?' (2008) 13(2) *Deakin Law Review* 131, 141–142. See Section 3.3.2
[273] *López Rodríguez v Spain*, UN Doc E/C.12/57/D/1/2013.
[274] Intergovernmental organisations could seek an advisory opinion that engaged WTO issues but it would be non-binding: *Charter of the United Nations* art 96(2).
[275] Beiter, above n 70, 497–498.
[276] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 229, 1078.
[277] Ibid 1045.
[278] Ibid.
[279] Ibid 1114–1123.

ICESCR provides protection for patent and copyright law.[280] If most trade marks are excluded from this protection, Yu's model characterises a conflict between trade marks protection and human rights protection as an external conflict.[281] The position in Yu's analysis is that, where the intellectual property is not protected as a human right, human rights concerns prevail.[282] This approach is also evident from declarations made within the UN system concerning the impact of *TRIPS* and the WTO on human rights.[283] In a conflict between human rights and intellectual property legal systems involving trade marks, this approach suggests that there is limited ability for intellectual property laws to be integrated into a human rights forum. This will vary depending on the forum. In some jurisdictions, trade marks law is subject to limited human rights protection for the right to property.[284]

Assuming that the intellectual property rights in question are not protected as human rights, it is necessary to consider the relevant forum for resolving conflicts between those rights and human rights. Unlike the clear rules for dispute resolution in the WTO, there are multiple potential human rights fora. Breaches of human rights have been litigated in the ICJ, which has broad jurisdiction to hear disputes regarding public international law between states,[285] and determines them in accordance with international conventions, customary international law, the general principles of law and, as a subsidiary source, judicial decisions and teaching of highly qualified publicists of the various nations.[286] A small number of cases disputed engage human rights directly[287] and a larger number engage human rights indirectly.[288] Unfortunately not all rulings have been implemented.[289]

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[280] Peter K Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property' (2016) 69(1) *SMU Law Review* 37.

[281] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 229, 1078. See Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 294, 85–95; Peter K Yu, 'Ten Common Questions about Intellectual Property and Human Rights' (2007) 23(4) *Georgia State University Law Review* 709, 726–730. Carpenter focuses on limited right to property protection: Megan M Carpenter, 'Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?' (2009) 99(4) *Trademark Reporter* 892, 915–916.

[282] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 229, 1078–1093.

[283] For a recent example, see Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 70th sess, Agenda Item 73(b), UN Doc A/70/285 (5 August 2015). See also Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 30th sess, Agenda Item 3, UN Doc A/HRC/30/44 (14 July 2015); Committee on Economic, Social and Cultural Rights, *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN ESCOR, 61st sess, UN Doc E/C.12/GC/24 (23 June 2017).

[284] See *Anheuser-Busch Inc v Portugal (Merits)* (2007) I Eur Court HR 39 ('*Anheuser-Busch*').

[285] *ICJ Statute* arts 35, 34.

[286] Ibid art 38.

[287] For example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 113 [166].

3.5.2 Approach of Intellectual Property Fora

The WTO provides a clear approach to dispute resolution binding on WTO members. The *TRIPS* Council also provides a forum for discussion of political disputes, which can address human rights and intellectual property issues.[290] As noted, the *Paris Convention* permits resolution of disputes through the ICJ, but intellectual property disputes have not been addressed in this forum.[291] This sub-section will focus on the WTO dispute resolution processes and assess the ability of those mechanisms to incorporate human rights. It will first consider the argument that *TRIPS* flexibilities permit the inclusion of human rights, and the counter-arguments.

One approach to the interactions between human rights and intellectual property is that, although there is no reference to human rights in *TRIPS*, the flexibility mechanisms of the agreement permit consideration of human rights.[292] In the considerations of *TRIPS* by the Dispute Settlement Body and the Appeal Board, human rights arguments have not yet been addressed.[293] Interpretations of relevant provisions including Articles 7 and 8 are limited. [294] Article 8 of *TRIPS* privileges policy protecting public health, which is relevant to the human right to health.[295] Yet Article 8 provides no clear provision for the right to freedom of expression, which is relevant to the use of trade marks.[296] The WTO Appellate Body has

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[288] See examples in Mashood A Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Routledge, 2010) 224.

[289] In some cases, this is influenced by the unwillingness of the responding party to participate. See, for example, *Vienna Convention on Consular Relations (Paraguay v United States of America*) *(Provisional Measures)* [1998] ICJ Rep 248.

[290] Musungu, above n 96, 446–450; *Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration); *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (2 September 2003) (Decision of 30 August 2003); *Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of the Paragraph 6 of the Doha Declaration on TRIPS and Public Health: Proposal for a Decision on an Amendment to the TRIPS Agreement*, WTO Doc IP/C/41 (6 December 2005) (Decision Proposal).

[291] Ricketson, above n 14, 323.

[292] See, eg, Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights - Report of the High Commissioner*, UN ESCOR, 52nd sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2001/13 (27 June 2001) [65]-[67].

[293] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 30th sess, Agenda Item 3, UN Doc A/HRC/30/44 (14 July 2015) 33-34.

[294] Taubman, above n 118. But see *Australia – Plain Packaging Measures* [7.2429]

[295] Genevieve Wilkinson, 'The Human Rights (Parliamentary Security) Act 2011 (Cth) and the Increasingly Visible Intersections between the Human Right to Health and Intellectual Property in Australia' (2016) 105 *Intellectual Property Forum* 46.

[296] See Andreas Rahmatian, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 335, 347–356. See also Jonathan Griffiths, 'Is There a Right to an Immoral Trademark?' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 425.

acknowledged that the agreement should not be read in isolation from public international law.[297] However, the reference to public international law by WTO dispute settlement mechanisms is limited in practice.[298] Although the consideration of *TRIPS* flexibilities by the WTO dispute settlement mechanisms in their decisions has been criticised as limited,[299] the decision in *Australia – Plain Packaging* confirms a trend towards recognition of national interests supported by those flexibilities. However, even where there has been greater consideration of those flexibilities, the dispute settlement bodies have not placed great emphasis on human rights.[300] This may reflect failures by the disputants to emphasise human rights-based arguments. It is also important to recognise the limited number of disputes.[301]

Given the absence of direct consideration of human rights in the decisions of the WTO dispute settlement mechanisms regarding *TRIPS*, considerations of disputes engaging other WTO laws and human rights can be instructive.[302] In some cases, articles XX and XXI of *GATT* permit consideration of human rights concerns.[303] There is an expectation of compliance in good faith with human rights obligations and WTO obligations by WTO Members, however Marceau argues that there may be circumstances of irreconcilable conflict that require political agreement as the WTO dispute settlement mechanisms are not courts of general jurisdiction and lack the ability to determine human rights matters.[304] More recently, Harris and Moon have argued that there are serious limitations to the ability of WTO Member States to accommodate the provisions of WTO Agreements and human rights.[305] Yigzaw characterises the two systems as essentially incompatible.[306] These assessments suggest that conflict rule integration is problematic for human rights in WTO fields where Article XX is applicable.

It is difficult to accurately assess the ability of the intellectual property dispute settlement mechanisms to integrate principles of human rights. The *Doha Declaration* and subsequent *TRIPS* amendment are the best indication that human rights concerns can be recognised and

[297] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (20 May 1996) [19].
[298] Marceau notes that all though WTO can be characterised as a self-contained regime, there is some influence from public international law so it may be best characterised as *lex specialis*: Marceau, above n 216, 766–767.
[299] See Grosse Ruse-Khan, 'The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO', above n 65.
[300] Dreyfuss and Frankel identify greater emphasis on flexibilities in *EC Geographical Indications* and *China Enforcement*: Dreyfuss and Frankel, above n 42, 565–566.
[301] Taubman, above n 118, 234.
[302] Rachel Harris and Gillian Moon, '"GATT" Article XX and Human Rights: What Do We Know from the First 20 Years?' (2015) 16(2) *Melbourne Journal of International Law* 432, 439–440.
[303] However, this remains hypothetical in the absence of explicit human rights arguments: see ibid 470–476. See also Tomer Broude, 'It's Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression' (2010) 13(5) *Journal of World Intellectual Property* 660.
[304] Marceau, above n 216, 792.
[305] Harris and Moon, above n 302.
[306] Yigzaw, above n 229, 95–96.

incorporated, but this approach corresponds to Marceau's argument that there may be cases of inter-systemic dispute that can only be resolved by political agreement.[307] The case study analysis will not suggest that there is currently a culture of considering human rights concerns in dispute settlement proceedings engaging *TRIPS*. Such a culture is possible given the flexibility provisions of the agreement discussed in this chapter. Analysis of approaches to treaty interpretation in Chapter 8 suggests that the provision for consideration of other relevant international laws in the WTO could more consistent with rule integration than the human rights systems. If such a culture develops, the WTO may be a preferable forum for recognising both sets of laws and addressing concerns between them.

3.6 CONCLUSION

This chapter has introduced key concepts in international law that address inter-systemic conflicts, and the key features of each of the international intellectual property and international human rights systems that permit inclusion of the other system. It has highlighted key relevant provisions in the international intellectual property and human rights systems. These provisions are valuable foundations for analysis of the relationship between human rights and intellectual property in Australia. More specific provisions relevant to international trade mark law will be considered in Chapter 6 to provide a more detailed understanding of the limitations those agreements pose for the inclusion of human rights concerns in developing domestic intellectual property policy.

The previous chapter considered the theoretical aspects of the interactions between intellectual property and human rights. As discussed in the previous chapter, this thesis explores Samuel Murumba's approach of synthesising a traditional natural law approach with an orthodox positivist approach.[308] Accordingly, this chapter focused on the positivist dimensions of interactions between the two fields, while the previous chapter used theory to consider the normative nature of the interactions.[309] Differences between positivist systems of international law also impact on domestic legislation, where states are bound by multiple overlapping and potentially conflicting obligations. Numerous interpretative tools in international law guide the resolution of conflicts between these obligations. The extent to which states can resolve these potential conflicts also depends on the extent to which international agreements permit domestic regulatory autonomy for states.[310]

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[307] Marceau, above n 216, 813–814.
[308] Murumba, above n 218, 136–147.
[309] Ibid.
[310] This chapter has identified and assessed a number of mechanisms within international intellectual property law and international human rights law, which permit a degree of domestic self-determination.

The obligations and principles of international law identified in this chapter are relevant to a conceptual framework for human rights and intellectual property. Each of the models identified in Chapter 1 recognises the relevance of international law to their approach, although different emphasis is placed on the relative importance of each field.

This chapter has concentrated on identifying multilateral obligations relevant to assessing the appropriateness of the identified models. The pluralistic approach to choosing between dispute resolution mechanisms for the two fields of law suggested by conflict rule integration is a valid approach for addressing fragmentation. It appears to be most consistent with the model presented by Helfer and Austin, as it engages with the broadest range of intellectual property obligations in an inclusive manner. The other prescriptive models privilege certain laws as a foundational premise of their approach. In contrast, Helfer and Austin focus on recognising the appropriate level at which primacy should be accorded to human rights. The following two chapters will provide more detailed analysis of relevant human rights, focusing on the human right to health.

See the use of the term self-determination in Graeme W Austin, 'Valuing Domestic Self-Determination in International Intellectual Property Jurisprudence' (2002) 77(3) *Chicago-Kent Law Review* 1155.

CHAPTER FOUR DEVELOPING A RIGHTS-BASED APPROACH TO HEALTH AS A FRAMEWORK FOR UNDERSTANDING THE HUMAN RIGHTS IMPLICATIONS OF TRADE MARK LAW

4.1 INTRODUCTION

This thesis uses human rights analysis of two case studies of trade mark law that engage the human right to health, but are frequently analysed through the lens of public health. There is more consideration of the relationship between trade marks law and the separate yet related field of public health in both domestic law[1] and international law.[2] This thesis develops the very limited consideration of the relationship between trade marks and the human right to health in the literature.[3] This chapter explains that the human right to health is a standard that is relevant to trade marks law, contrasting this to a public health approach. Although a public health approach remains an important feature of health protection, conflicts involving intellectual property and health benefit from consideration of states' binding obligations to protect the individual right to the enjoyment of the highest attainable standard of the human right to health. The chapter will identify mechanisms for analysis of the human right to health in a broader human rights context. It establishes a methodology for a human rights-based approach to analysis in the case studies, which addresses concerns of special importance to the right to health. Using a right to health approach provides a more effective vehicle for states to recognise their human rights obligations and progressively realise the highest attainable standard of health.

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[1] In Australia, the focus on plain packaging and public health is evident throughout Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012).

[2] See, eg, Sam Halabi, 'International Trademark Protection and Global Public Health: A Just-Compensation Regime for Expropriations and Regulatory Takings' (2012) 61(1) *Catholic University Law Review* 325; Valentina S Vadi, 'Trade Mark Protection, Public Health and International Investment Law: Strains and Paradoxes' (2009) 20(3) *European Journal of International Law* 773; Jonathan Liberman, 'Combating Counterfeit Medicines and Illicit Trade in Tobacco Products: Minefields in Global Governance' (2012) 40(2) *Journal of Law, Medicine and Ethics* 326.

[3] Laurence Helfer, Karen J Alter and Florencia Guerzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103(1) *American Journal of International Law* 1; Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Knowledge' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan, 2002) 161, 174–175; Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership' (2017) 7(1) *Victoria University Law and Justice Journal* 76, 76–80; Henning Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health' (2013) 9(2) *Journal of Private International Law* 308; Henning Grosse Ruse-Khan, *Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 9–11, 47–48, 62–63.

4.2 THE HUMAN RIGHT TO HEALTH IN INTERNATIONAL LAW

This section sets out the broad nature of the human right to health and the relevant standards that will be used to assess human right to health obligations in this thesis.

4.2.1 Nature of Human Right to Health

This thesis focuses on the human right to health as it is expressed in the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'). Article 12 of the *ICESCR* develops the right found in Article 25 of the *Universal Declaration of Human Rights* ('*UDHR*')[4] and provides for 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[5] This will be referred to as the 'right to health' in this thesis. Article 12 then elaborates on further steps to be taken in relation to that right:

- to reduce infant mortality and promote the healthy development of the child;
- to improve environmental and industrial hygiene;
- to prevent, treat and control epidemic, endemic, occupational and other diseases; and
- to create conditions to assure medical service and attention in the event of sickness to all.[6]

Chapman characterises these steps as the minimum core content of the right that are conceptual rather than immediately enforceable.[7] She contrasts this with minimum core obligations that states must action immediately.[8]

The concrete nature of the human rights obligations enshrined in the *ICESCR* gives it important legal weight when the health implications of other international agreements, including agreements regulating trade marks, are assessed.[9] Chapter 3 has identified fragmentation between the fields of human rights and intellectual property. Interpretative tools identified in Chapter 3 to address associated conflicts include 'any relevant rules of international law

[4] Article 25 of the *Universal Declaration of Human Rights* provides that '[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'. *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25 ('*UDHR*'). Tobin identifies earlier articulations of the right to health: John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012) 41.

[5] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(1) ('*ICESCR*').

[6] Ibid art 12(2).

[7] Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016) 54.

[8] Ibid.

[9] Alston argues that rights contained in the *International Bill of Rights*, which comprises the *UDHR*, the *ICESCR* and the *International Covenant on Civil and Political Rights* ('*ICCPR*'), are settled human rights: Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 608–609. This would include the right to health as it is articulated in Article 25 of the *UDHR* and Article 12 of *ICESCR*.

applicable between the parties.'[10] The plain packaging case study in Chapter 8 will argue that this can engage human rights agreements in disputes involving intellectual property law, including *ICESCR*, which is the focus of this chapter, and other treaties containing overlapping health obligations, such as the *Convention on the Rights of the Child*.[11] Australia has ratified *ICESCR*, although Chapter 5 will establish that human rights agreements are not usually directly implemented into Australian legislation.[12]

Public health arguments may also lack the normative weight of human rights considered in Chapter 2. This chapter will consider the way in which the moral legitimacy of the right to health has been a powerful advocacy tool in addressing conflicts between human rights and intellectual property. One reason for this may be the recognition of the integral role of the human right to health for realisation of the right to life.[13] This link has been used by courts in some states to address the failure to include justiciable economic, social and cultural rights in their constitutions.[14]

For several decades, the content of the right to health, generally, and the obligations that it imposed on states were considered to be unclear.[15] The content of the right was clarified in 2000 when the Committee on Economic Social and Cultural Rights (CESCR) published *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* in relation to the right to health ('*General Comment 14*').[16] CESCR's general

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[10] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c) ('*VCLT*').

[11] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

[12] Baker and Taylor reference examples of partial implementation in federal law and state law: Richard Baker and Vanessa Taylor, 'The Right to Health: A Right on the Rise' (2013) 19 *Journal of Jurisprudence* 275, 283.

[13] Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [3] ('*General Comment 14*'). See also UN Human Rights Committee, *General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life. Revised Draft Prepared by the Rapporteur*, Advance Unedited Version, adopted on First Reading, 120th sess (July 2017) [30] <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf>, which recognises the relationship between health and the right to life.

[14] See, eg, *State of Punjab v Mohinder Singh Chawla* (1997) 2 SCC 83 (Judgment of the Indian Supreme Court). Tobin gives examples of integration of the right to health into the right to life in India, Nepal, Pakistan, Bangladesh, Brazil and Columbia but expresses concern about inflation of the right to health such that it displaces more applicable rights: Tobin, above n 4, 187–190, 203.

[15] In 1999, Brigit Toebes contributed significantly to scholarship interpreting the meaning and significance of the international human right to the highest attainable standard of health, which will be referred to by the term 'right to health': Brigit CA Toebes, *The Right to Health as a Human Right in International Law* (Intersentia, 1999).

[16] Tobin, above n 4, 1–2.

comments provide guidance for states on the interpretation of specific human rights.[17] *General Comment 14* confirmed that a right to health does not require states to guarantee to individuals a right to 'be healthy.'[18] The right to health has further developed through the work of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health.[19] In 2008 Paul Hunt, the Special Rapporteur at that time, argued that *General Comment 14* provided an authoritative and 'substantive understanding of the right to health that could be made operational and improved in the light of practical experience.'[20]

This thesis will focus on the content provided by *General Comment 14* in identifying the scope of the human right to health.[21] However, the content of human rights can be dynamic.[22] Tobin describes the right to health as a maturing right that continues to face significant challenges.[23] These include: failures of states to give importance to the human right to health in developing policies about health; the extent to which a rights-based agenda has been adopted by the World Health Organization (WTO); reluctance in the medical literature on health to embrace human rights; and the heavily contested overall normative content of the right to health.[24] This chapter will explain the importance of the additional human rights standards and obligations incorporated into a right to health approach. The content of the right has expanded in different contexts in key international human rights treaties[25] and other agreements, such as the *Framework Convention on Tobacco Control (*'FCTC'), that have been ratified by Australia.[26] Although public health agreements can also be relevant to interpretation, they are unlikely to engage the claims of human rights to legal hierarchy that were considered in Chapter 3.[27] They

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[17] Rhona KM Smith, *Textbook on International Human Rights Law* (Oxford University Press, 7th ed, 2016) 70–71. CESCR is responsible for the monitoring functions of the implementation of *ICESCR*.
[18] *General Comment 14*, UN Doc E/C.12/2000/4, [8].
[19] Chapman, above n 7, 16.
[20] Paul Hunt, 'The Health and Human Rights Movement: Progress and Obstacles' (2008) 15(5) *Journal of Law and Medicine* 714, 715.
[21] This is consistent with Hunt's assessment that *General Comment 14* provides an authoritative interpretation of the human right to health: ibid.
[22] Importantly, the interpretation of the content of the right as it is found in the *International Bill of Rights* is not static: Tobin, above n 4, 92–94. See Alston, above n 9, 607; Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) *Health and Human Rights* 109, 121.
[23] Tobin, above n 4, 1–6.
[24] Ibid 5.
[25] See *CRC* art 24; *Convention for the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention for the Elimination of All Forms of Discrimination Against Women*, opened for signature 19 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 12(1), 12(2); *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for siganture 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) arts 25, 28, 43(1)(c); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN GAOR, 61st sess, Agenda Item 67 (b), UN Doc A/Res/61/106 (entered into force 3 May 2008) art 25.
[26] *World Health Organization Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) art 11 ('*FCTC*').
[27] The *FCTC* is considered a public health agreement by Vadi: Vadi, above n 2, 785–789.

can also engage questions of necessity where they are invoked pursuant to Article 8 of the World Trade Organization *Agreement on Trade Related Aspects of Intellectual Property Law* ('*TRIPS*').[28]

4.2.2 General Comment 14 Interpretation of the Right to Health

Important concepts developed in *General Comment 14* include tripartite obligations, core minimum obligations and obligations of comparable priority. Tripartite obligations to respect, protect and fulfil the right to health are explained in *General Comment 14*.[29] The obligation to respect the right to health is generally viewed as an obligation on the state not to interfere with an individual's enjoyment of the right to health. An example includes the obligation not to discriminate against individuals in the provision of health services.[30] The obligation to protect the right to health requires states to protect individuals against the actions of third parties that may negatively impact on their realisation of the human right to health.[31] States are also obliged to fulfil the right to health, through a range of measures including the provision of health services, the facilitation of access to those services and the promotion of the human right to health.[32]

Core minimum obligations are identified in *General Comment 14*.[33] These obligations are directly relevant to understanding what Helfer and Austin consider to be human rights ends, which should not be excluded by intellectual property means[34] and are used by Yu to address internal human rights conflicts involving intellectual property.[35] These can provide guidance for understanding which obligations are so important that they necessitate modifications of

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[28] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS*'). See Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs* (Kluwer Law International, 3rd ed, 2014) 157–158. But see application of this to interpretation of *TRIPS* Article 20 and Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018)) [7.2598].

[29] Gostin and Cabrera argue that the traditional focus on distinctions between civil and political rights and economic, social and cultural rights is being replaced by emphasis on obligations to respect, protect and fulfil rights, focusing on the type of state obligation rather than the nature of the right: Oscar A Cabrera and Lawrence O Gostin, 'Global Tobacco Control: A Vital Component of the Right to Health' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press, 2013) 261, 288. See also Lawrence Gostin et al, *Advancing the Right to Health: The Vital Role of Law* (World Health Organization, 2017) 11–12.

[30] *General Comment 14*, UN Doc E/C.12/2000/4, [34].

[31] Ibid [35].

[32] Ibid [33].

[33] Ibid [43].

[34] Laurence R Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights' (2008) 49(1) *Harvard International Law Journal* 1.

[35] Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40(3) *University of California Davis Law Review* 1039, 1105–1123.

intellectual property law.[36] Similarly, although *General Comment 14* does not specifically identify the status of 'obligations of comparable priority' in relation to the human right to health, they are also important.[37]

The obligation immediately relevant to the tobacco plain packaging case study is the obligation of comparable priority to prevent, treat and control endemic diseases.[38] This reflects the specific obligation in Article 12 to prevent, treat and control epidemic, endemic, occupational and other diseases. *General Comment 14* identifies a violation of the obligation to include state failure to protect consumers and workers from practices detrimental to health, using marketing and consumption of tobacco as an example.[39] Importation of counterfeit goods that are potentially injurious to public health and safety engages the tripartite obligation of states to protect individuals from the actions of third parties that may be damaging to their health.[40] This is relevant to state human rights obligations regarding adoption of a national public health strategy and plan of action to monitor progressive realisation of the right to health.[41]

4.2.3 The Human Right to Health and Public Health

This section contrasts the content and nature of the human right to health and public health. It also identifies aspects of the human right to health that are relevant to understanding interactions between trade marks and the human right to health.

4.2.3.1 Historical relationship

The main international institution overseeing health, the World Health Organization (WHO), proclaimed the importance of the human right to health and enshrined it in its constitution in 1946.[42] Constitutional recognition of the right to health occurred in 1946, shortly after the inclusion of the right in the 1945 *UDHR*. However, the subsequent approach taken by the WHO did not focus on human rights but emphasised public health.[43] This coincided with a Cold War polarisation between a Western emphasis on civil and political rights and an Eastern emphasis on economic, social and cultural rights.[44] Consequently, for the WHO to remain as broadly

[36] Ibid. Cf Helfer and Austin, who do not specify that core minimum obligations are the specific benchmark: Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 511–522.
[37] *General Comment 14*, UN Doc E/C.12/2000/4, [44].
[38] Cabrera and Gostin, above n 29.
[39] *General Comment 14*, UN Doc E/C.12/2000/4, [51].
[40] Ibid [35].
[41] Ibid [43]
[42] World Health Organization, *Preamble to the Constitution, Adopted by the International Health Conference, New York, 1946* (World Health Organization, 1948).
[43] Tobin, above n 4, 27–33.
[44] Ibid 30–32.

relevant as possible, it was necessary to soften the focus on human rights and emphasise health outcomes.[45] The alternative approach that was adopted was a public health approach, whereby health was characterised as a global public good.[46] As a global public good, necessary public health measures became potentially justifiable restrictions on other human rights in certain circumstances.[47] This emphasised population health rather than individual rights to human health.[48]

This emphasis on entire populations to understand demography relevant to public health initiatives contrasts with the emphasis on the individual and the dignity of the individual in human rights law, although there is overlap of the concerns in each field.[49] Epidemiology underpins public health investigations and data is essential to both fields.[50] Public health describes a health-related problem and provides a basis for intervention and promotion.[51] The human right to health guides our assessment of health issues within a context of progressive realisation of economic, social and cultural rights and a broader human rights framework grounded in non-discrimination, participation and accountability.[52]

In 2005, the WHO revised its *International Health Regulations* and explicitly required that their implementation be 'with full respect for the dignity, human right principles and fundamental freedoms.'[53] This support for a human rights approach to implementation by the WHO is contemporaneous with more detailed definitions of the right to health in scholarship and policy described in this chapter.[54]

4.2.3.2 Growing similarities

Recognition of the foundational importance of health to individuals, communities and nations is important to both public health and the right to health.[55] Gostin argues that states' duties in

[45] Ibid 31–32.
[46] Fiona Sim and Martin McKee, *Issues in Public Health* (Open University Press, 2nd ed, 2011) 186.
[47] See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3) ('*ICCPR*').
[48] Sim and McKee, above n 46, 186; Brigit Toebes, 'Human Rights and Public Health: Towards a Balanced Relationship' (2015) 19(4) *The International Journal of Human Rights* 488, 488–491.
[49] See Mzwandile A Mabhala and Walid El Ansari, 'Public Health and Population Dynamics' in Frances Wilson and Mzwandile Mabhala (eds), *Key Concepts in Public Health* (SAGE, 2009) 40, 40–45.
[50] Hamed A Adetunji, 'Principles of Epidemiology' in *Key Concepts in Public Health* (SAGE, 2009) 36.
[51] See L Kay Bartholomew Eldredge et al, *Planning Health Promotion Programs: An Intervention Mapping Approach* (John Wiley & Sons, 2016) 7–8.
[52] Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22.
[53] World Health Organization, *International Health Regulations (2005)* (World Health Organization, 3rd ed, 2016) art 3.1.
[54] Sim and McKee, above n 46, 186.
[55] Lawrence O Gostin, *Global Health Law* (Harvard University Press, 2014) 17–31; *General Comment 14*, UN Doc E/C.12/2000/4, [1].

public health are grounded in democratic theory, in which individuals subordinate themselves to community welfare to protect the 'common goods of health, welfare and security.'[56] Public health largely retains its territorial character to the extent that public health agreements in international law are relatively rare. The WHO has adopted few agreements and generally references human rights justifications for them.[57] The nature of the contrasting fundamental status of human rights agreements has been explored in Chapters 2 and 3.[58]

A human rights perspective recognises the critical importance of the right to health for the exercise of other rights.[59] The notion of public health and the conception of health as a public good are already integrated into a human rights framework. Human rights agreements permit states to use public health to justify limitations on other human rights, including freedom of expression, freedom of religion and freedom of association.[60] The human right to health strengthens these limitations as it imposes mandatory obligations rather than permissible exceptions. The plain packaging of tobacco case study considers public health as a mandatory restriction on freedom of expression.[61] However, states are not required to implement these public health goals as mandatory obligations.[62] Similarly in *TRIPS*, public health objectives can be the basis for implementation flexibility.[63] In contrast, right to health obligations are an important part of a rights-based approach that is grounded in states' clearly binding obligations in international law.[64]

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[56] Lawrence O Gostin and Lindsay F Wiley, *Public Health Law: Power, Duty, Restraint* (University of California Press, 3rd ed, 2016) 9.
[57] See *FCTC*; World Health Organization, above n 53.
[58] Freckelton links to globalisation of health law to human rights: Ian Freckelton, 'The Emergence and Evolution of Health Law' (2013) 29(2) *Law in Context* 74, 91–92.
[59] *General Comment 14*, UN Doc E/C.12/2000/4, [1].
[60] *ICCPR* arts 12(3), 18(3), 19(3)(b).
[61] Public health is separately recognised in the International Bill of Rights as a potential limit on the exercise of certain human rights. Murphy criticises this for its potential to lack balance and become a question of public health or human rights: Thérèse Murphy, *Health and Human Rights* (Hart Publishing, 2013) 2–3. The *FCTC*, which provides guidance for the legislation, notes both the relevance of public health and the human right to health to the convention: Kate Lannan, 'The WHO Framework Convention on Tobacco Control: The International Context for Plain Packaging' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012). Although the legislation did not specifically differentiate between the limiting function of public health and the right to health, it provides an example of use of both concepts in practice. The right to health is engaged as part of a state's tripartite obligation to protect individuals from threats to their health, including from the actions of third parties. See Explanatory Statement, Tobacco Plain Packaging: Amendment Regulation 2012 (No 1) (Cth) 2012.
[62] *ICCPR* arts 12(3), 18(3), 19(3)(b).
[63] *TRIPS*; Rochelle C Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property' (2015) 36(4) *Michigan Journal of International Law* 557, 565.
[64] *General Comment 14*, UN Doc E/C.12/2000/4, [1]. The CESCR has stated that this is one of the overall objectives of the agreement, to 'establish clear obligations for States parties in respect of the full realization of the rights in question': Committee on Economic, Social and Cultural Rights, *General*

The centrality of the individual is also important to the right to health, contrasting to the emphasis public health places on subordinating individual concerns to common welfare.[65] However, several factors have diminished the starkness of the distinction between the focus of public health on collective and population health, as opposed to the focus on the individual.[66] The development of a synergistic human rights and health approach has engaged the distinct fields of medicine and public health.[67] The shift in the global disease burden from communicable diseases to non-communicable diseases has suggested that the 'role of personal behaviour within a broader social context' has influenced health status.[68] This has more clearly linked individuals and populations.[69] Linkages also developed because tools and technologies used within each discipline were mutually useful.[70] A key feature of public health is use of epidemiological evidence of population health.[71] This is also relevant to considerations of whether or not states are fulfilling the human right to health.[72]

Chapman stresses the social and collective dimensions of economic, social and cultural rights, including the right to health.[73] She argues that we should emphasise public health dimensions within the right to health and rights-based approaches to health.[74] One of the reasons for this is that *General Comment 14* recognises the 'important public health components which link the health of the individual to the community.'[75] For example, groups are often the beneficiaries of health systems[76] and Chapman emphasises that focusing solely on individual health entitlements might undermine important public health efforts to benefit collectives.[77] This is an important

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Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant), UN ESCOR, 5th sess, UN Doc E/1991/23 (14 December 1990) [9] ('*General Comment 3*').

[65] Gostin and Wiley, above n 56, 7–8.

[66] See ibid 12–13.

[67] Gruskin and Tarantola noted an earlier, traditional distinction that has been made between public health, which focused on the health of population and collective rights, and medicine, which focused on the individual: Sofia Gruskin and Daniel Tarantola, 'Health and Human Rights' in S Gruskin et al (eds), *Perspectives on Health and Human Rights* (Routledge, 2005) 3, 26–27.

[68] Ibid 27.

[69] Ibid 42.

[70] Ibid 27.

[71] Gostin and Wiley, above n 56, 13.

[72] Chapman, above n 7, 56.

[73] Ibid.

[74] Ibid 58–59. Helen Potts shows links between disciplines in relation to effective strategy core minimum obligations: Helen Potts, 'The Right to Health in Public Health: Is This a New Approach?' (2008) 15(5) *Journal of Law and Medicine* 725, 737. Cf Benjamin Mason Meier and Larisa M Mori, 'The Highest Attainable Standard: Advancing a Collective Human Right to Public Health' (2005) 37 *Columbia Human Rights Law Review* 101.

[75] Chapman, above n 7, 56.

[76] Ibid.

[77] Ibid 56, citing Leslie London et al, 'Social Solidarity and the Right to Health: Essential Elements for People-Centred Health Systems' (2015) 30(7) *Health Policy and Planning* 938.

ongoing consideration, which reinforces the need to consider individual and collective dimensions of health.[78]

The interactions between the fields of public health and human rights are growing.[79] Taket notes that, increasingly, effective health promotion is linked to empowerment-based approaches and these have strong congruence with human rights approaches.[80] Tobin argues that there is a mutually supportive connection between the idea within public health discourse that the state remains responsible for the protection and promotion of health of its citizens, and the obligation that is placed on states in human rights law to protect the right to health of individuals.[81] Combined with the developing literature on the human right to health and increased institutional focus on the right, this has contributed to a human rights framework for action in public health.[82] Gruskin and Tarantola argue that this could be 'used to shape specific interventions aimed at reducing the impact of health conditions on the lives of individuals and populations.'[83] Although they have critical differences between them, the two approaches should not be characterised as mutually exclusive but complementary.

4.2.3.3 Important differences

The right to health is perceived to be extremely useful as a tool for advocacy.[84] The clearest example of the benefit of a human rights approach to health can be found in the use of the right in the context of HIV/AIDS.[85] Public responsibility and accountability was of great importance to the HIV/AIDS epidemic.[86] Framing key issues related to the epidemic as human rights issues encouraged awareness beyond domestic borders, which resulted in advocacy in fields such as

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[78] Chapman, above n 7, 57, citing Alicia Ely Yamin, 'Power, Suffering, and Courts: Reflections on Promoting Health Rights through Judicialization' in *Litigating Health Rights: Can Courts Bring More Justice to Health* (Harvard University Press, 2001) 333.
[79] Ann R Taket, *Health Equity, Social Justice and Human Rights* (Routledge, 2012) 1.
[80] Ibid.
[81] See Tobin, above n 4, 41.
[82] See an example of influence of these factors in Orielle Solar and Alec Irwin, 'A Conceptual Framework for Action on the Social Determinants of Health' (Social Determinants of Health Discussion Paper 2, World Health Organization, 2010) 12–16 <http://www.who.int/sdhconference/resources/ConceptualframeworkforactiononSDH_eng.pdf>.
[83] Gruskin and Tarantola, above n 67, 44.
[84] Crammond argues that human rights can be of instrumental value to advocating for improvements to health services and social determinants, and to advocacy, particularly where protection of human rights is enshrined in law: Brad Crammond, 'The Instrumental Value of Human Rights in Health' in Ann Taket (ed), *Health Equity, Social Justice and Human Rights* (Routledge, 2012) 146, 146–147. See also Gruskin and Tarantola, above n 67.
[85] Jonathan M Mann, 'AIDS and Human Rights: Where Do We Go from Here?' (1998) 3(1) *Health and Human Rights* 143; Jonathan Wolff, *The Human Right to Health* (WW Norton & Co, 1st ed, 2012) 41.
[86] Gruskin and Tarantola, above n 67, 4; Jonathan Mann and Daniel Tarantola, 'Responding to HIV/AIDS: A Historical Perspective' (1998) 2(4) *Health and Human Rights* 5, 5–8.

access to medicine.[87] Non-discrimination became a significant advocacy issue for those infected with HIV/AIDS or those who were perceived to be infected.[88] Crammond argues that the interest in developing a rights-based approach has been driven by global reaction to the spread of HIV/AIDS, as related health policies focused on quarantine or incarceration in several countries.[89] Advocacy on the impact of pharmaceutical patent use on effective treatment of HIV/AIDS eventually influenced waivers and amendments to the *TRIPS* agreement that encouraged the use of compulsory licensing to address important access to essential medicine issues.[90] Domestic litigation in South Africa linked access to HIV/AIDS medicine to a justiciable right to health.[91] The prominent associated human rights discourse formed part of a growing recognition of the relationship between intellectual property and human rights, which encouraged the framing of health concerns as individual rights rather than necessary population measures.[92] Although many human rights problems identified in relation to HIV/AIDS endure, an estimated reduction in infection rates has been viewed as a significant victory for the inclusion of a human rights approach in development objectives in the past two decades.[93]

A human rights approach can use the legal and moral legitimacy associated with the fundamental nature of human rights.[94] Although Novogrodsky criticises the failure of the right to health to be used successfully in contexts other than the HIV/AIDS epidemic[95] and other theorists have identified the use of human rights only as a weapon of last resort,[96] the right is

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[87] Gostin and Mann applied a human rights approach to the HIV/AIDS epidemic and demonstrated the importance of the approach to the issue: Lawrence O Gostin and Jonathan Mann, 'Towards the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Health Policies' (1994) 1(1) *Health and Human Rights* 58.

[88] Mann and Tarantola, above n 86, 5–8. Concerns remain: Michel Sidibe, 'Harnessing the Power and Promise of Human Rights to End AIDS by 2030' (2017) 19(2) *Health and Human Rights* 111.

[89] Crammond, above n 84, 147.

[90] Sisule F Musungu, 'The TRIPS Agreement and Public Health' in Carlos María Correa and Abdulqawi Yusuf (eds), *Intellectual Property and International Trade: The TRIPS Agreement* (Kluwer Law International, 2nd ed, 2008) 421, 446–450; *Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration).

[91] *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 721 (Constitutional Court) ('*TAC*'); Duncan Matthews, 'Intellectual Property Rights, Human Rights and the Right to Health' in Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 118, 133–136.

[92] Matthews, above n 91, 130–136; Susan K Sell, 'TRIPS and The Access to Medicines Campaign' (2001) 20(2) *Wisconsin International Law Journal* 481.

[93] Sidibe, above n 88, 111. See United Nations Department of Economic and Social Affairs, *The Millennium Development Goals Report 2015* (United Nations, 2015).

[94] Matthews describes the way that human rights language permitted framing of the access to medicines debate as a moral issue: Matthews, above n 91, 136. See Noah Novogrodsky, 'After AIDS' (2013) 14(2) *Melbourne University Law Review* 643, 650–651. See Samuel Murumba, 'Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property' (2012) 38(1) *Monash University Law Review* 119.

[95] Novogrodsky, above n 94, 657.

[96] Murumba, above n 94, 135–136.

increasingly used in relation to health concerns.[97] There is clear evidence of the consideration of the right to health in the growing use of human rights impact assessments, health impact assessments and right to health impact assessments.[98] Bustreo and Hunt observe an increasing reference by states to the right to health in the World Health Assembly as indicative of 'profound changes in the relationship between health and human rights' in many countries.[99] There is also evidence of the impact of the right to health in relation to policies, laws and interventions in specific countries.[100] The characterisation of human rights as a tool to promote public health is useful because it encourages emphasis on dignity in public health measures, which builds public confidence in those measures and increases their authority, and recognises that there is a fundamental right to live in an environment conducive to the fundamental right to health.[101]

Although there are overlaps between state obligations to respect and fulfil the right to health and public health concerns, these are less evident where states are obligated to protect the right to health. Yet, intersections between trade marks law and health frequently engage the protection requirement of the tripartite obligation to protect the human right to health. This will be seen in both case studies. Tobacco plain packaging engages state obligations to protect individuals from the harmful activities of tobacco companies in advertising their product on packaging.[102] A human rights-based approach means that considerations of the human right to health are also integrated with protection of other human rights, as protection of one human right is interdependent with all other human rights.[103] Counterfeiters do not have the same incentive as trade mark owners to produce quality products and may not comply with health and safety standards.[104] However, for alleged counterfeiters, the right to a fair trial can be important to

[97] Chapman, above n 7, 311. See also Helfer, Alter and Guerzovich, above n 3.
[98] See Lisa Forman and Gillian MacNaughton, 'Moving Theory into Practice: Human Rights Impact Assessment of Intellectual Property Rights in Trade Agreements' (2015) 7(1) *Journal of Human Rights Practice* 109, 131–132. But see Rebekah Gay, 'Mainstreaming Well Being: An Impact Assessment for the Right to Health' (2008) 13(2) *Australian Journal of Human Rights* 33, 49–50. Gay argues that the consideration of health in human rights impact assessments is necessarily superficial and prefers the integration of a right to health impact assessment into a health impact assessment.
[99] Flavia Bustreo and Paul Hunt, 'The Right to Health Is Coming of Age: Evidence of Impact and the Importance of Leadership' (2013) 34(4) *Journal of Public Health Policy* 574, 575. See recognition of translation of the right to health into good health practice and human rights as a contributing factor to health gains for women and children in Flavia Bustreo and Paul Hunt, *Women's and Children's Health: Evidence of Impact of Human Rights* (World Health Organisation, 2013) 22–24.
[100] Bustreo and Hunt, *Women's and Children's Health: Evidence of Impact of Human Rights*, above n 99.
[101] Sim and McKee, above n 46, 186.
[102] *General Comment 14*, UN Doc E/C.12/2000/4, [35]; *CRC* art 24.
[103] *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights*, UN GAOR, UN Doc A/CONF.157/23 (25 June 1993) pt 1 para 5.
[104] The complex nature of this problem is considered in Chapter 9. See J Janewa Osei Tutu, 'Private Rights for the Public Good?' (2013) 66(4) *SMU Law Review* 767.

trade mark legislation that includes offences related to counterfeiting.[105] Mann et al has argued that violation of a broad range of other human rights can have negative impacts on the right to health.[106] The obligations on states to protect against right to health violations differs from ways that public health can be used to justify limitations on other human rights, including freedom of expression, freedom of religion and freedom of association. [107]

The measures that states are expected to provide to fulfil the right to health engage a range of actors significantly broader than public health actors. The anti-counterfeiting case study in this thesis considers the obligations of states to protect individuals from the actions of third party counterfeiters who import inferior quality counterfeit goods that pose potential threats to health and safety. In Australia, public health authorities are engaged when the relevant goods are therapeutic goods but they are much less likely to be engaged in relation to other counterfeit goods that pose health concerns.[108] In this case, protecting the human right to health also engages other actors operating outside the sphere of public health, such as Border Force and law enforcement agencies. Public health can and does engage with other actors, but human rights law obliges states to engage with other actors to fulfil their protection obligations pursuant to the human right to health.[109]

4.2.3.4 Synthesis

This section has identified differences between the fields of public health and the human right to health that suggest benefits to adopting a human rights approach in analysis of Australian trade mark legislation. The binding nature of human rights supports their implementation where they conflict with other international laws, such as international intellectual property laws. In human rights, the human right to health emphasises positive rights while public health approaches support restrictions of human rights for necessary public health measures. States are accountable for the implementation of the human right to health, which should be monitored. Transparency facilitates monitoring and enables situations of conflict between intellectual property and human rights to be identified.

The following chapter will identify problems with accountability and monitoring of human rights that are also relevant to the relationship between intellectual property and human rights in

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[105] See Jonathan Griffiths, 'Criminal Liability for Intellectual Property Infringement in Europe: The Role of Fundamental Rights' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012) 191.
[106] Jonathan Mann et al, 'Health and Human Rights' (1994) 1(1) *Health and Human Rights* 7, 17–19. See Gruskin and Tarantola, above n 67, 35.
[107] *ICCPR* arts 12(3), 18(3), 19(3)(b).
[108] See Chapter 9 case study analysis.
[109] Forman and MacNaughton, above n 98, 118, 131–132.

Australia. To better understand that relationship, the case studies also consider the significance of intellectual property rights protected by domestic and international law. As noted in Chapter 1, in some instances intellectual property rights are protected as human rights. A human rights-based approach recognises that other rights can be interdependent and important. The case studies will show that other important human rights are engaged and should be considered when the health aspects of trade mark laws are assessed. Assessing whether human right to health obligations are enforced can be more complex than identifying whether the means in question are necessary public health measures, although this assessment is also relevant to a human rights-based analysis.

4.3 WHAT IS A RIGHTS-BASED APPROACH?

This section sets out the human rights-based approach to health that will be used in the case studies as a standard for measuring compliance with human rights in trade mark legislation.[110] A significant and important advantage of a human rights approach is that it embeds a framework that requires states to monitor and be accountable for human rights.[111] Rights-based approaches engage with the content of the right to health provided in *General Comment 14* and are 'participatory, non-discriminatory processes striking fair balances that are respectful of the entitlements of the most disadvantaged, including those living in poverty.'[112] This commitment to human rights can result in a useful framework for policy-makers, encouraging the use of measures such as the tripartite obligations to respect, protect and fulfil the right to health.[113] Obligations include protection against third party actors, emphasis on individuals and their inherent dignity, non-discrimination and development of systems that are transparent, accountable and participatory.[114] A human rights-based approach also recognises underlying causes of health issues, which might not ordinarily be considered within the scope of health policy, and 'establishes a clear scope of obligations on the part of the government.'[115] Poverty is

[110] Hunt, Yamin and Bustreo note that measuring extent of noncompliance with human rights standards, 'remains a crucially important task': Paul Hunt, Alicia Ely Yamin and Flavia Bustreo, 'Making the Case: What Is the Evidence of Impact of Applying Human Rights-Based Approaches to Health?' (2015) 17(2) *Health and Human Rights Journal* 1, 2–3.
[111] Potts identifies accountability and monitoring as important distinguishing features of the human right to health from public health: Potts, above n 74, 741. See also Alicia Ely Yamin, *Power, Suffering, and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter* (University of Pennsylvania Press, 2016) 97–98.
[112] Paul Hunt, 'Missed Opportunities: Human Rights and the Commission on Social Determinants of Health' (2009) Suppl 1 *Global Health Promotion* 36, 41.
[113] *General Comment 14*, UN Doc E/C.12/2000/4.
[114] Ibid.
[115] World Health Organization, 'Human Rights, Health and Poverty Reduction Strategies' (Health & Human Rights Publication Series Issue No 5, United Nations High Commissioner for Human Rights and the World Health Organization, 2008) <http://apps.who.int/iris/bitstream/handle/10665/43962/WHO_HR_PUB_08.05_eng.pdf;jsessionid=6903E126C25F89AA1A892C6A57EEDF72?sequence=1>; Chapman, above n 7, 248–277.

a fundamental underlying determinant of health.[116] Although these concerns may be increasingly recognised in public health analysis,[117] *General Comment 14* clarifies state obligations in this respect. The right to health also engages obligations of international cooperation.[118] The interdependent nature of human rights also engages assessment of the impact of policy on other relevant human rights.[119] The right to health can be pervasively linked to all human rights protections.[120] Violations of a wide range of human rights often have negative health impacts[121] and determinants of health often operate outside of the health sector.[122]

The human rights and health approach developed in the 1990s.[123] The use of the right to health as a tool for action in relation to a number of issues related to the HIV/AIDS epidemic was extremely important to the increased use of human rights in relation to health.[124] In 2005, Gruskin and Tarantola developed the approach suggested by Gostin and Mann to frame a series of questions that could be used for assessing policies and programs using a health and human rights framework.[125] The intention was to use the approach to determine 'whether health policies, programmes and practices [were] valid from both a public health and a human rights perspective.'[126] In 2015, Hunt, Yamin and Bustreo described a growing integration of human rights into health,[127] despite significant work remaining to achieve a common understanding of a human rights-based approach to health.[128] Although public health should be considered and included in rights-based approaches to health, public health approaches continue to differ from rights-based approaches to health.[129] Hunt, Yamin and Bustreo emphasise that human rights

[116] Chapman, above n 7, 248–277; Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22, 122.
[117] Forman and MacNaughtan describe these considerations being used in health impact analysis: Forman and MacNaughton, above n 98, 118–119.
[118] *General Comment 14*, UN Doc E/C.12/2000/4, [51].
[119] Jonathan Mann, *Health and Human Rights: A Reader* (Routledge, 1999) 232; Alicia Ely Yamin, 'Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care' (2008) 10(1) *Health and Human Rights* 45; Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22.
[120] See Mann et al, above n 106, 17–19.
[121] Gruskin and Tarantola, above n 67, 35. See Mann et al, above n 106, 17–19.
[122] Kendyl Salcito et al, 'Experience and Lessons from Health Impact Assessment for Human Rights Impact Assessment' (2015) 15(1) *BMC International Health & Human Rights* 24.
[123] A key milestone was the launch of the journal, *Health and Human Rights*, which was established in 1994 by Jonathan Mann. See Mann et al, above n 106.
[124] Gostin and Mann developed an approach of health and human rights, using the HIV/AIDS epidemic as an example to develop key features of their approach: Gostin and Mann, above n 87.
[125] Gruskin and Tarantola, above n 67, 43–45.
[126] Ibid 39.
[127] Hunt, Ely Yamin and Bustreo, above n 110, 3.
[128] Ibid 8. Taket criticises a lack of awareness of human rights in the public health workforce and public health students: Taket, above n 79, 1.
[129] Hunt argues that human rights training for health professionals, government officials and staff working in health-related fields will create 'an environment that supports the adoption of rights-based approaches by the health community.' Hunt, 'The Health and Human Rights Movement: Progress and Obstacles', above n 20, 724. See also Kumanan Rasanathan, Johanna Norenhag and Nicole Valentine, 'Realizing

approaches use interdisciplinary approaches, including those from social sciences, medicine and public health, to the measurement of outcomes.[130] Hunt argues that both established human rights non-governmental organisations and health professionals need to engage with the health and human rights movement for the right to health to be operationalized.[131] Yamin argues that a transformative engagement between health and human rights requires the use of broad definitions of economic, social and cultural rights, despite the 'narrow conceptions of rights [that] continue to be reflected in public discourse and underpin the neoliberal paradigm of economic development and globalization.'[132] The approach that she proposes emphasises the social component of health and argues that all components of a rights-based approach must be tied to society and involve states 'taking suffering seriously,'[133] accepting their responsibility to provide international assistance and cooperation to ensure the realisation of economic, social and cultural rights in low-income countries.[134]

Although it is possible to use a right to health or health impact assessment to measure rights compliance,[135] there is growing support for a broader human rights-based approach that can give special emphasis to the right to health.[136] This recognises the interdependent and interrelated nature of human rights.[137] Sim and McKee identify a number of conflicts between human rights and public health, identifying potential conflicts between a human right to health and each of: the right to respect for private and family life; freedom of thought, conscience and religion; freedom of assembly and association; the right to liberty and security; the prohibition on torture; the prohibition on slavery; and the right to a fair trial.[138]

This thesis will analyse the case studies using a broader human rights approach, although it will give special emphasis to the human right to health. Key features of a human rights-based approach include: ratification of key international human rights treaties and endorsement of

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Human Rights-Based Approaches for Action on the Social Determinants of Health' (2010) 12(2) *Health and Human Rights Journal* 49, 56.

[130] Hunt, Ely Yamin and Bustreo, above n 110, 1–2.

[131] Hunt, 'The Health and Human Rights Movement: Progress and Obstacles', above n 20, 723.

[132] Ely Yamin, 'Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care', above n 119, 46. Chapman also critiques the impact of neo-liberalism on realisation of the right to health: Chapman, above n 7.

[133] Ely Yamin, 'Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care', above n 119, 53.

[134] Ibid 54.

[135] Salcito et al use empirical analysis of corporate impact to argue that there is an overlap between health impact assessments and human rights impact assessments: Salcito et al, above n 122. See also Gay, above n 98.

[136] Forman and MacNaughton demonstrate the increasing importance of a broader human rights approach: Forman and MacNaughton, above n 98, 120–122.

[137] Toebes argues that addressing global public health from a human rights perspective indicates an integrated approach to human rights, emphasising the importance of both civil and political rights and economic, social and cultural rights: Toebes, above n 48, 491.

[138] Sim and McKee, above n 46, 187–191.

relevant global commitments, recognition of the right to health in domestic constitutions, establishment of oversight bodies and the ensuring of policy coherence and effective coordination amongst multiple stakeholders.[139] Some of these standards are identifiable in the human rights-based approach to development that has influenced a human rights-based approach to health.[140] Pillars of this approach included 'universality and inalienability, indivisibility, interdependence and interrelatedness, non-discrimination and equality, participation and inclusion, and accountability and the rule of law.'[141]

Impact assessments are useful mechanisms for highlighting the potential and actual human rights and health impacts of certain pieces of legislation, operations, policies or programs.[142] Helfer and Austin argue that these mechanisms are extremely useful for assessing the potential human rights implications of intellectual property legislation.[143] Human rights impact assessments are becoming increasingly important tools in assessing human rights compliance and enabling advocacy on human rights issues, including the impact of *TRIPS* and free trade agreements.[144] A human rights-based approach to areas of intellectual property that engage health concerns is particularly relevant to Australia, given the current environment of expanding intellectual property obligations in free trade agreements.[145] Forman has analysed human rights impact assessment tools 'drawn from the international human right to health' to consider the impact of *TRIPS* in Thailand within the context of global pharmaceutical access.[146]In this model, she characterises rights as 'drivers of social change' that permit social actors and policy makers to collect evidence about human rights impact that could influence adjustments to law, policy and programs.[147] The impact assessment was undertaken in Thailand primarily by a non-government organisation, FA Watch, in response to negotiations for a free trade agreement

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[139] Bustreo and Hunt, *Women's and Children's Health: Evidence of Impact of Human Rights*, above n 99; Bustreo and Hunt, 'The Right to Health Is Coming of Age: Evidence of Impact and the Importance of Leadership', above n 99, 577.

[140] A number of discussions of rights-based approaches to health refer to earlier concepts of a rights-based approach to development. See, eg, Hunt, Ely Yamin and Bustreo, above n 110.

[141] For an example of an early rights-based approach to development, see: United Nations Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies* (United Nations, 2003).

[142] Alana Klein, 'So Long as You Have Your Health: Health Care Distribution in Canada and Proceduralist Human Rights' (2012) 30(2) *Windsor Yearbook of Access to Justice* 247, 254–262.

[143] Helfer and Austin, above n 36, 518–520.

[144] Klein, above n 142, 254–262; Lisa Forman, 'From TRIPS-Plus to Rights-Plus? Exploring Right to Health Impact Assessment of Trade-Related Intellectual Property Rights through the Thai Experience' (2012) 7(2) *Asian Journal of WTO and International Health Law and Policy* 347, 354.

[145] Forman, above n 144, 366; Gillian Moon, 'Trading in Good Faith? Importing States' Economic Human Rights Obligations into the WTO's Doha Round Negotiations' (2013) 13(2) *Human Rights Law Review* 245. See Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements - Productivity Commission Research Report* (November 2010) 248, 280, 317–321.

[146] Forman, above n 144, 347–348.

[147] Ibid 355. See also Prawase Wasi, '"Triangle That Moves the Mountain" and Health Systems Reform Movement in Thailand' (2000) 4(2) *WHO Human Resources for Health Development Journal* 106.

between the United States and Thailand. Forman makes several observations that are instructive for future human rights impact assessments.[148] Forman criticises the report for lack of 'explicit assessment of how intellectual property rights could have impacted on codified and binding right to health obligations regarding medicines' and failure of the inclusion of rights into its analytical components.[149] This indicates that a systematic human rights methodology for analysis is critical to a human rights impact assessment, although it is often only a part of the required approach. [150] This thesis develops its own methodology for human rights analysis of intellectual property legislation.

Limitations to assessing human rights impacts should also be acknowledged as relevant and important.[151] Restrictions on available data mean that it is difficult to effectively undertake human rights impact assessments and limitations on publicly available data in the case studies means that a full human rights impact assessment is beyond the scope of this thesis. [152] This thesis will use primarily doctrinal analysis to interpret the way in which the legislation in the case studies engages the right to health and other human rights, referring to rules of interpretation in public international law where relevant. The standards set out in this chapter and contained in the International Bill of Rights focus the rights-based analysis undertaken. The following sections of this chapter identify the methodological approach used in the case studies and note key features of the right to health that will be considered in the analysis, consistent with Hunt's recognition of their centrality to a rights-based approach to health.

4.3.1 Methodological Approach

The methodology for the case study analysis in this thesis synthesises key literature in the field in the context of the earlier findings in this chapter about the features of the right to health that are important, particularly those that are important for the relationship between health and

[148] Forman states that future reports should be 'strongly linked to human rights standards and an evidence base' avoiding strongly critical language or they will threaten the 'legitimacy, independence or influence of the report.' Assessments are likely to be facilitated by the existence of a National Human Rights Institution, constitutional protection for the right to health and legislation and ratification of human rights: Forman, above n 144, 362–369.
[149] Ibid 363–364.
[150] For example, Forman and MacNaughton recommend a human rights impact assessment approach tailored to assessment of the impact of intellectual property laws in trade agreements on access to medicines. It includes a multi-disciplinary approach, using economic modelling to assess medicine availability, participation of rights holders and use of human rights impact assessments in conjunction with advocacy and campaigning on trade agreements: Forman and MacNaughton, above n 98, 118, 129–130.
[151] For example, limitations on availability and collection of data: Wolff, above n 85, 132–133.
[152] Problems exist with the availability of information that is necessary to undertake human rights impact assessments both by states and other health-related organisations: ibid; Gunilla Backman et al, 'Health Systems and the Right to Health: An Assessment of 194 Countries' (2008) 372(9655) *The Lancet* 2047.

intellectual property.[153] It is influenced by the human rights-based approach for case study analysis of a range of health policies and programs developed by Ann Taket,[154] drawing on previous work by leading scholars in the field: Gostin and Mann[155] and Gruskin and Tarantola.[156] It is also influenced by Gruskin, Bogecho and Ferguson's operational norms and standards for a rights-based approach to health: availability, accessibility, acceptability and quality (AAAQ), participation, non-discrimination, transparency and accountability.[157] In 2016, Hunt reviewed the literature to identify important features of human rights-based approaches to health.[158] Unifying features were consideration of all relevant human rights including participation, equality and non-discrimination.[159] Hunt justifies considering all rights, as this can broaden the support base for analysis, not only invoking a wide range of national and international laws but also engaging a 'broader coalition of groups and interests.'[160] He agrees that AAAQ is closely associated with the right to health, but suggests that Gruskin, Bogecho and Ferguson's 'minimal list' needs to be expanded to address progressive realisation, maximum available resources, and international assistance and cooperation.[161] Hunt suggests that in practice the right to health is not always central to human rights inquiries addressing health-related issues.[162] He advocates ensuring that the human right to health is central to rights-based analysis addressing health because it considers certain important characteristics that other human rights considered in a human rights-based approach might not engage.[163] Freedom of expression, fair trial and privacy are civil rights considered in the case studies that do not frequently engage considerations of progressive realisation, maximum available resources, and international assistance and cooperation, consistent with Hunt's assessment. Hunt's expanded considerations are more likely to be relevant to the economic, social and cultural rights contained in *ICESCR*, including Article 15.[164] This is one of the reasons that Chapter 11

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[153] Taket's approach has been modified as the case studies considered deal with more expansive areas of law than the programs to which the framework is applied in her book. The areas chosen should address criticism that Taket's framework has only been narrowly applied in case studies that do not assess policies engaging significant human rights conflicts: Theo Lorenc, 'Health Equity, Social Justice and Human Rights by Ann R. Taket' (2012) 22(3) *Critical Public Health* 373.
[154] Taket, above n 79, 102–111.
[155] Gostin and Mann, above n 87, 58–80.
[156] Gruskin and Tarantola, above n 67.
[157] Sofia Gruskin, Dina Bogecho and Laura Ferguson, '"Rights-Based Approaches" to Health Policies and Programs: Articulations, Ambiguities, and Assessment' (2010) 31(2) *Journal of Public Health Policy* 129, 129–145.
[158] Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22.
[159] Ibid 110.
[160] Ibid.
[161] Ibid 115.
[162] Ibid 111.
[163] Ibid.
[164] *ICESCR* art 15. In relation to *ICESCR* art 15(1)(c), CESCR considers several matters identified by Hunt as relevant to rights-based analysis: Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material*

emphasises the importance of these considerations as part of a rights-based approach to human rights analysis of intellectual property to found and support a human rights culture for trade marks.

The case studies ask the following questions:

1. How do the legislation and its operation contribute to the tripartite obligations to respect, protect and fulfil the right to health?
2. Is this consistent with progressive realisation of the right to health? Is the legislation effective in realising the human right to health?
3. Is the legislation consistent with obligations of international cooperation and assistance?
4. What other human rights are relevant to the legislation and its operation? Are these rights impacted positively or negatively by the legislation? Is this consistent with human rights obligations?
5. Whose rights are impacted positively and negatively by the legislation and its operation? Do the legislation and its operation permit participation of these stakeholders? Are the legislation and its operation consistent with principles of transparency and non-discrimination?
6. What system of monitoring, evaluation, accountability and redress exists to ensure that the legislation is progressing towards its intended human rights goals and that adverse effects can be addressed?

4.3.2 Using the Human Right to Health as a Reference Point for Rights-Based Analysis

The standard used in the human rights-based analysis in this thesis is based on international law. This section considers approaches to interpretation of the right and its broader use in advocacy. Hunt advocates emphasis in human rights-based approaches on the interpretation of the right to health using principles of public international law. He criticises the approach taken by Tobin to interpreting the right to health by reference to the consensus of an interpretive community[165] as potentially excluding 'the active and informed participation of those living in poverty.'[166] He argues that Tobin's approach ignores the objective of reducing and alleviating poverty, which he

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Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15, Para 1(c) of the Covenant), UN ESCOR, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [25]-[28], [36]-[38], [41], [45].

[165] Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22, 119. Cf Tobin, above n 4, 75–120.

[166] Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22, 120.

argues to be the object and purpose of *ICESCR*.[167] Hunt's criticism of Tobin identifies an important underlying determinant of health, but the characterisation of the object and purpose of *ICESCR* as the alleviation of poverty is narrow.[168]

Chapman provides a more integrated assessment of the object and purpose of ICESCR. She characterises the purpose of a human right as to

> frame public policies and private behaviors so as to protect and promote the human dignity and welfare of all members and groups within society, particularly those who are vulnerable and poor, and to effectively implement them.[169]

This statement of the purpose of a human right is useful for understanding the object and purpose of *ICESCR*. It recognises the centrality of human dignity and welfare, noting Hunt's concern that special emphasis should be placed on the poor. However, it also recognises that object and purpose should acknowledge CESCR's guidance in *General Comment 3* that one of the overall objectives of the agreement is to 'establish clear obligations for States parties in respect of the full realization of the rights in question.'[170] Chapman distinguishes the legal entitlement conferred by the right to health from the conceptual framework of a human rights-based approach to health, which 'is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.'[171]

As stated in Chapter 3, other tools are relevant to interpretation of a specific right. The very language that is being interpreted – the 'highest attainable standard' of health – suggests that the standards contained in *ICESCR* are applicable beyond the alleviation of poverty.[172] This assessment is critical to recognising the extent to which progressive realisation influences the thresholds of human rights protection that can be required by models conceptualising the relationship between intellectual property and human rights.

4.3.3 Features of a Human Rights-Based Approach Addressing the Right to Health

This section considers concepts that are relevant to the methodology. The human right to health is resource dependent.[173] This can influence the AAAQ of health services.[174] In recognition of

[167] Ibid 122.
[168] Ibid. Hunt acknowledges that there is work to be done on object and purpose.
[169] Chapman, above n 7, 17.
[170] *General Comment 3*, UN Doc E/1991/23, [9].
[171] Chapman, above n 7, 6.
[172] See ibid 17.
[173] Todd Landman, *Studying Human Rights* (Psychology Press, 2006) 11.

the broader relevance of resources to realisation of economic, social and cultural rights, *ICESCR* provides that rights are to be progressively realised.[175] This is interpreted to mean that states must immediately take 'deliberate, concrete and targeted' steps, using all appropriate means, towards the realisation of the enshrined rights although they may not be realised immediately.[176] However, core minimum rights should not be progressively realised, they should be immediately implemented.[177] Tobin argues that the core minimum obligations are unrealistic for some states[178] and that a non-derogable core minimum approach is not consistent with the explicit agreement of states that there should be a progressive realisation of the right to health.[179] Chapman criticises *General Comment 14* for translating 'broadly framed' minimum core content outlined in Article 12(2) into immediately enforceable core obligations.[180] She recommends reducing the list to a more narrowly framed practicable list of priorities that are based on clear and widely affirmable principles.[181] The relevant core obligations for the right to health will be considered in analysis of the case studies, as they can be relevant for determining when right to health considerations should compel modification of intellectual property law.[182]

States that cannot meet core obligations must demonstrate that every effort has been made to satisfy them using all resources at its disposal. In *General Comment 3*, CESCR explains the obligation in Article 2(1) for each state party to take the necessary steps 'to the maximum of its available resources.'[183] Maximum available resources include those available within the state and from the international community.[184] Even where resources are not adequate, states are still required to strive towards realisation of the right and continue to monitor and plan for that realisation.[185] It is not clear how a non-derogable minimum core approach fits in with the approach taken by CESCR to resource allocation.[186] CESCR questions whether measures are:

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[174] See Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22, 115.
[175] *ICESCR* art 2(1).
[176] *General Comment 3*, UN Doc E/1991/23, [2]–[3].
[177] *General Comment 14*, UN Doc E/C.12/2000/4, [43]–[44].
[178] Tobin, above n 4, 252.
[179] Tobin argues that application of accepted principles of treaty interpretation, such as the ordinary meaning of progressive, are not consistent with this approach and there is no justification to legitimate an alternative meaning: ibid 239–241. See also Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113.
[180] Chapman, above n 7, 54.
[181] Ibid 55.
[182] A threshold for determining when right to health considerations should compel modification of intellectual property law is relevant to the model proposed by Helfer and Austin: Helfer and Austin, above n 36, 516–522.
[183] *General Comment 3*, UN Doc E/1991/23, [10].
[184] Ibid [13].
[185] Ibid [11].
[186] Tobin argues that this approach should be principled, evidence based, consultative and participatory, transparent and evaluative: Tobin, above n 4, 237.

- targeted;
- non-discriminatory in operation;
- allocated in accordance with international human rights standards;
- using options least restrictive of the Convention rights approach adopted;
- using a time frame; and
- considering the situation of disadvantaged, marginalised individuals or groups.[187]

It is also important to consider the impact of using resources to support one right at the expense of realisation of other rights.[188]

Another issue relevant to progressive realisation is that some states will have realised standards beyond the core minimum standards. These states are obligated not to retrogress from standards that they have already reached.[189] Once steps have been taken to progressively realise the right to health, nations are required to maintain these standards, although Klein suggests that existing enforcement of no retrogression is weak.[190] Where retrogression is in relation to core minimum standards for the right to health, it constitutes a violation.[191] The significance of these matters will be considered in analysis of the case studies.

The importance of international cooperation in *General Comment 14* is another consequence of the resource-dependent nature of economic and social rights.[192] International cooperation in relation to health matters has been a key concern in relation to health, noted in the *Charter of the United Nations*.[193] The purposes of cooperation and promotion and protection of the health of all peoples were recognised with the human right to health in the Constitution of the WHO in 1946.[194] Increasingly, human rights discourse should recognise its significance, given the importance of poverty as an underlying social determinant of health.[195]

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[187] *General Comment 14*, UN Doc E/C.12/2000/4, [28-[29]. For a discussion of proportionality, see David Bilchitz, 'Socio-Economic Rights, Economic Crisis and Legal Doctrine' (2014) 12(3) *International Journal of Constitutional Law* 710.
[188] J Janewa Osei Tutu, 'Value Divergence in Global Intellectual Property Law' (2012) 87(4) *Indiana Law Journal* 1640, 1681. See recognition of centrality of resource assessment to a rights-based approach to health in Ely Yamin, 'Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care', above n 119, 48–49. See also J Janewa Osei Tutu, 'Corporate "Human Rights" to Intellectual Property Protection?' (2015) 55 *Santa Clara Law Review* 1; Osei Tutu, 'Private Rights for the Public Good', above n 104.
[189] *General Comment 3*, UN Doc E/1991/23, [9]; *General Comment 14*, UN Doc E/C.12/2000/4, [32].
[190] Klein, above n 142, 251–253.
[191] *General Comment 14*, UN Doc E/C.12/2000/4, [48].
[192] Wolff, above n 85, 11–12.
[193] *Charter of the United Nations* arts 55, 56.
[194] Tobin, above n 4, 28; World Health Organization, above n 42.
[195] Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', above n 22, 119–122.

International cooperation and assistance has multiple dimensions. The notion of assisting states to realise core minimum obligations is used as a threshold for the obligation of international cooperation in relation to realisation of the right to health.[196] Chapman identifies the guidance in *General Comment 14* that poor countries should receive international assistance and cooperation to enable them to fulfil core obligations as an important consideration.[197] Wolff argues that the obligation of wealthy states to assist less wealthy states to meet their core minimum obligations can address potential conflicts between the concepts of progressive realisation and core minimum obligations, but notes the potential difficulty of enforcing this obligation.[198] Pogge has developed the notion of the responsibility of states for other states in relation to one component of the right to health – access to essential medicines.[199] Despite this, the obligation of international cooperation is insufficiently recognised as a human rights obligation by states.[200]

International cooperation is also relevant to the responsibilities of institutions, which are considered in the case studies regarding the right to health.[201] The case studies will also consider another aspect of international cooperation: obligations that compel states to 'ensure that their actions as members of international organizations take due account of the right to health.'[202]

Human rights provide a unifying framework so that rights can be balanced against each other, when the right to health is implicated but other fundamental rights are also implicated, using existing mechanisms for resolving conflicts between human rights.[203] Importantly, human rights other than health can be implicated in relation to intellectual property law. In relation to both copyright and trade marks, human rights considerations often include a recognition that restricting these rights can restrict the right to freedom of expression.[204] As noted in Chapter 1, a developing issue in relation to trade marks is the role of a human right to property. This right is largely being developed in a European context. Australia is not party to any convention that

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[196] *General Comment 14*, UN Doc E/C.12/2000/4, [45].
[197] Chapman, above n 7, 205, considering. *General Comment 14*, UN Doc E/C.12/2000/4, [45].
[198] Wolff notes the potential conflict between a concept of progressive realisation and a concept of core minimum obligations that are set out in *General Comment 14*: Wolff, above n 85, 11.
[199] Thomas Pogge, 'Human Rights and Global Health: A Research Program' (2005) 36(1–2) *Metaphilosophy* 182.
[200] See discussion of problems with existing approaches in *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN GAOR, 67th sess, Agenda Item 70 (b), UN Doc A/67/302 (13 August 2012) [22]-[33].
[201] This is consistent with the recognition that 'intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities regarding the realization of the right to health:' *General Comment 14*, UN Doc E/C.12/2000/4, [42].
[202] Ibid [39].
[203] See Peggy Ducoulombier, 'Interaction between Human Rights: Are All Human Rights Equal?' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 39, 40–42; Lorenzo Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008) 19, 27–28.
[204] For a consideration of restrictions posed by both fields, see: Helfer and Austin, above n 36, 221–312.

binds it to protect the right to property, but the right to property is included in the foundational document, the *UDHR*.[205]

4.4 CONCLUSION

This chapter provides an overview of the right to health in international law and identifies key relevant concepts to the assessment of intellectual property legislation. This builds on findings from the previous chapters about the relationship between human rights and intellectual property, and the normative and legal tools which guide interpretation of that relationship where there is conflict. The identified differences between the fields of public health and the human right to health suggest benefits to adopting a human rights approach in analysis of Australian trade mark legislation.

Several features of the right to health are relevant to the case study analysis. States are required to engage with a broader range of actors than those engaged in public health practice in order to respect, protect and fulfil their obligations regarding the human right to health. The obligation to protect individuals from the activities of third parties who may threaten the realisation of the right to health compels states to consider how they address the activities of parties operating outside of the field of public health. These include those operating in the tobacco industry, when plain packaging legislation is considered, and those operating in counterfeiting industries, when anti-counterfeiting legislation is considered. The operation of these types of protection obligations demonstrates how states' tripartite obligations overlap with public health operations but can also have a broader focus. Human rights also engage a broader range of concerns regarding the impact of legislation and its operation on other human rights, given the understanding that human rights are interdependent and the violation of other human rights can negatively impact realisation of the human right to health. The human right to health further engages obligations of international cooperation. In many ways, a human right to health perspective complements a public health approach. However, the different normative value attached to human rights means that it could be a more effective tool for assessment that can be used in advocacy. Relevant evidence from a public health perspective in relation to the analysis of trade mark law can be incorporated into a human rights analysis. Other approaches to the analysis of the human rights impact of intellectual property in trade agreements suggest that a human rights impact analysis is an important part of understanding interactions between human rights and intellectual property. The systematic human rights analysis that will be undertaken in this thesis can contributed towards human rights impact assessment. The thesis will assess

[205] One way that the *UDHR* becomes binding is through customary international law: Khulekani Moyo and Sandra Liebenberg, 'The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability' (2015) 37(3) *Human Rights Quarterly* 707. See *UDHR* art 26.

human rights implications of legislation to determine the extent to which human rights impact necessitates the modification of intellectual property rights in the case studies and subsequent analysis.

The chapter sets out the methodological framework used in this thesis: a rights-based approach to the health implications of trade mark law. This uses the human right to the highest attainable standard of health enshrined in the *ICESCR* as a standard for analysis. The chapter considers the historical operation of the right and identifies continuing difficulties in establishing a minimum standard for a right like the human right to health that is subject to progressive realisation. A human rights-based approach to health, consistent with *General Comment 14*, can be contrasted with a public health approach. The approach taken in this thesis is largely inclusive of a public health approach and complementary to it, as individual rights cannot be separated from public health concerns. However, public health frequently functions in international law as an exception to certain obligations. States can choose to rely on public health exceptions. A human rights-based approach requires states to maintain consistency with standards of effectiveness, accountability, equality, non-discrimination and participation, as well as a recognition of the importance and interdependence of other human rights. This human rights framework is used to establish the methodological approach taken in the thesis to understanding the relationship between trade marks and human rights in Australia, particularly in relation to the human right to health. Part of this approach is a doctrinal analysis of Australian trade mark law and international intellectual property law. The following chapter will use human rights-based analysis of Australian law to assess how the right to health is protected in Australia.

The use of the right to health in the international movement seeking protection for the human rights of individuals impacted by the HIV/AIDS epidemic is the clearest example of how human rights dialogue can provide a strong normative basis for civil society and social movements. This may have greater normative force than public health to the extent that it emphasises the fundamental and inalienable nature of human rights. A human rights framework can provide unity for advocacy based in the protection of rights such as the right to health. The following chapter will assess the extent to which the recent introduction of parliamentary scrutiny legislation in Australia presents increased opportunities for advocacy and compliance that engage economic, social and cultural rights. Additional features of protection for human rights in Australia relevant to a rights-based approach to health will also be assessed so that the case studies can be considered in the context of Australian human rights protection.

CHAPTER FIVE HOW THE HUMAN RIGHT TO HEALTH IS PROTECTED IN THE AUSTRALIAN HUMAN RIGHTS FRAMEWORK

5.1 INTRODUCTION

This chapter considers how features of the framework developed in Chapter 4 apply to Australian legislation engaging the right to health. It considers the effectiveness of both the Australian human rights framework and specific protection of the right to health in Australia. The analysis in the chapter is useful to assess the broader existence of human rights culture in Australia. The analysis also identifies examples of interactions between health and intellectual property in Australia, which are important for understanding how a human rights culture can be developed for trade marks in Australia. Deficiencies in effective protection of human rights within domestic jurisdictions are relevant to the concern identified in Helfer and Austin's Welfare Preservation Questions that other structural limitations on the realisation of rights should be identified before intellectual property rights are modified.[1]

Protection of the human right to health is an important concern for both case studies examined in this thesis. This chapter considers whether Australian approaches to health are consistent with human rights-based principles of progressive realisation, international cooperation and assistance, interdependent and interrelated rights, and participation and accountability identified in Chapter 4. This assessment contributes to previous analysis of the right to health in Australia[2] by using detailed analysis of the Australian Joint Parliamentary Committee on Human Rights (AJPCHR) materials to assess approaches to implementation of the right to health.[3] It identifies

[1] Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 520. See Chapter 1, Section 1.3.3.3.

[2] See, eg, Mariette Brennan, 'Good, the Bad and the Unhealthy: An Assessment of Australia's Compliance with the International Right to Health' (2015) 39(2) *University of Western Australia Law Review* 373; Helen Potts, 'The Right to Health in Public Health: Is This a New Approach?' (2008) 15(5) *Journal of Law and Medicine* 725; Bernadette McSherry and Kay Wilson, 'Detention and Treatment Down Under: Human Rights and Mental Health Laws in Australia and New Zealand' (2011) 19(4) *Medical Law Review* 548; Bernadette McSherry and Lisa Waddington, 'Treat with Care: The Right to Informed Consent for Medical Treatment of Persons with Mental Impairments in Australia' (2017) 23(1) *Australian Journal of Human Rights* 109; Ian Freckelton, 'Health and Human Rights: Challenges of Implementation and Cultural Change' (2008) 15(5) *Journal of Law and Medicine* 794. Cf approach taken in Terry Carney, 'Human Rights and Health Law' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 2nd ed, 2014) 103.

[3] Goldblatt has recently used AJPCHR materials to consider protection of economic, social and cultural rights for women, and has recognised the right to health as a relevant consideration, but the examples she uses from the materials do not concentrate on realisation of the right to health: Beth Goldblatt, 'Claiming Women's Social and Economic Rights in Australia' (2017) 23(2) *Australian Journal of Human Rights* 261.

growing use of rights discourse in relation to the right to health in Australia that extends beyond the traditional emphasis on vulnerable groups. However, external monitoring reports on Australia's implementation of the right to health, and assessment in the literature of standards central to a human rights-based approach to the right to health indicate that significant obstacles remain for comprehensive protection of the right to health in Australia. This information provides context for the human rights-based analysis of health in the case studies.

5.2 AUSTRALIAN FRAMEWORK FOR PROTECTION OF HUMAN RIGHTS AND THE RIGHT TO HEALTH

Human rights are protected in several ways in Australia. The approach to protection is limited by failure to observe important human rights standards. Many of these standards were identified in Chapter 4. Primary criticisms of the approach to human rights protection in Australia include the lack of justiciable constitutional protection for many human rights and additional failures to provide legislative protection for economic, social and cultural rights.

5.2.1 Australian Human Rights System

In Australia, legislation can be used to protect human rights[4] but there are only a few examples of constitutional protection for human rights.[5] There is some recognition of specific rights in certain pieces of legislation. This includes legislation prohibiting discrimination on the grounds of age, gender, sex and race[6] and some common law principles.[7] Where not restricted by statute,

[4] Baker and Taylor reference examples of partial implementation in federal law and state law: Richard Baker and Vanessa Taylor, 'The Right to Health: A Right on the Rise' (2013) 19 *Journal of Jurisprudence* 275, 283.

[5] Peter Bailey argues that certain constitutional safeguards are similar to those found in the *Universal Declaration of Human Rights* ('*UDHR*'), the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*') and the *International Covenant on Civil and Political Rights* ('*ICCPR*'). Relevant provisions identified by Bailey in addition to the basic guarantee of the rule of law are sections 51(xxiiiA), 51(xxxi), 75, 80, 92, 116 and 117 of the *Australian Constitution*: Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 1st ed, 2009). French also notes the importance of constitutional judicial powers and the enshrined rule of law and identifies significance for human rights in the electoral and franchise provisions of the *Constitution*: Robert French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (2015) 42(2) *Brief* 14, 14, 20. French also notes the implied constitutional freedom of political communication: Robert French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons (Part Two)' (2015) 42(3) *Brief* 30, 31–32. See also protection available for Victoria and Australian Capital Territory respectively in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).

[6] See *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth). For an example of state protection against discrimination, see *Anti-Discrimination Act 1977* (NSW). French notes that the Commonwealth has not legislated to give effect to *ICESCR* or *ICCPR* under the external affairs power: French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons (Part Two)', above n 5, 34.

provisions of international conventions have some use as a guide for developing the common law.[8] This reflects the dualist approach to incorporation of international agreements into Australian law, which means that many international human rights agreements remain largely unincorporated in Australian law.[9] There is no effective regional protection mechanism for the Asia-Pacific that might change this.[10]

Limited incorporation of human rights agreements into legislation, combined with the absence of a constitutionally enshrined bill of rights in Australia, has largely restricted the ability of individuals in Australia to enforce their human rights.[11] Even where there is some protection of these rights in human rights charters in Victoria and the Australian Capital Territory (ACT), these are limited. For example, in the ACT, the *Human Rights Act 2004* provides for a review of the actions of government agencies[12] or a declaration of incompatibility of a statute with human rights. [13] The legislation also requires interpretation of other laws consistent with those rights, so far as it is possible to do so.[14] This cannot invalidate a statutory provision. Instead, the Attorney-General must respond to the declaration in writing and parliament may then address

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[7] See list of rights protected by common law in James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 1–50. See list provided by Corrin that includes right of access to courts, immunity from deprivation of property without compensation, legal professional privilege, privilege against self-incrimination, privilege from extension of scope of penal statute by a curt, freedom from extension of governmental immunity by a court, immunity from interference with freedom of religion and right to access legal counsel when accused of a serious crime: Jennifer Corrin, 'Australia: Country Report on Human Rights' (2009) 40(1) *Victoria University of Wellington Law Review* 37, 42. French adds: no deprivation of liberty, except by law; right to procedural fairness when affected by the exercise of public power and freedom of speech and of movement: French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons (Part Two)', above n 5, 32. See also Rosalind Croucher, 'The Common Law and the Protection of Rights, Freedoms and Privileges: Insights from the ALRC Freedoms Inquiry' (2016) 22 *James Cook University Law Review* 1, 6, 8–12; Carolien van Ham and Louise Chappell, 'Democracy and Human Rights: A Tripartite Conceptual Framework' (2017) 23(2) *Australian Journal of Human Rights* 143, 156.

[8] McSherry and Waddington, above n 2, 117. Van Ham and Chappell note that 'in reality Australian judges have been cautious about advancing human rights through common law': van Ham and Chappell, above n 7, 156.

[9] McSherry and Waddington explain the negative implications of this for the implementation of human rights contained in the *Convention on the Rights of Persons with Disabilities*: McSherry and Waddington, above n 2, 114. See also *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN GAOR, 61st sess, Agenda Item 67 (b), UN Doc A/Res/61/106 (entered into force 3 May 2008).

[10] McSherry and Waddington, above n 2, 113–114.

[11] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (Readhowyouwant.com Limited, 2017) 182–197.

[12] *Human Rights Act 2004* (ACT) s 40B.

[13] For example, the *Human Rights Act 2004* (ACT) operates so that courts may declare incompatibilities between legislative instruments and human rights and the Attorney-General must present these declarations of incompatibility to the legislature. This does not mean that the legislature is compelled to change the relevant legislation. The legislation also requires the Attorney-General to prepare *Statements of Compatibility* in relation to new bills before parliament stating whether or not they are compatible and, if they are not compatible, the ways that they are not compatible: ibid s 37.

[14] Ibid s 30.

the incompatibility, although it is not required to do so.[15] The legislation also provides that public authorities must act consistently with the human rights protected therein.[16] However, the protection that these instruments provides for economic, social and cultural rights is extremely limited.[17] There is no protection for the human right to health. The strength of the mechanisms to effect change is also problematic[18] as failure to comply with the statements of compatibility does not invalidate proposed legislation[19] and the legislation also provides for limitations to human rights.[20] In some cases, state or territory charters can be used to indirectly protect the right to health through other protected rights, such as the right to family.[21]

Limitations on the recognition of economic, social and cultural rights have been compounded by the exclusion of the *International Covenant on Economic, Social and Cultural Ri*ghts ('*ICESCR*')[22] from the mandate of Australia's national human rights institution[23] and Australia's failure to ratify the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*,[24] which establishes an individual complaint mechanism. In contrast, it is possible for complaints against Australia to be brought by individuals to the Human Rights Committee regarding breaches of civil and political rights.[25] Economic, social and cultural rights are not frequently recognised as justiciable rights in countries like Australia with a common law legal system.[26] Value is placed on the importance of economic, social and cultural rights, but not as human rights.[27] While some of Australia's international human rights obligations have clearly been translated into statute, there has been a general reluctance to translate economic, social and cultural rights into legislation.[28] There is some protection from discrimination in key areas, such

[15] Ibid s 33.
[16] Ibid s 40B.
[17] See ibid ss 27, 27A. See also Goldblatt, above n 3, 267; Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1) *UNSW Law Journal* 193; Rebecca Young, 'Justiciable Socio-Economic Rights? South African Insights into Australia's Debate' (2008) 15 *Australian International Law Journal* 181.
[18] Goldblatt uses amendments to social security to demonstrate this point: Goldblatt, above n 3, 274–275.
[19] *Human Rights Act 2004* (ACT) s 39.
[20] Ibid s 28. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
[21] Harper, Ghinea and Lipworth cite *Castles v Secretary*, Department of Justice: C Harper, N Ghinea and W Lipworth, 'The Right to Health: Implications for the Funding of Medicines in Australia' (2017) 24(3) *Journal of Law and Medicine* 640, 647.
[22] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[23] *Australian Human Rights Commission Act 1986* (Cth) ss 3, 11.
[24] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted 10 December 2009, 869 UNTS 34 (entered into force 5 May 2013).
[25] See, eg, Human Rights Committee, *Views: Communication No 2237/2013*, 120th sess, UN Doc CCPR/C/120/D/2237/2013 (9 October 2017, adopted 13 July 2017).
[26] Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62(4) *American Journal of Comparative Law* 1043, 1057.
[27] Andrew Byrnes, 'The Protection and Enjoyment of Economic Social and Cultural Rights' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2012) 125, 128–130.
[28] Ibid 139–140.

as provision of housing and other retail services,[29] but there is no positive right to housing or to health. There is environmental protection legislation[30] but no justiciable right to water or to food.

Controversy remains as to whether or not court-based protection of human rights is desirable in Australia.[31] Australian exceptionalism to adopting a Constitutional Bill of Rights or a national, statutory Charter of Rights has been criticised[32] but this approach does not seem likely to change in the near future.[33] The most recent recommendation that Australia adopt a bill of rights[34] was not adopted by either of the two major political parties and no referendum on incorporating a bill of rights into the Australian Constitution has ever occurred.[35] Instead, another recommendation to introduce human rights scrutiny legislation was adopted and implemented.[36] Campbell and Morris argue that the scrutiny of legislation is beneficial for a democratic model,[37] which suggests that rights are best protected through democratic processes rather than by judicial application of limitations.[38]

Van Ham and Chappell analyse overlapping weaknesses in vertical, horizontal and diagonal accountability in their consideration of the relationship between democracy and human rights.[39] They cite a range of weaknesses in vertical, horizontal and diagonal democratic accountability in Australia that prevent the protection of human rights for many vulnerable groups.[40] A fundamental reason for failures in horizontal accountability is the absence of justiciable human

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[29] See, eg, *Age Discrimination Act 2004* (Cth) s 28.
[30] See, eg, *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).
[31] French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons (Part Two)', above n 5, 34.
[32] See Gillian Triggs, 'Creating a Human Rights Culture' (2014) 17 *Southern Cross University Law Review* 59; Dianne Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights' (2001) 26(5) *Alternative Law Journal* 219. Goldblatt notes that this is particularly so for economic and social rights: Goldblatt, above n 3, 267. See Williams and Reynolds, above n 11, 88–114. See also Young, above n 17.
[33] van Ham and Chappell, above n 7, 154–157. See Triggs, above n 32.
[34] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) xxxiv <http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report.html>.
[35] Byrnes, 'The Protection and Enjoyment of Economic Social and Cultural Rights', above n 27, 130–131.
[36] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); Australian Government Attorney-General's Department, *Australia's Human Rights Framework* (April, 2010) <https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>.
[37] Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Australian 'Human Rights (Parliamentary Scrutiny) Act 2011' (2015) 34(1) *University of Queensland Law Journal* 7, 7–10. Cf criticisms by Williams and Reynolds in Williams and Reynolds, above n 11, 130–137.
[38] Campbell and Morris, above n 37, 7–10, 8.
[39] van Ham and Chappell, above n 7.
[40] Ibid 154.

rights for individuals.[41] Failure to recognise minority groups in elections is a failure in vertical accountability that is reinforced by weaknesses in horizontal accountability resulting from 'the absence of an entrenched or statutory bill of rights, leaving the executive and legislature with primary control over human rights determinations.'[42] Van Ham and Chappell conclude that, historically, voters have not been willing to punish governments for breach of minority rights in the same way that they punish breaches of majority rights, and this influences government policy. [43] A clear example of this is popular response to government policies regarding asylum seekers.[44] Van Ham and Chappell's analysis is important to understanding the extent of protection for the right to health in Australia, given the many difficulties identified in relation to the protection of the right to health for vulnerable groups.

5.2.2 Protecting the Right to Health in Australia

The right to health enshrined in *ICESCR* is not a constitutional protection enforceable by individuals in Australia. There is extremely limited constitutional consideration of health, limited to quarantine and provision of medical and dental services and the prohibition on conscription of those services.[45] Guiding principles in the *Australian Charter of Healthcare Rights* recognise that 'everyone has a right to the highest possible standard of physical and mental health [in Australia].'[46] This may be influential but the *Charter* is not legally binding.[47] Carney argues that, because States and Territories have governance over health laws and there is little common law protection for health, this results in fragmentation and complication.[48] Opportunities for asserting individual rights to health are limited.[49] Carney emphasises that it is not that there are no human rights implications, or an absence of human rights bases for normative evaluation of the law and its operation, but that these are frames that lie outside the law.[50]

[41] Ibid 155.
[42] Ibid 160.
[43] Ibid.
[44] Ibid 153–154, citing George Williams, 'The High Court, the Constitution and Human Rights' (2015) 21(1) *Australian Journal of Human Rights* 1, 6.
[45] Brennan, above n 2, 373, 378.
[46] Australian Commission on Safety and Quality in Healthcare, *Australian Charter of Healthcare Rights* (July 2008) <https://www.safetyandquality.gov.au/wp-content/uploads/2012/01/Charter-PDf.pdf>.
[47] Freckelton, above n 2; Harper, Ghinea and Lipworth, above n 21, 646. Baker and Taylor suggest that that the limited and non-binding nature of the *Charter* is one of the reasons that the right to health is not incorporated into Australian law: Baker and Taylor, above n 4, 283–285.
[48] Carney, above n 2, 103.
[49] Ibid 106.
[50] Ibid 107.

Australia's failure to expressly use human rights discourse in relation to matters involving health does not mean that the human right to health is frequently violated in Australia.[51] While constitutional inclusion of these rights is an important means for measuring implementation of economic, social and cultural rights such as the right the health, it is not the only mechanism that is relevant to implementation of the right to health.[52] In her assessment of Australian healthcare systems, Brennan argues that Australian legislation is largely compliant with the requirements of the right to health, as set out in *General Comment 14*,[53] despite an absence of direct legislative protection for the international right to health.[54] However, she recognises that an absence of rights-focused compliance mechanisms poses a risk and that there are a number of issues that are potentially problematic for Australian implementation of the right to health.[55] The impact of these structural limitations appears to be a continuing failure to protect the right to health of vulnerable groups.[56] Although these failures are recognised by external monitoring mechanisms, the 'toothless' nature of their associated enforcement mechanisms is one reason that these criticisms do not effect change.[57]

5.2.3 Accountability Mechanisms

One of the most important features of a human rights approach to health is the use of monitoring and accountability mechanisms. Potts identifies this as a key difference between a right to health approach and a public health approach.[58] Problematically for accountability, Australia has been criticised for failing to meet its 'national health policy which includes a detailed plan for the full realisation of the right to health.'[59] The absence of such a policy document makes it difficult for domestic and international accountability methods to assess whether there is evidence of

[51] Brennan, above n 2, 373–375.
[52] See range of approaches considered in Helena Alviar García, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015).
[53] Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) ('*General Comment 14*').
[54] Brennan, above n 2.
[55] Ibid 415–417.
[56] Ibid. See also Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, 61st sess, 47th mtg, UN Doc E/C.12/AUS/CO/5 (11 July 2017, adopted 23 June 2017) ('*Concluding Observations on the Fifth Report*').
[57] Goldblatt, above n 3, 267. Carney notes that Australia remains subject to the scrutiny of UN treaty bodies but notes that CESCR remains outside the remit of the Australian Human Rights Commission: Carney, above n 2, 107.
[58] Potts, above n 2, 741.
[59] Anand Grover, *Report of the Special Rapporteur to the Human Rights Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Addendum: Mission to Australia*, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20/Add.4 (3 June 2010) [100] ('*Report of the Special Rapporteur: Mission to Australia*'). See *Concluding Observations on the Fifth Report*, UN Doc E/C.12/AUS/CO/5.

progressive realisation of the right to health.[60] Instead, the parliamentary scrutiny processes conduct piecemeal assessments, which will be considered in more detail in Section 5.3. This is amplified by the absence of a separate checking mechanism through binding regional human rights systems.

5.2.3.1 International accountability

Although the standard of Australian healthcare is recognised as high, external monitoring identifies problems with the implementation of the right to health generally and specific problems for vulnerable groups, most notably Indigenous people.[61]

In a country report in 2008, the Special Rapporteur on Health praised the quality of the Australian healthcare system. [62] However, he identified serious deficiencies in relation to rights to health of Indigenous people and made numerous recommendations focused on the health rights of Indigenous people.[63] This section details how those concerns have been echoed in other monitoring reports. Other relevant recommendations by the Special Rapporteur include concern about the absence of constitutionally enforceable human rights, the need to 'develop a national health policy which includes a detailed plan for the full realization of the right to health,' the need to give priority for human rights education and the need to address the health impacts of 'the qualitative and quantitative inadequacy of educational services for remote communities.' [64]

The emphasis on Australia's failure to protect the health of Indigenous people is a feature of the reports of relevant treaty-monitoring bodies, but reports on Australia also recognise many other direct and indirect problems for realisation of the right to health in Australia. A number of recommendations were made by the Committee on Economic, Social and Cultural Rights (CESCR) in relation to Australia's right to health obligations regarding protection of vulnerable groups.[65] Several other general recommendations are also relevant to health. These include the limited justiciability of *ICESCR* rights,[66] Australia's failure to meet its existing commitments regarding official development assistance,[67] and the failure to include the *ICESCR* in the

[60] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014) 1041–1059.
[61] *Report of the Special Rapporteur: Mission to Australia*, UN Doc A/HRC/14/20/Add.4.
[62] Ibid [1].
[63] Ibid.
[64] Ibid [100].
[65] *Concluding Observations on the Fifth Report*, UN Doc E/C.12/AUS/CO/5, [43]-[50]. These included limited progress in meeting health targets outlined in the *Closing the Gap Strategy for Indigenous Persons*; the need to improve mental health protection by revising mental health laws and recognising the mental health impacts of policies regarding indigenous persons and asylum seekers; the need to increase efforts to combat obesity; and treatment of children born with intersex variations.
[66] Ibid [5]-[6].
[67] Ibid [7]-[8].

mandate of the Australian Human Rights Commission.[68] The interrelated nature of economic, social and cultural rights also means that numerous other recommendations made by CESCR can implicate the right to health.[69] Similarly, several recommendations recently made by the Human Rights Committee in relation to Australia's obligations regarding civil and political rights are also relevant to health.[70] Interrelated rights were also identified in recommendations following Australia's Universal Periodic Review (UPR).[71] Specific recommendations in the UPR regarding the right to health focused on: improving access of Indigenous people to healthcare; access of all children to all levels of quality health services (including Indigenous children, migrant children and children in remote or rural areas); and the need for legislative prohibition of the sterilisation of children and of adults with disability, in the absence of prior, fully informed and free consent, except where there is a serious threat to life or health.[72]

Human rights-focused analysis of health legislation and policy in Australia has largely[73] concentrated on Indigenous issues,[74] mental health issues,[75] and issues affecting refugees and asylum seekers,[76] issues identified as important by the CESCR in its concluding observations on Australia's periodic reviews.[77] However, broader concerns about the justiciability of rights and

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[68] Ibid [9]-[10].

[69] Examples include the need to address more effectively: climate change [11]-[12]; the negative impact of business activities on human rights including private businesses acting under Australia's jurisdiction abroad and companies operating in Australia [13]-1[4]. The report also notes the need to recognised the needs of vulnerable groups and more effectively address: significant disadvantage of Indigenous People [15]-[16]; the implementation of the National Disability strategy [19]-[20]; inequality between men and women [21]-[22], [25]-[26], unemployment [23]-[24]; working conditions for migrant workers [27]-[28]; insufficient provision of income support benefits [31]-[32]; domestic violence [33]-[34]; violence against persons with disabilities [35]-[36]; and poverty, including child poverty [39]-[40]. Additionally, important are: the need to halt offshore processing [17]-[18]; social security benefits for asylum seeker to permit an adequate standard of living [32]; and family reunification [37]-[38]. See ibid.

[70] Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017, adopted 3 and 6 November 2017) [22], [24], [26], [28], [32], [34], [36], [38], [40], [42], [44], [50] ('*Concluding Observations on the Sixth Report*').

[71] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016, adopted 12 November 2015).

[72] Ibid.

[73] For an excellent analysis of the human rights compliance of Australia's public and private health care systems, see Brennan, above n 2.

[74] Corrin, above n 7, 51.

[75] Bernadette McSherry, 'Mental Health and Human Rights: The Role of the Law in Developing a Right to Enjoy the Highest Attainable Standard of Mental Health in Australia' (2008) 15(5) *Journal of Law and Medicine* 773; McSherry and Wilson, above n 2.

[76] Fiona Martin and Terry Hutchinson, 'Mental Health and Human Rights Implications for Unaccompanied Minors Seeking Asylum in Australia' (2005) 1(1) *Journal of Migration and Refugee Issues* 1.

[77] Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (22 May 2009); Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 55th mtg, UN Doc E/C.12/1/Add.50 (11 September 2000); *Concluding Observations on the Fifth Report*, UN Doc E/C.12/AUS/CO/5.

Australia's failure to implement a national health policy incorporating detailed plans for the realisation of the right to health remain important to considerations of Australian implementation of a rights-based approach to health.

5.2.4 Domestic Accountability

Australia's National Human Rights Institution (NHRI) is called the Australian Human Rights Commission (AHRC). Problematically, the *ICESCR* is not included as an agreement that the AHRC should monitor in its mandate.[78] The AHRC uses related human rights agreements to consider economic, social and cultural rights, consistent with its mandate to monitor those agreements.[79] This means that the emphasis of the AHRC's monitoring of the right to health is primarily in relation to the health of vulnerable groups or where it relates specifically to civil and political rights or the rights recognised in the *Convention Against Torture*.[80]

More recently there has been strong criticism of the Australian Government's treatment of AHRC, which has been characterised as an attack on its integrity and independence.[81] *Forgotten Children* was an AHRC report on children of asylum seekers and refugees in detention that was strongly critical of government policy spanning two different administrations.[82] The Australian Government's reaction to *Forgotten Children* included direct attacks on the integrity of the President of the AHRC and the security of her position.[83] This appears to be inconsistent with Australia's obligations pursuant to the *Paris Principles*.[84] Brodie argues that NHRIs encourage participation in making governments accountable for their human rights obligations.[85] This is supported by van Ham and Chappell, who argue that the inquiry function of the AHRC provides the most impact for protection of human rights and awareness of human rights abuses.[86] Consequently, government mistreatment of the AHRC raises participation concerns, given the limited opportunities for individuals to participate in scrutiny of the government's human rights

[78] *Concluding Observations on the Sixth Report*, UN Doc CCPR/C/AUS/CO/6, [9]-[10]; *Australian Human Rights Commission Act 1986* (Cth) ss 3, 11.
[79] Goldblatt suggests it is arguable that the AHRC has responsibility for social and economic rights as part of its function: Goldblatt, above n 3, 268.
[80] The Forgotten Children Report demonstrates how the AHRC engages with these overlapping obligations: Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 79–86.
[81] van Ham and Chappell, above n 7, 157. See Meg Brodie, 'Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire' (2015) 38(3) *UNSW Law Journal* 1215.
[82] Australian Human Rights Commission, above n 80. See Brodie, above n 81.
[83] Brodie, above n 81, 1215–1216.
[84] Ibid 1255–1260.
[85] Ibid 1260.
[86] van Ham and Chappell, above n 7, 156–157.

obligations.[87] This is reinforced by broader criticisms of government willingness to implement recommendations of the AHRC.[88]

5.2.4.1 Non-Government Organisations

Van Ham and Chappell recognise the important contribution of civil society organisations to diagonal accountability. Non-Government Organisations (NGOs) have two key functions in Australia: advocating for support on human rights issues and supporting those who are in danger of having rights abused.[89] Goldblatt highlights the important role of NGOs in advocating for economic and social rights.[90] She identifies the significance of NGO shadow reports to recommendations made in CESCR's 2017 report on Australian compliance with *ICESCR*.[91] The majority of NGOs advocating for health rights often emphasise the rights of specific vulnerable groups.[92] This combines with the AHRC's mandate limitations to further limit the focus on right to health concerns that are not specific to vulnerable groups. Advocacy of this nature is more likely to be within a public health paradigm.[93]

5.2.5 Legislative Monitoring

There are several legislative mechanisms within Australian law, particularly for prospective legislation, that have the potential to protect human rights.[94] Parliamentary human rights scrutiny is specifically focused on human rights[95] but the work of the Joint Senate Committee on Treaties (JSCOT) is relevant as it analyses the impact of Australia's international agreements

[87] Brodie, above n 81, 1259–1260.
[88] Ibid 1245–1247.
[89] van Ham and Chappell, above n 7, 159.
[90] Goldblatt, above n 3, 269.
[91] Ibid 267.
[92] See National Association of Community Legal Centres, Kingsford Legal Centre and Australian NGO Coalition, *United Nations Committee on Economic, Social and Cultural Rights. Review of Australia Fifth Periodic Report under the International Covenant on Economic, Social and Cultural Rights: Australian NGO Coalition Submission* (May 2017) 87–102. See also National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre, *Freedom Respect Equality Dignity: Action - NGO Submission to the UN Committee on Economic, Social and Cultural Rights. Australia* (April 2008) 12, 115–128 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59a8f38d893fc06716974a6a/1504244654021/Final.pdf>.
[93] See, eg, Belinda Townsend, Deborah Gleeson and Ruth Lopert, 'Pharma's Next Frontier? New Threats to Public Health in the Regional Comprehensive Economic Partnership Agreement' (2016) 40(1) *Australian and New Zealand Journal of Public Health* 5.
[94] See French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons (Part Two)', above n 5; Triggs, above n 32, 69.
[95] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

before they enter into legislation.[96] The Scrutiny of Bills Committee has also identified potential incompatibilities between human rights and legislation.[97]

5.2.5.1 Parliamentary scrutiny

Economic, social and cultural rights, as well as civil and political rights, have gained increasing recognition in explanatory materials following the introduction of human rights parliamentary scrutiny of new legislation.[98] Other matters relating to human rights can be referred to the parliamentary scrutiny committee. [99] Most new bills must be accompanied by a statement of compatibility that assesses the compliance of the legislation with human rights.[100] Scrutiny legislation lists seven key human rights treaties for the joint parliamentary committee to consider in its analysis of proposed pieces of legislation, existing Acts and referred matters.[101] The list includes *ICESCR*, as well as other treaties that explicitly provide for the protection of economic, social and cultural rights in specific contexts.[102] Initial analysis identified evidence of increased awareness of and protection for human rights.[103] However, there were also criticisms of several aspects of the function, including reports not being issued until after the legislation had passed. [104]

The Statement of Compatibility is intended to show that the member of parliament responsible for the bill has considered the implications for designated human rights of the piece of legislation.[105] Despite this, Rajanayagam argues that there are considerable differences in the depth of consideration that is actually given to human rights for different bills, and criticises the

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[96] Joint Standing Committee on Treaties, Parliament of Australia, *Resolution of Appointment* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Resolution>.

[97] The role of the Scrutiny of Bills Committee is 'to assess legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary propriety.' Senate Standing Committee for the Selection of Bills, Parliament of Australia, *Selection of Bills Committee*, No 10 of 2011 (18 August 2011).

[98] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) pts 3-4. See discussion of effectiveness in Dan Meagher, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and the Courts' (2014) 42(1) *Federal Law Review* 1; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility Under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *UNSW Law Journal* 1046. Cf criticisms by Williams and Reynolds in Williams and Reynolds, above n 11, 130–137. Freckelton suggests a potential change in attitude to human rights with the introduction of *State Charters of Rights*: Freckelton, above n 2, 799.

[99] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(c).

[100] Ibid pt 3.

[101] Ibid s 3.

[102] Ibid.

[103] Campbell and Morris, above n 37, 25–27.

[104] Ibid.

[105] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). For example, a subsequent Plain Packaging Regulation recognised implications for both freedom of expression and the human right to health and argued that the restrictions that the regulation imposed on freedom of expression were consistent with the requirements of international human rights law: Explanatory Statement, Tobacco Plain Packaging: Amendment Regulation 2012 (No 1) (Cth).

absence of legal consequences for a failure to submit these statements of compatibility with legislation.[106] Williams and Reynolds recognise serious shortcomings regarding power imbalances between the lower house of parliament and the executive arm of power, and the absence of judicial supervision of human rights compliance.[107] In cases of amending legislation, the analysis focuses narrowly on the amendments rather than the broader human rights implications of legislation. Goldblatt criticises the absence of participation of relevant actors in scrutiny mechanisms and the lack of effective implementation of inquiry findings where participation can occur.[108] These are consistent with other criticisms of the effectiveness of the mechanism in effecting legislative changes that recognise human rights obligations.[109]

Despite these shortcomings, the fact that the right to health has been noted and considered on a number of occasions in explanatory legislative material represents promising ongoing recognition of the relevance of the human right to health to a number of areas of intellectual property.[110] Section 5.3 of this chapter uses examples of this recognition to understand whether they provide evidence of compatibility with human right to health standards and intersections between intellectual property legislation and human rights.

5.2.5.2 JSCOT

JSCOT is important because it conducts Senate inquiries that consider the potential impact of treaties once Australia has agreed to them, and its findings may not be consistent with the government treaty impact analysis prepared following agreement to treaties.[111] JSCOT consults the public, particularly expert members of the public, who can be invited to give oral evidence. Human rights implications of proposed agreements can be addressed in consultation.[112] Consultation is potentially important in the case of trade agreements where there has not been widespread consultation and there are serious concerns about the transparency of the

[106] Rajanayagam, above n 98, 1050.
[107] In recognition of these significant limitations to the effectiveness of the legislation, Williams and Reynolds recommend some procedural changes that could improve the operation and effectiveness of the legislation, including minimum time periods to permit analysis by the Committee before Bills are debated. Williams and Reynolds argue that for this reason a Bill of Rights should be revisited: George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 507. See also Williams and Reynolds, above n 11, 118–137.
[108] Goldblatt, above n 3.
[109] See Williams and Reynolds, above n 107; Williams, above n 44.
[110] See, eg, Explanatory Statement, Tobacco Plain Packaging: Amendment Regulation 2012 (No 1) (Cth).
[111] Cf Australian Government Department of Foreign Affairs and Trade, *National Interest Analysis [2011] ATNIA 31: Anti-Counterfeiting Trade Agreement* (2011) [5]-[12] to the recommendation of JSCOT in Joint Standing Committee on Treaties, Parliament of Australia, *Report 126: Anti-Counterfeiting Trade Agreement* (June 2012) 60–62.
[112] See Matthew Rimmer, Supplementary Submission No 1.1 to Joint Senate Committee on Treaties, *Anti-Counterfeiting Trade Agreement 2011*, 21 November 2011, 7-8.

agreement.[113] The intellectual property provisions of trade agreements engage health concerns that can be relevant to JSCOT scrutiny. For example, JSCOT's report on the *Australia-United States Free Trade Agreement* (AUSFTA) identified widespread concerns about the health impacts of obligations in relation to pharmaceuticals.[114] This prompted recommendations regarding further consultation on relevant regulations.[115] Although the concerns were not recognised as human rights concerns by JSCOT in its report, they can be clearly linked to right to health obligations to provide access to medicines.[116] These concerns did not prevent JSCOT from recommending that the treaty was in the national interest. Concerns about human rights impacts can potentially be identified by JSCOT, but this example suggests that recognition of analogous concerns does not necessarily change the recommendation to adopt the treaty or effect change in the terms.

JSOCT scrutiny occurs for treaties with high visibility. Examples that will be considered in this thesis include the *Trans-Pacific Partnership*, the *Anti-Counterfeiting Trade Agreement* and the *China–Australia Free Trade Agreement*. However, there are also treaties that are not considered sufficiently significant to attract in-depth enquiries. For example, Australia has become party to several agreements under the auspices of the World Customs Organisation. A number of these are classified as minor treaties and do not attract Senate enquiries.[117] In some cases, the relevant agreements are consistent with existing practices, such as the *1999 Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures*, which necessitated only two minor amendments as Australian Customs Practices already met or exceeded the minimum requirements set out in the agreement. These types of agreements are relevant to the operational aspects of coordination of customs authorities. However, Chapter 9 of this thesis will identify the potential for them to address substantive and procedural issues that are relevant to human rights.

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[113] See concerns identified in Joint Standing Committee on Treaties, Parliament of Australia, *Report 126*, above n 111, 45–55.
[114] Joint Standing Committee on Treaties, Parliament of Australia, *Report 61: The Australia – United States Free Trade Agreement* (June 2004) 276–278. See discussion of some concerns in Michael Blakeney, 'The Pacific Solution: Australia and Negotiation of the Trans-Pacific Partnership Agreement (TPPA)' (2014) 37(2) *University of Western Australia Law Review* 123, 140–141.
[115] Joint Standing Committee on Treaties, Parliament of Australia, *Report 61*, above n 114, 92.
[116] Ibid 83-95, 247-252.
[117] See, eg, the characterisation of an amendment to the *Convention Establishing a Customs Cooperation Council* as a minor treaty action in: Joint Standing Committee on Treaties, Parliament of Australia, *Report 110: Treaties Tabled on 18, 25 (2) and 26 November 2009 and 2 (2) February 2010* (2010) app C. See also Andrew Byrnes, 'Time to Put on the 3-D Glasses: Is There a Need to Expand JSCOT's Mandate to Cover "Instruments of Less than Treaty Status"?' (2015) 22 *Australian International Law Journal* 1.

5.2.6 Synthesis

The absence of a constitutional framework of justiciable protection for human rights has serious implications for participation and accountability in relation to human rights in Australia. Rights to health may be incorporated in limited ways in legislation but the constitutional limitations are exacerbated by the failure to include the *ICESCR* in the mandate of the AHRC. There are also problems regarding the appropriateness of the Australian Government's treatment of the AHRC as a national human rights institution. These types of limitations have been identified by international external monitoring bodies, including the Special Rapporteur on Health, the CESCR and the Human Rights Committee, which also focus on serious limitations in the protection of the right to health for vulnerable groups in Australia. Goldblatt criticises the effectiveness of international accountability mechanisms but notes their importance, given the limitations of domestic accountability mechanisms in Australia.[118] These limitations include problems with the effectiveness of JSCOT in recognising the seriousness of human rights implications of international treaties.[119]

There are serious concerns about the limited incorporation of the right to health into Australian legislation, which severely restricts accountability. Problematically, the effectiveness of the AJPCHR scrutiny mechanisms in securing protection for human rights has been questioned. However, given the serious limitations for human rights protection identified in this section, parliamentary scrutiny needs to continue to be considered as it can be an important tool in building a human rights culture. The following section will assess the extent to which some features of a rights-based approach to health are being recognised through parliamentary scrutiny. The literature considering realisation of the human right to health in Australia recognises that there are enormous inequalities for realisation of health in the Australian system.[120] The previous focus in analysis of human rights implications of health legislation and policy on indigenous issues,[121] mental health issues,[122] and issues affecting refugees and asylum seekers[123] reflects the continuing need for rights-based approaches to public health systems to

[118] Goldblatt, above n 3, 267.
[119] See Rimmer, above n 112, 7–8; Joint Standing Committee on Treaties, Parliament of Australia, *Report 126*, above n 111.
[120] Grover, above n 59, 9 [37].
[121] Corrin, above n 7, 51.
[122] McSherry, above n 75; McSherry and Wilson, above n 2.
[123] Martin and Hutchinson, above n 76.

address the underlying determinants of health.[124] Hunt has emphasised poverty, which is a common but not necessarily universal characteristic of vulnerable groups.[125]

5.3 Evidence of a Rights-Based Approach to Health in Australia

This section uses important standards identified in Chapter 4 to understand protection of the right to health in Australia and applies interpretative guidance from CESCR. It focuses on legislative materials and journal articles. Hunt has identified the importance of poverty to these protection standards.[126]

The section will consider the primary mechanism for recognition of human rights in legislative explanatory materials: human rights impact statements for proposed federal legislation as part of parliamentary human rights scrutiny.[127] A review of Parliamentary Scrutiny concluded reports between 2012 and 2016 (and related reports and correspondence) provides a body of analysis of the consistency of new legislation with the human right to health in Australia. Although there have been well-based criticisms of their effectiveness, these reports give important insights into the approach taken to health in Australian law. Using these reports, it is possible to consider whether there is implementation of certain characteristics of a rights-based approach to health. It is possible that this implementation is to some extent coincidental.[128] However, associated materials evidence the work of the AJPCHR in encouraging sponsoring members of parliament to use human rights-based analysis in explanatory legislative materials.[129] A useful example of the educative function of the process is the 2014 *Guidance Note 1*, which guides the drafting of

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[124] Benjamin Mason Meier et al, 'Rights-Based Approaches to Public Health Systems' in Elvira Berocochea, Corey Weinstein and Dabney Evans (eds), *Rights-Based Approaches to Public Health* (Springer, 2010) 19, 19–28.

[125] Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) *Health and Human Rights* 109, 122. Goldblatt recognises impact of poverty in Australia in Goldblatt, above n 3, 261–265.

[126] Hunt, above n 125, 122. Yamin notes the centrality of recognising poverty to human rights-based approaches to health: Alicia Ely Yamin, *Power, Suffering, and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter* (University of Pennsylvania Press, 2015) 97–98.

[127] Brennan has previously taken a general approach in the context of health care systems: see Brennan, above n 2. Potts has noted prevalence of a public health approach in Australia: see Potts, above n 2, 741.

[128] See Williams, above n 44, 6–11.

[129] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (March 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>. However, the response to this guidance is not always sufficient: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament* (2016) 168–171.

human rights compatibility statements, and the information provided in the 2015 *Guide to Human Rights*.[130]

Prior to the implementation of human rights scrutiny legislation, references to health in Australian legislation and extrinsic materials were usually references to public health.[131] The requirements of the Act to provide Statements of Compatibility with human rights in explanatory materials supporting new legislation have facilitated increasing references to the right to health.[132] This section highlights some of the limitations to this scrutiny but notes that the AJPCHR is directing lawmakers towards an increasing understanding of principles of progressive realisation, maximum available resources and no retrogression. This is a positive contribution towards developing a culture of recognition of the human right to health in legislative development.

5.3.1 Realisation of Tripartite Obligations to Respect, Protect and Fulfil the Right to Health

Australia has been criticised for failing to meet obligations to respect the right to health. This is generally viewed as an obligation on the state not to interfere with an individual's enjoyment of the right to health. The AJPCHR has expressed concerns where legislation fails to recognise the obligation not to discriminate against individuals in the provision of healthcare services.[133] Examples of this are evident from concerns raised by the AJPCHR in legislative scrutiny regarding the right to health of asylum seekers[134] and indigenous persons in Australia. [135]

The Productivity Commission has criticised Australia's entry into bilateral and regional arrangements relevant to obligations to respect and protect the right to health[136] that might constitute violations of the right to health. [137] The lack of Australian Government transparency in trade agreement negotiations, and the expected impact of intellectual property obligations on realisation of the right to health pursuant to this, has prompted correspondence between the

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[130] See Williams and Reynolds, above n 107, 507. This demonstrates the educative function of the process, although this analysis will note relevant limitations in these reference materials that could be addressed to improve that educative function.
[131] See, eg, *Tobacco Plain Packaging Act 2011* (Cth) s 3.
[132] See, eg, Explanatory Statement, Tobacco Plain Packaging: Amendment Regulation 2012 (No 1) (Cth); Explanatory Memorandum, Intellectual Property Laws Amendment Bill 2014.
[133] *General Comment 14*, UN Doc E/C.12/2000/4, [34].
[134] See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Fourth Report of the 44th Parliament* (2016) 83–96.
[135] See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Tenth Report of the 44th Parliament* (2014) 168–169.
[136] See Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements - Productivity Commission Research Report* (November 2010) 248, 280, 317–321.
[137] *General Comment 14*, UN Doc E/C.12/2000/4, [50].

Special Rapporteur for Health and the Australian Government.[138] Australia's correspondence recognises (but dismisses) the concerns about the transparency of these negotiations and its impact on both participation and accountability.[139] Although the focus of concern appears to have been patent rights, this is an important example of potential conflicts between intellectual property and the human right to health in Australia. Gleeson, Tienhaara and Faunce have made extensive criticisms of the impact of AUSFTA and other trade agreements on health policy.[140] The broader impact of bilateral and trade agreements for development of a human rights culture for trade marks will be addressed in Chapter 10.

The obligation to protect the right to health obliges states to protect individuals against the actions of third parties that may negatively impact on their realisation of the human right to health.[141] States' obligations to protect individuals from threats to the right to health do not seem to be identified by the AJPCHR as an essential component of the right to health.[142] However, some consideration has been given in analysis of legislation to protection elements of the right.[143] Brennan identifies the importance of the obligation to protect individuals from threats to their right to health in relation to the provision of health services.[144] Brennan notes that government regulation of both private health care providers and private health insurance is an important issue.[145]

States are also obliged to fulfil the right to health through a range of measures, including providing health services, facilitating access to those services and promoting the human right to

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[138] Letter from James Love, Thiru Balasubramaniam, Krista Cox and Manon Ress on Behalf of Knowledge Ecology International (and Others) to Anand Grover, 22 March 2011 <https://www.keionline.org/wp-content/uploads/r2h_anand_grover_tpp_22march2011.pdf>; Letter from Anand Grover, United Nations Special Rapporteur on the Right to Health, to Australian Government Representative, 19 July 2011 <https://spdb.ohchr.org/hrdb/19th/AL_Australia_19.07.2011_(4.2011).pdf>; Letter from Peter Woolcott, Australian Permanent Representative to the United Nations in Geneva, to Anand Grover, United Nations Special Rapporteur on the Right to Health, 23 November 2011 <https://spdb.ohchr.org/hrdb/19th/Australia_23.11.11_(4.2011).pdf>.

[139] Ibid.

[140] Deborah Gleeson, Kyla Tienhaara and Thomas Faunce, 'Challenges to Australia's National Health Policy from Trade and Investment Agreements' (2012) 196(5) *Medical Journal of Australia* 354. The focus of the analysis has been on public health. See, for example, David G Legge et al, 'Australia's Position on Medicines Policy in International Forums: Intellectual Property Protection and Public Health' (2014) 73 *Journal of Australian Political Economy* 103. However, the concerns identified also engage states' obligations to respect the right to health. The right to health is cited in a footnote in Ruth Lopert and Deborah Gleeson, 'The High Price of "Free" Trade: U.S. Trade Agreements and Access to Medicines' (2013) 41(1) *Journal of Law, Medicine & Ethics* 199.

[141] *General Comment 14*, UN Doc E/C.12/2000/4, [35].

[142] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights*, above n 129, 57.

[143] See, eg, amendments to Agricultural and Veterinary Chemicals Legislation: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eighth Report of the 44th Parliament* (2014) 1–3.

[144] Brennan, above n 2, 392.

[145] Ibid.

health.[146] Brennan gives a comprehensive overview of the way in which Australia fulfils the right to health for healthcare systems, recognising serious concerns about fulfilment of the right to health in relation to vulnerable groups.[147] The AJPCHR does not appear to focus on the availability, accessibility, acceptability and quality criteria identified as relevant to a rights-based approach to health in the previous chapter.

5.3.2 Progressive Realisation of the Right to Health

Although the Special Rapporteur has praised the quality of the Australian healthcare system,[148] Australia still needs to develop a national health policy that includes a detailed plan for the full realisation of the right to health.[149] This will better demonstrate the ways in which Australia is progressively realising health. Special attention needs to be given to the realisation of health for vulnerable groups, particularly Indigenous peoples.[150] Concerns about the impact of Australia's agreement to additional intellectual property obligations, because of its entry into trade agreements on health, engage concerns about whether this could restrict Australia's ability to progressively realise the right to health in the future. Amendments to the Pharmaceutical Benefits Scheme were criticised for their potential impact on public health in relation to AUSFTA[151] and continue to present concerns.[152] Restrictions on access to medicine because of pharmaceutical benefits measures could also constitute retrogression of Australia's progressive realisation of that right.[153]

AJPCHR materials demonstrate recognition of the need for restrictions on rights to be consistent with restrictions in international law.[154] The AJPCHR criticises bill sponsors who do not explain

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[146] *General Comment 14*, UN Doc E/C.12/2000/4, [33].
[147] Brennan, above n 2.
[148] *Report of the Special Rapporteur: Mission to Australia*, UN Doc A/HRC/14/20/Add.4, summary.
[149] Ibid [100].
[150] *Report of the Special Rapporteur: Mission to Australia*, UN Doc A/HRC/14/20/Add.4.
[151] Joint Standing Committee on Treaties, Parliament of Australia, *Report 61*, above n 114, 83–95, 247–252.
[152] Legge et al argue that AUSFTA set a precedent for more onerous provisions in the subsequent bilateral trade agreement negotiated between the United States and South Korea: Legge et al, above n 140, 117. See also Lopert and Gleeson, above n 140, 203–205. Gleeson, Tienhaara and Faunce discuss potential for future agreements to undermine compromises in AUSFTA: Gleeson, Tienhaara and Faunce, above n 140.
[153] Lopert and Gleeson note these concerns but say that the negative effect has not eventuated: Lopert and Gleeson, above n 140, 204–205. Legge et al suggest that this has not been the effect of AUSFTA but the inclusion of an annexure on pharmaceutical pricing has impacted on subsequent trade agreements that have had more onerous restrictions: Legge et al, above n 140, 117.
[154] The limitation criteria for restrictions on economic, social and cultural rights is set out in *2014 Guidance Note 1*. Limitations must be prescribed by law, with a legitimate objective, a rational connection between the limitations and that objective and proportionality: Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014).

how potential restrictions on rights meet this test.[155] A significant part of the AJPCHR correspondence regarding potential restrictions on rights engages with the need to follow the correct approach for justifying restrictions on human rights. Special attention is given to providing safeguards for vulnerable groups.[156] Once this occurs, the AJPCHR usually accepts that the restriction on rights is legitimate.[157] Although this approach is arguably consistent with the approach to general exceptions provided in Article 4 of *ICESCR*, Article 4 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') permits exceptions only in time of emergency for civil or political rights.[158] Further, AJPCHR materials do not address the consistency of resource allocation with the principles set out in *General Comment 3*.[159]

Australia has an obligation to take 'reasonable measures within its available resources to progressively secure broader realisation of the right to health.'[160] However, the AJPCHR also accepts that realisation of the right to health is subject to maximum available resources.[161] AJPCHR has been willing to provide the Government with a margin of appreciation in the way it allocates resources between State governments.[162] Importantly, the AJPCHR recognises the prohibition on retrogressive measures.[163] However, it has been heavily criticised for its willingness to accept justifications for retrogression regarding the right to social security, which it justifies because of overall budgetary savings in circumstances where some protection for the right remains protected.[164] Goldblatt links this to the focus of the AJPCHR on human rights compatibility statements without capacity to consider arguments by those potentially affected by the relevant legislation.[165]

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[155] See, for examples: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament*, above n 129, 32–34; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eighth Report of the 44th Parliament*, above n 143, 3.
[156] See discussion of underlying determinants of health in Parliamentary Joint Committee on Human Rights, Parliament of Australia, *First Report of 2012* (2012) 10–11.
[157] See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirtieth Report of the 44th Parliament* (2015) 109. See also Williams and Reynolds, above n 11, 131–136.
[158] See Chapter 3, Section 3.3.2.
[159] Harper, Ghinea and Lipworth, above n 21, 652.
[160] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights*, above n 129, 57.
[161] See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Third Report of 2013* (2013) 133–134.
[162] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirtieth Report of the 44th Parliament*, above n 157, 109.
[163] See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Fourth Report of the 44th Parliament*, above n 134, 117–119.
[164] Goldblatt, above n 3, 274.
[165] Ibid.

Effectiveness of legislative measures is relevant to both the appropriateness of the means used by states to realise their obligations[166] and requirements that states move towards full realisation of the right to health 'as expeditiously and effectively as possible.'[167] Efficacy has been considered by the AJPCHR in relation to requirements under the *Therapeutic Goods Act*.[168] This legislation will be considered in relation to anti-counterfeiting in Chapter 9.

5.3.3 International Cooperation and Assistance

The CESCR also interprets the right to health to include an obligation of international cooperation and assistance for states that have the capacity to assist other countries in facilitating access to essential health facilities, goods and services, and to provide the necessary aid when required.[169] Supporting materials for plain packaging legislation identify Australia's leadership role introducing plain packaging as important to reducing global health impacts of tobacco consumption.[170] This can be linked to the need for states to cooperate in assisting less well-resourced states to provide a core minimum standard of health.[171]

There is little emphasis on international cooperation and assistance in legislative explanatory materials, including the AJPCHR correspondence, Guidance Notes and Guide to Human Rights. The failure to appreciate the human rights significance of international cooperation and assistance can be identified from the explanatory material for the introduction of the *TRIPS Protocol on Compulsory Licensing*.[172] The associated Explanatory Memorandum adopting the protocol recognises that it supports the right to health enshrined in the *ICESCR* in relation to the obligation to take necessary steps to prevent, treat and control epidemic, endemic, occupational and other diseases.[173] Although this would 'advance the human right to health for everyone, including children, in developing countries by assisting with the treatment of serious health problems,' the Explanatory Memorandum does not recognise Australia's obligations of international cooperation and assistance pursuant to the right to health.[174] However, the

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[166] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant)*, UN ESCOR, 5th sess, UN Doc E/1991/23 (14 December 1990) [3] ('*General Comment 3*').
[167] Ibid [9].
[168] See discussion of the need for prescriptions for medication to be based on efficacy: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Third Report of 2013*, above n 161, 62.
[169] This summary is drawn from *General Comment 14*.
[170] Australian Government Department of Foreign Affairs and Trade, *National Interest Analysis [2004] ATNIA 7: World Health Organization Framework Convention on Tobacco Control, Done at Geneva on 21 May 2003* (2004) [7]. See Chapter 8, Section 8.3.2.2.
[171] John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012) 340–351.
[172] Genevieve Wilkinson, 'The Human Rights (Parliamentary Security) Act 2011 (Cth) and the Increasingly Visible Intersections between the Human Right to Health and Intellectual Property in Australia' (2016) 105 *Intellectual Property Forum* 46.
[173] Explanatory Memorandum, Intellectual Property Laws Amendment Bill 2014 40.
[174] *General Comment 14*, UN Doc E/C.12/2000/4, [45].

Regulation Impact Statement acknowledges that the mechanism that was being implemented had had little use internationally. Internationally, the protocol has been criticised as cumbersome and difficult to use.[175] These criticisms did not appear to influence the conclusion reached in the Regulation Impact Statement to not adopt the approach, which would make access to compulsory licensing simpler, quicker and cheaper for users of the system.[176] This decision, based on increased delay and cost related to potential appeals generated by the simpler system, fails to recognise the importance of user-friendliness in providing effective measures that can support the right to health in other countries, which is important for effective international cooperation and assistance.[177]

5.3.4 Interdependent and Interrelated Rights

Human rights scrutiny considers six other human rights agreements that are relevant to the realisation of health. There is overlap with each of these other agreements in legislative scrutiny considering the right to health.[178] In matters where the human right to health is engaged, there are often interdependent or interrelated human rights engaged.[179] Frequently, legislation that supports the right to health also supports other rights, such as the right to an adequate standard of living.[180] In some cases, the right to health is restricted with several other rights, such as for legislation concerning migration, asylum seekers and refugees.[181] Stronger Futures legislation supported the right to health but restricted multiple other rights, and the health justifications were not sufficient to justify those restrictions.[182]

Legislation that supports human rights has also posed potential restrictions on other human rights, including rights to work, equality and non-discrimination, and privacy. Scrutiny of legislation that raises concern for equality and discrimination often highlights the impact of

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[175] Richard Elliott, 'Pledges and Pitfalls: Canada's Legislation on Compulsory Licensing of Pharmaceuticals for Export' (2006) 1(1-2) *International Journal of Intellectual Property Management* 94.
[176] Explanatory Memorandum, Intellectual Property Laws Amendment Bill 2014 18-27.
[177] Wilkinson, above n 172, 48–49.
[178] See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament* (2015) 48–52, 56–59; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament*, above n 129, 171; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Tenth Report of 2013* (2013) 17–20.
[179] For example, measures which engage both the right to health and the right to a fair trial: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixth Report of 2013* (2013) 86–89.
[180] Ibid 111-113.
[181] See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament*, above n 178, 56–59; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament*, above n 129, 149–194. See also Parliamentary Joint Committee on Human Rights, Parliament of Australia, above n 155, 27-84.
[182] Serious concerns were raised in the *Review of Stronger Futures*: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament*, above n 129, 32–34; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eleventh Report of 2013* (2013) 56–62.

legislation on vulnerable groups, particularly women.[183] The 'No Jab, No Pay' vaccination policy engages the rights of children and economically disadvantaged families. It removes exemptions based on religion or conscientious objections from the requirement for parents to vaccinate their children to receive childcare subsidisation and some social security payments.[184] This engages the right to health, social security and freedom of thought, opinion and religion.[185] In the Statement of Compatibility, the AJPCHR appeared to accept the conclusion that the limitation on the right to social security was necessary and proportionate to the legitimate aim of promoting the right to physical and mental health.[186] Some social security payments could still be received.[187] After further clarification of the relationship between the restriction and its objective, the Committee found that the restriction on thought, opinion and religion was justified.[188] Although the restriction refers to necessary public health measures, emphasis was placed on the right to health justifications for restrictions on the right to freedom of opinion, thought and religion, consistent with permissible limitations for fundamental rights and freedoms of others.[189]

5.3.5 Participation

Given the emphasis of the human right to health on the individual identified in Chapter 4, participation is particularly important for ensuring effective realisation of rights. [190] For intellectual property and human rights, a significant barrier to participation is transparency. Transparency concerns have been identified in relation to Australia's negotiation of trade agreements.[191] The effectiveness of JSCOT in responding to concerns identified through participation mechanisms should be scrutinised.[192] However, the plain packaging legislation

[183] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifth Report of 2013* (2013) 30–31; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixth Report of 2013*, above n 179, 36–39.
[184] Explanatory Memorandum, Social Services Legislation Amendment (No Jab, No Pay) Bill 2015.
[185] Explanatory Memorandum, Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2018. See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Ninth Report of the 44th Parliament* (2015) 31–33.
[186] Explanatory Memorandum, Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 11-12.
[187] Ibid 12.
[188] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Seventh Report of the 44th Parliament* (2016) 68–69.
[189] Ibid.
[190] Melanie Edmunds describes the importance of participation for enabling the right to health to be realised by those who are mentally ill in Australia: Melanie Edmunds, 'Inequitable Physical Illness and Premature Mortality for People with Severe Mental Illness in Australia' (2018) 20(1) *Health and Human Rights* 273.
[191] Transparency concerns have been raised in relation to Australia's negotiation of the Trans-Pacific Partnership by the Special Rapporteur on Health. See Letter from Anand Grover, United Nations Special Rapporteur on the Right to Health, to Australian Government Representative, above n 138.
[192] Susan Harris Rimmer, 'Australia's Trade Diplomacy and the Trans-Pacific Partnership: "You've Got to Row Your Own Boat"' (2016) 70(6) *Australian Journal of International Affairs* 625.

implementing the *World Health Organization Framework Convention on Tobacco Control* ('*FCTC*')[193] was developed by the National Health Taskforce, which consulted extensively with a range of stakeholders. Development of the legislation and review of its implementation engaged further consultation.

The AJPCHR permits participation through inquiries by the AJPCHR that can seek submissions from a wide range of stakeholders.[194] However, not many inquiries are undertaken and there are concerns about the efficacy of these inquiries in effecting change.[195] Separate government inquiries often accompany intellectual property legislation, although the stakeholder focus reflects traditional intellectual property stakeholders rather than focusing on the human rights concerns of individuals.[196]

Direct recognition of the relevance of participation to human rights is evident in scrutiny.[197] Concerns were raised regarding participation in relation to the removal of additional standing for individuals with experience in environment conservation or research in environmental protection claims.[198] The AJPCHR noted that 'removal of a right of a person or bodies who are committed to environmental protection from seeking to enforce the protections in the Environment Act, may engage and limit the right to a healthy environment.'[199] These limitations potentially impede full realisation of the right to health, given its links to the right to a healthy environment.[200]

5.3.6 Accountability

Section 5.2 of this chapter has identified numerous concerns that are relevant to accountability, including concerns about the lack of teeth of international mechanisms that identify problems in protection of the right to health in Australia. An additional concern that is apparent from analysis of the considerations of the AJPCHR in relation to the right to health, is a trend of affording a reasonably wide margin of appreciation for detailed explanations of justifications on

[193] Explanatory Memorandum, Tobacco Plain Packaging Bill 2011, 2-3; National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020. A Discussion Paper* (2008) 292–293.
[194] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). See Goldblatt, above n 3, 274–275.
[195] Goldblatt has raised serious concerns about the effectiveness of this mechanism in relation to the failure of the conclusions of its inquiry into cuts to social security to influence legislative change: ibid.
[196] Despite extensive consultation, the submissions referenced in the recent Productivity Commission report do not refer to human rights: Australian Government Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No 78 (23 September 2016). Limited human right concerns have previously be raised in relation to copyright: Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report No 122 (November 2013) 48–49, 54, 69, 451, 454.
[197] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Tenth Report of the 44th Parliament*, above n 135, 114–118.
[198] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).
[199] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Seventh Report of the 44th Parliament* (2015) 4–7.
[200] Ibid.

restrictions on the right to health, although there are occasional rejections by the Committee.[201] Further problems associated with negotiating trade agreements will be considered in Chapters 9 and 10. Problems with accountability that are directly relevant to the relationship between intellectual property and human rights include the failure of the government to effectively respond to right to health problems that were identified in JSCOT, in relation to the negotiation of international agreements in the case of AUSFTA.[202]

5.3.7 Synthesis

Analysis of parliamentary human rights scrutiny provides evidence of a growing human rights discourse for health.[203] This includes recognition of several human rights standards in legislative development that are important for progressive realisation, including obligations not to retrogress, and recognition of the interdependence and interrelatedness of the right to health. These standards will be considered in the case study. Scrutiny provides tools to educate lawmakers about key features of a human rights-based approach to health, features which are also relevant to separate legislative development. Analysis of the case studies in Chapter 11 will consider the potential for the role of parliamentary scrutiny to be expanded. These steps towards greater scrutiny support a culture of human rights analysis of legislation that may lead a more supportive human rights culture for trade marks in Australia.

Explanatory legislative materials still suggest limitations with the recognition of obligations of international cooperation and assistance. A principal example is the failure to recognise the need for effectiveness in providing a mechanism to implement the *TRIPS Protocol on Compulsory Licensing*. This example is relevant to understanding the likely effectiveness of prescriptive models proposed for addressing broader conflicts between intellectual property and human rights. These obligations are considered in more depth in the case studies and Chapters 10 and 11.

There is also evidence that Australia needs to further consider its obligations to protect human rights in its entry into international agreements and conduct in international organisations. Analysis of Australia's obligations to respect and protect the right to health indicates the potential negative impact on health of increasing international intellectual property obligations.

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[201] See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament*, above n 178, 56–59; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament*, above n 129, 149–194. See also Ibid 27–84.
[202] See Blakeney, above n 114, 140–141.
[203] Grenfell and Moulds identify some evidence of rights discourse in parliamentary debates and a 'culture of respect for the value of parliamentary scrutiny': Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *UNSW Law Journal* 40, 74–79.

Prior analysis has focused on access to medicine, but Chapter 10 will use the case study to consider broader concerns that Australia's engagement with regional and bilateral trade agreements will threaten future fulfilment of the right to health.

Scrutiny may not be viewed as a 'key site for activism' analogous to the horizontal accountability provided by courts empowered to implement human rights standards.[204] However, progress towards a culture of human rights recognition remains important in the absence of effective horizontal mechanisms.[205] Education plays an important role in this.[206] The reports of the AJPCHR and correspondence regarding legislation can educate lawmakers about human rights approaches to effectiveness, which may not have been previously considered but may be considered in future policy development. The AJPCHR has reminded ministers that future human rights compatibility statements should include information regarding whether changes to healthcare are legitimate, rational, reasonable and proportionate.[207] This is consistent with the AJPCHR's Guidance Notes.[208] These combine with tools for assessing compatibility with human rights provided by the Attorney-General's Department to provide additional important educational support.[209] This contributes towards an understanding among lawmakers of what constitutes a human rights approach to health and provides a resource for understanding that approach for others.

Despite ratification of key human rights agreements, the flourishing of human rights culture in Australia is limited by numerous structural and operational concerns. Van Ham and Chappell link overlapping weaknesses in vertical, horizontal and diagonal accountability to the relationship between democracy and human rights.[210] Examples of diagonal accountability that have been considered in this chapter include NGOs and parliamentary scrutiny. There are limitations on the extent to which any of these mechanisms can address the weaknesses that van Ham and Chappell identify in relation to horizontal and vertical accountability. [211] One important tool that can address failures in vertical accountability is education. The CESCR has

[204] Goldblatt, above n 3, 276.
[205] Triggs, above n 32, 69.
[206] See first recommendation emphasising importance of human rights education: National Human Rights Consultation Committee, above n 34, xxix. Triggs emphasises importance of education: Triggs, above n 32, 71. Compare Goldblatt's criticisms of the AJPHRC: Goldblatt, above n 3, 267.
[207] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Tenth Report of the 44th Parliament*, above n 135, 166.
[208] See the guidance sheet about permissible limits on rights: Australian Government Attorney-General's Department, *Permissible Limitations. Public Sector Guidance Sheet* <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>.
[209] Parliamentary Joint Committee on Human Rights, above n 154. See also Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence Provisions, Civil Penalties and Human Rights* (2014).
[210] van Ham and Chappell, above n 7.
[211] Ibid.

urged the government to expand human rights education, and examples of the AJPCHR educating legislators on human rights compliance have been used throughout this chapter. However, this is not a substitute for three key issues that have been identified in this chapter: the development of individually enforceable human rights, including economic, social and cultural rights; the inclusion of economic, social and cultural rights in the AHRC mandate; and improved recognition of the findings of the AHRC and Human Rights Parliamentary Scrutiny. Expanding the inquiry function of the AJPCHR so that it can give more attention to existing legislation could also address some of the same functions as expansion of the AHRC mandate. Development of a national plan for realisation of the right to health is specifically important to the right to health. As the constitutional deficit is unlikely to change in the short term and Australia is not part of an effective regional protection system for human rights, the direct applicability of Geiger's model is limited, and structural limitations with human rights realisation are potentially relevant to conflicts between intellectual property and human rights.[212]

5.4 CONCLUSION

In many ways, Australia progresses towards realisation of the right to health. AJPCHR materials demonstrate that value is placed on realisation of the right to health in Australia. Unfortunately, there are serious problems with the realisation of the right to health for many vulnerable groups, which should be linked to a lack of accountability. This is one of the features of the limited emphasis on a rights-based approach to health in Australia. The absence of constitutional protection for the right to health and other rights in Australia significantly limits accountability. There are limitations in the effectiveness of parliamentary scrutiny as an accountability mechanism, as the government does not always recognise the recommendations of the AJPCHR in relation to prospective legislation or inquiries. The small number of inquiries means that scrutiny of legislation introduced prior to 2012 is extremely limited.

Broader direct independent scrutiny of economic, social and cultural rights is restricted in Australia because of the failure to include *ICESCR* as part of the limited mandate of the AHRC. Although other agreements that are part of the mandate, such as the *Convention on the Rights of the Child*, provide mechanisms for the AHRC to scrutinise economic, social and cultural rights in some cases, there are problems with the willingness of the Government to effectively respond to criticisms by the AHRC. These have been amplified by recent treatment of the AHRC in a manner inconsistent with the *Paris Principles*. The backdoor method of scrutiny also means that emphasis remains with the health concerns of vulnerable groups. Accordingly, the importance of progressive realisation of health for the broader population is not directly considered. This is

[212] Helfer and Austin, above n 1, 520.

exacerbated by Australia's failure to meet its obligations to specifically plan how it will realise the right to health.

Structural limitations have also permitted serious restrictions on vulnerable groups. This is particularly evident in the case of asylum seekers and Indigenous people. AJPCHR materials suggest that this extends to limitations on effective realisation of the right to health for asylum seekers. They are also relevant concerns for the relationship between human rights and intellectual property. Even though there are participation opportunities once Australia has signed international agreements regarding intellectual property, the effectiveness of this participation in correcting negative human rights impacts can be limited. There are problems with the transparency of the negotiation of these agreements that limit timely scrutiny. The right to health example shows that detailed parliamentary scrutiny can engage many issues relevant to a human rights-based approach to health. However, serious limitations exist in relation to recognition of international cooperation and assistance obligations, participation of relevant actors in scrutiny, and the accountability of parliament to this scrutiny. The following chapters of this thesis will show that international cooperation, transparency and participation, and accountability are important concerns in international trade marks law that need to be addressed in order to build a human rights culture for trade marks.

CHAPTER SIX TRADE MARKS, INTERESTS AND DOMESTIC REGULATORY AUTONOMY IN INTERNATIONAL LAW

6.1 INTRODUCTION

This chapter considers the treatment of trade marks within the international legal framework identified in Chapter 3. It identifies competing interests in the expansion of trade mark law, building on the discussion of the theoretical approaches that have underpinned trade marks in Chapter 2. Chapter 2 determined that expanded trade mark protection has moved away from protection of interests denoted by traditional justifications for trade mark law. This chapter considers the nature of that expansion in law. The chapter builds on the existing literature by adopting an interest-based analysis of the *Paris Convention for the Protection of Industrial Property* ('*Paris Convention*')[1] and the *Agreement on Trade-Related Aspects of Intellectual Property* ('*TRIPS*').[2] This focus on competing interests is useful for understanding the extent and significance of restrictions imposed by international law in each of the case studies. It develops the arguments introduced in Chapter 3 regarding the significance of domestic regulatory autonomy for enabling states to harmonise their intellectual property and human rights obligations. The chapter contributes to the literature by integrating the recent decision, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* ('*Australia – Plain Packaging Measures*'), into an interest-based analysis.

Part 2 of this chapter will outline the key trade mark provisions of relevant international agreements, focusing on the substantive requirements set out in the *Paris Convention* and *TRIPS*, which guide domestic trade mark legislation and structure international compliance requirements. These requirements limit the ability of states to privilege national interests and other obligations in international human rights law in developing policy. More detailed interpretation of the relevant trade mark provisions and how they have been interpreted by the World Trade Organization (WTO) Dispute Settlement Bodies provide content for the international framework introduced in Chapter 3. This is important for understanding the international legal aspects of each case study and the analysis of them in Chapter 2. Decided

[1] *Paris Convention for the Protection of Industrial Property*, opened for signature 20 March 1883, 828 UNTS 305 (entered into force 6 July 1884, revised at Stockholm 14 July 1967, amended 28 September 1979) ('*Paris Convention*').
[2] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual property Rights*') ('*TRIPS*').

WTO disputes are also relevant to understanding the multilateral regime shift towards addressing international counterfeiting concerns in bilateral or plurilateral agreements that will be discussed in Chapter 10.

Part 3 of this chapter will consider the nature of trade mark rights in international law and the influences of this on regulatory autonomy for states developing domestic trade mark law. It will develop the argument that international law places constraints on domestic regulatory autonomy when powerful economies expand rights for trade mark owners and seek to use bilateral and plurilateral agreements to oblige trading partners to replicate this expansion. Part 4 questions the justifications for this expansion. This analysis is linked to concerns identified in the previous chapter that recent developments in plurilateral and bilateral agreements further interfere with domestic regulatory autonomy. Interferences include limits on the ability of states to use the balancing mechanisms found in *TRIPS* to both calibrate domestic intellectual property policy and observe other obligations in international law, including human rights law.

6.2 INTERNATIONAL REGULATION OF TRADE MARK LAW

Trade mark registration systems are national systems.[3] States have historically been able to modify the rights granted to trade mark owners to further national interests.[4] This section sets out the primary requirements of multilateral treaties regarding trade mark law. It will map historical requirements and increases to standards of protection. These requirements of international intellectual property and trade mark law are relevant to understanding the obligations that countries may need to address when they attempt to harmonise trade mark law with human rights law. The history of trade mark protection set out in this section is important because, historically, international obligations appear to have been better suited to permitting states to calibrate domestic intellectual property policy in order to balance competing national interests appropriately.[5] An example of increased protection that was considered in Chapter 2 is protection for owners against dilution and tarnishment beyond specified registration for goods and services. Expansion of dilution and tarnishment protection is evident in domestic legislation in the United States and parts of the European Union, permitting an increasingly aggressive

[3] Daniel J Gervais, 'IP Calibration' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 86, 86, 88.
[4] See discussion of national differences in meaning of the term trade mark in Lionel Bently, 'The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press, 2008) 3, 40–41.
[5] Rochelle C Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property' (2015) 36(4) *Michigan Journal of International Law* 557.

approach to protection by trade mark owners.[6] This will be further considered in Section 6.3 within the context of the multilateral obligations considered in this section.

6.2.1 Paris Convention and Other Relevant Multilateral Intellectual Property Treaties

6.2.1.1 History of protection

As discussed in Chapter 3, trade marks law has operated in an international legal framework since the late nineteenth century. This has generated an increasing number of international legal obligations, which restrict domestic regulatory autonomy in the legislative space. The traditional function of trade mark law was as a badge of origin.[7] As international trade developed, traders developed an interest in protecting these badges of origin, often the marks of trade guilds, in different jurisdictions.[8] The multilateral protection regime for trade marks developed in Europe.[9] The importance of having reciprocal trade mark protection in Europe in the second half of the 19th century influenced the development of domestic trade mark regimes.[10] The eventual decision to adopt a trade mark registration system in the United Kingdom was influenced by concerns of English traders that the complex statutory and common law system of protection for traders in the mid-19th century did not encourage other countries to enter into bilateral agreements for the reciprocal protection of trade marks.[11] These bilateral agreements ultimately resulted in the *Paris Convention*, which included the requirement of national treatment of trade marks.[12] Developments in English law influenced the adoption of legislation throughout parts of

[6] David Tan, 'The Semiotics of Alpha Brands: Encoding/Decoding/Recoding/Transcoding of Louis Vuitton and Implications for Trademark Laws' (2013) 32(1) *Cardozo Arts & Entertainment Law Journal* 225, 245–247; Robert Burrell and Dev Gangjee, 'Trade Marks and Freedom of Expression: A Call for Caution' (2010) 41(5) *IIC - International Review of Intellectual Property and Competition Law* 544, 544. Halabi describes aggressive trade mark strategies of tobacco companies, alcohol and packaged food producers: Sam Halabi, 'International Trademark Protection and Global Public Health: A Just-Compensation Regime for Expropriations and Regulatory Takings' (2012) 61(1) *Catholic University Law Review* 325, 365–367.

[7] Thomas D Drescher, 'The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth' (1992) 82(3) *Trademark Reporter* 301, 309–320. See also Patricia Loughlan, 'Trade Marks: Property Rights and Their Limits' (2005) 31(2) *Monash University Law Review* 273; Bently, 'The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark', above n 4, 5–7.

[8] Consequently, international arrangements influenced the development of English legislation, commentaries and case law: Bently, 'The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark', above n 4, 14–16.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid 40–41.

the Commonwealth, including in the Australian colonies, during this period.[13]

6.2.1.2 Function of Paris Convention

The *Paris Convention* contained trade mark protection standards for state parties.[14] Importantly, the agreements used national treatment to ensure that all states that were party to the agreement had to, respectively, provide the same levels of protection for nationals of other party states as they provided for their own nationals.[15] The *Paris Convention* also established a right of priority for trade mark applicants so that owners could file in other Convention countries within six months of the priority date of their initial application and maintain priority over other applicants who filed after their priority date.[16] The standards of protection increased over the course of numerous revisions.[17] Additional provisions, such as protection for well-known marks against registration by third parties in territories where the mark was well-known but not registered, were later included, but many matters were left to domestic law.[18] This permitted different definitions of trade marks to operate within the different Member States.[19] Even where standards existed, there were no effective dispute mechanisms to ensure that they were enforced.[20] Implementation remained a political issue.[21]

After numerous revisions, the *Paris Convention* preserves a level of domestic regulatory autonomy for trade marks legislation by permitting each member of the Union it establishes to determine conditions for filing and registration.[22] It makes registrations independent by prohibiting refusals or invalidations of registrations on the ground that filing, registration or

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[13] There was also diversity, particularly before 1875: Lionel Bently, 'The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (2011) 12(1) *Theoretical Inquiries in Law* 161, 169–171. See also Amanda Scardamaglia, *Colonial Australian Trade Mark Law: Narratives in Lawmaking, People, Power and Place* (Australian Scholarly Publishing, 2015) 117.

[14] *Paris Convention* arts 6-7*bis.*

[15] Ibid arts 2, 3.

[16] Ibid art 4. Ricketson suggests that this period remains shorter than that for patents (12 months) as trade mark applications were perceived to be lest technical than patents: Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press, 2015) 532.

[17] See Susan K Sell, 'Intellectual Property as a Trade Issue: From the Paris Convention to GATT' (1989) 13(4) *Legal Studies Forum* 407, 408–411.

[18] Dreyfuss and Frankel, above n 5, 561. Article 6*bis* was included in 1925: Ricketson, above n 16, 551.

[19] Bently, 'The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark', above n 4, 40–41. Ricketson (above n 16, 531) argues that

> historically, lack of definition may not have been a problem: the term 'trade mark' was generally understood as referring to some kind of visible sign used in relation to goods so as to indicate their source. Accordingly, there may have been a de facto harmony of approach among Paris Union countries as to what constituted a 'trade mark.' In more recent times, non-visual signs, such as sounds and smells, have come to be used as marks for goods, but this will be a matter for national laws to determine, with no guidance or direction from the *Paris Convention*.

[20] Matthew Kennedy, *WTO Dispute Settlement and the TRIPS Agreement* (Cambridge University Press, 2016) 4–8; Peter K Yu, 'TRIPS and Its Achilles Heel' (2011) 18(2) *Journal of Intellectual Property Law* 479, 486–487.

[21] Kennedy, above n 20, 4–18.

[22] *Paris Convention* art 6(1).

renewal has not been effected in the country of origin.[23] This independence is reinforced by the provision that once a mark is registered, it is considered to be independent of registration in the country of origin.[24]

6.2.1.3 Interests protected

Requirements regarding the type and nature of protection that should be provided by members of the Union strengthen the rights of trade mark owners but are subject to restrictions that reflect other interests. Article 6*bis* strengthens the rights of owners and consumers, providing for refusal or cancellation (for at least five years after registration) of registrations reproducing a well-known mark or an essential part of a mark such that it is liable to create confusion.[25] No time limits operate for cancellation of marks registered or used in bad faith.[26] Some provisions could protect either trade mark owners or other traders. Article 8 provides protection for unregistered trade names.[27] Article 12 requires open communication of trade mark registrations, which is relevant to the interests of trade mark owners, other traders, consumers and the public.[28] Article 7 emphasises the rights of owners, prohibiting obstacles to registration of a mark based on the nature of the goods to which the mark is applied.[29] Article 7*bis* provides for protection of collective marks.[30]

Other interests that restrict the rights of owners include consumer protection,[31] public interests[32] and the interests of other traders.[33] Article 6*ter* emphasises consumer and public interests, providing for refusal or cancellation of trade marks or elements of trade marks containing state emblems, official hallmarks and emblems of international organisations in certain circumstances, and establishes a notification system for the central registration of relevant signs to effect the requirements.[34] Article 6*quater* promotes consumer interests and business efficacy

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[23] Ibid art 6(2); Ricketson, above n 16, 533–534.
[24] *Paris Convention* art 6(3). Ricketson notes that while filing an application for registration was sufficient under the original *Paris Convention*, Article 6*quinquies* requirement of 'duly registered in the country of origin' means that registration is required before independence of protection will occur: ibid 537. Ricketson emphasises that 'the principle of independence of protection contained in Article 6(3) underlines and reinforces the territorial character of rights obtained under the Convention': at 536.
[25] *Paris Convention* art 6*bis*(1), (2).
[26] Ibid art 6*bis*(3).
[27] Ibid art 8.
[28] Ibid art 12.
[29] Ibid art 7.
[30] Ibid art 7*bis* (introduced Washington revision 1911). Ricketson argues that, as collective marks were not included in the definition of industrial property in Article 1(2), they are excluded from national treatment under Article 2(1). Ricketson prefers this view to the view that they are included within the scope of the expression 'trademark': Ricketson, above n 16, 532.
[31] For example, *Paris Convention* arts 6*bis*(1), (2).
[32] For example, ibid arts *6ter, 6quinquies* B(ii), *6quinquies* B(iii).
[33] Ibid art *6quinquies* B(i).
[34] Ibid art *6ter*.

where assignment occurs[35] and permits further domestic regulation of assignments of trade marks where the use of the assignee might mislead the public.[36] Article 6*septies* regulates registration and use of a mark by an agent or representative of the owner of the mark where that registration or use is not authorised.[37] The requirement in Article 6*quinquies* for countries to accept a trade mark duly registered in the country of origin 'as is'[38] is subject to certain exceptions: where the registration would infringe existing third party rights;[39] where the marks lack distinctive quality or are descriptive or customary descriptors;[40] and where the marks are contrary to morality or public order, particularly where they would deceive the public.[41] The prohibition on unfair competition in Article 10*bis* also protects consumers.[42] Article 6*sexies* provides for the protection of service marks but does not require registration of those marks.[43]

The provisions of the *Paris Convention* regarding seizure of imported goods provide further mechanisms to strengthen the rights of owners internationally. Article 9 provides for the seizure of imported goods unlawfully bearing a trade mark or trade name.[44] Ricketson argues that 'Article 9 ultimately imposes no positive additional obligation to the fundamental requirement to accord national treatment.'[45] Attempts at prescriptions regarding sanctions 'proved to be too ambitious.'[46] As discussed in Chapter 3, enforcement issues of this nature became an important impetus for developing the *TRIPS* agreement.[47] Article 9(4) excludes goods in transit from the

[35] Ibid art 6*quater*(1) provides for the transfer of business or goodwill at the same time that a mark is assigned.
[36] Ibid art 6*quater*(2).
[37] Ibid art 6*septies.*
[38] Ibid art 6*quinequies* A. Ricketson emphasises that this requirement for protection is only in relation to the form of the mark and restrictions may be placed on the rights conferred: Ricketson, above n 16, 542. This is confirmed by *Australia – Plain Packaging Measures*: Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018) [7.1765] ('*Australia – Plain Packaging Measures*'). See also *Australia – Plain Packaging Measures* at [7.1758]-[7.1775].
[39] *Paris Convention* art *6quinquies* B(i). Ricketson notes that this need not be limited to trade mark rights but could include other rights such as trade names, copyright and even privacy: Ricketson, above n 16, 542-543. This exception potentially limits the scope of protection available for well-known marks, although *McCormick* suggests that there is still broad protection available for well-known marks in section 60 of the Trade Marks Act: *McCormick & Co Inc v McCormick* (2000) 51 IPR 102.
[40] *Paris Convention* art *6quinquies* B(ii).
[41] Ibid art *6quinquies* B(iii).
[42] Ibid art *6quinquies* B2.
[43] Ibid art 6*sexies* (Lisbon Revision Conference 1958).
[44] The relevant sanctions are generally left to domestic legislation: Georg Hendrik Christiaan Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property, as Revised at Stockholm in 1967* (WIPO, 1968) 136.
[45] Ricketson, above n 16, 602.
[46] Bodenhausen, above n 44, 136.
[47] Kennedy, above n 20, 4–6; Daniel J Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell, 4th ed, 2012) 10–11.

obligations otherwise provided in Article 9.[48] Article 10 further provides for seizure of goods bearing false indications as to the source or the identity of the provision.[49] The provisions permit states 'considerable flexibility,'[50] which can be compared to the more prescriptive seizure provisions of *TRIPS*. The latter has been interpreted in the *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* ('*China Enforcement*') decision to retain some flexibility.[51] Article 10*ter* requires the provision of remedies and rights to sue in relation to Articles 9, 10 and 10*bis*,[52] the prohibition against unfair competition.[53]

6.2.1.4 Treatment of other agreements and disputes

Article 19 of the *Paris Convention* permits members to make agreements between themselves concerning industrial property, so long as they are not inconsistent with the *Convention*.[54] This obligation contrasts with the most favoured nation obligations in *TRIPS*. Most favoured nation obligations mean that individual agreements of the nature contemplated by Article 19 contribute to increasing intellectual property standards in a manner that is arguably not beneficial to a significant number of members of the multilateral agreements.[55] Dispute settlement mechanisms have also been used for *TRIPS* trade mark disagreements.[56] Although Article 28 provides for the regulation of disputes between members in the International Court of Justice, this article has not been invoked since it was introduced through the Stockholm revisions to the agreement.[57] The main vehicle for addressing disputed issues has been the revision conferences.[58]

6.2.1.5 Treaties harmonising international registration

Following the *Paris Convention*, two groups of agreements facilitated more streamlined international trade mark recognition, which increased certainty and consistency for international regulation to enhance protection for owners, primarily, and consumers. The *Madrid Agreement Concerning the International Registration of Marks* ('*Madrid Agreement*') and the subsequently adopted *Protocol Relating to the Madrid Agreement concerning the International Registration*

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[48] *Paris Convention* art 9(4). Ricketson argues that goods that are warehoused are likely to be considered no longer in transit: Ricketson, above n 16, 604.
[49] *Paris Convention* art 10(1).
[50] Ricketson, above n 16, 599.
[51] Dreyfuss and Frankel, above n 5, 565–566.
[52] *Paris Convention* art 10*ter*.
[53] Ibid art 10*bis*. Breach of this provision was unsuccessfully argued in *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2607]-[7.2796].
[54] *Paris Convention* art 19.
[55] See Anselm Kamperman Sanders and Dalindyebo Shabalala, 'Intellectual Property Treaties and Development' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 41, 65–71.
[56] See Section 6.2.4.
[57] Ricketson, above n 16, 323.
[58] Kennedy, above n 20, 4–8; Ricketson, above n 16, 321.

of Marks (‘*Madrid Protocol*’) established an administrative procedure.[59] This attempts to streamline the registration of trade marks in multiple countries but does not provide for automatically valid unitary registration conferring uniform rights across member countries.[60] The system is now centrally administered by the International Bureau of the World Intellectual Property Organisation (WIPO).[61] The *Madrid Protocol*, has 101 contracting parties.[62] International registration is further streamlined through the adoption of the classification systems enshrined in the *Nice Agreement* and the *Vienna Agreement*.[63] This establishes a uniform system for the classification of goods and services into defined categories.

The *Trademark Law Treaty* was adopted in 1994 but did not enter into force until 1 August 1996.[64] Agreement had been slow because, although technological development strongly indicated that change was necessary, the economic, social and political impact of amending the intellectual property agreements administered by WIPO was perceived to be significant.[65] The *Trademark Law Treaty* reduced and standardised procedural requirements but also required the equal treatment of marks protecting goods and services.[66] Many national systems had previously treated service marks differently.[67] The *Singapore Treaty on the Law of Trademarks* updated the

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[59] *Madrid Agreement Concerning the International Registration of Marks*, opened for signature 14 April 1891, revised at Stockholm (1967), amended in 1979, 828 UNTS 391 (entered into force 23 October 1983) (‘*Madrid Agreement*’); *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, opened for signature 27 June 1989, WIPO Lex No TRT/MADRIDP-GP/004, [2001] ATS 7 (entered into force 1 December 1995, amended on 12 November 2007) (‘*Madrid Protocol*’).

[60] Ricketson, above n 16, 608–610, 623-624 (Protocol). The *Trademark Registration Treaty* provided for central registration but was not widely adopted: at 626-627.

[61] Ibid 525–528.; *Paris Convention* art 15(1)(a).

[62] *Madrid Protocol*, WIPO Lex No TRT/MADRIDP-GP/004, [2001] ATS 7. See World Intellectual Property Organization, *WIPO-Administered Treaties: Contracting Parties - Madrid Protocol* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=8>; World Intellectual Property Organization, *WIPO-Administered Treaties: Contracting Parties - Madrid Agreement (Marks)* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=21>.

[63] *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, opened for signature 15 June 1957, revised 14 July 1967, 13 May 1977, amended 28 September 1979, 550 UNTS 45 (entered into force 8 April 1961) (‘*Nice Agreement*’); *Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks*, opened for signature 12 June 1973, 1863 UNTS 317 (entered into force 9 August 1985) (‘*Vienna Agreement*’).

[64] *Trademark Law Treaty*, opened for signature 27 October 1994, 2037 UNTS 35 (entered into force 1 August 1996) (‘*Trademark Law Treaty*’). Gervais notes that the treaty was not agreed until the conclusion of the Uruguay Round, in which *TRIPS* was negotiated: Gervais, above n 47, 11.

[65] Gervais, above n 47, 11. Ricketson notes that, although they constitute soft law, the *BIRPI* and *WIPO Joint Recommendations* provide valuable guidance for substantive harmonisation of trade mark law: Ricketson, above n 16, 666–667.

[66] *Trademark Law Treaty* art 2(2)(a). The *Trademark Law Treaty* also reduces procedural requirements for registration in relation to authentication and certification of documents: at art 8. It further standardises procedural requirements; for example, it provides for a uniform 10 year term plus a 10 year renewal period: at art 13(7).

[67] See Marshall Leaffer, ‘The New World of International Trademark Law’ (1998) 2 *Marquette Intellectual Property Law Review* 1, 10–11; Ricketson, above n 16, 531–532, 534.

Trademark Law Treaty in relation to administrative procedure.[68]

6.2.1.6 Synthesis

The relevant interests protected by the *Paris Convention* include strong rights for owners, protection of national interests of Union members, protection for consumers and protection for other traders. The *Paris Convention* provides important foundations for an international registration system. This enables traders to better protect goodwill associated with their marks internationally. Despite the relatively detailed provisions outlined above, limited enforcement of them meant that states had relative freedom to implement nationally appropriate standards and maintain domestic regulatory autonomy.[69] Although the multilateral provisions may have permitted expansive protection for trade mark owners, harmonisation was influenced by the desire for coordinated trade mark regulation systems.[70] For example, the emphasis of the United State Trade Representative that formed an incentive for states to agree to *TRIPS* was on copyright and patents.[71]

Importantly, Article 2.1 of *TRIPS* incorporates substantive obligations set out in the *Paris Convention*.[72] Where these provisions are interpreted in WTO dispute settlement mechanisms, they will be interpreted with reference to the object and purpose of *TRIPS*, not the *Paris Convention*.[73] This influences the cohesiveness of the international systems.[74]

6.2.2 TRIPS Trade Mark Law Provisions

TRIPS incorporated existing standards and further developed substantive trade mark standards.[75] The key provisions about the protection of trade mark rights are those specified in Part II, Section 2 of *TRIPS* (Articles 22.3, 23.2 and 24.5) in relation to trade marks and geographical indications, and in Part III relating to enforcement. Key obligations that were considered likely to influence legislative change for countries such as Australia included:

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[68] *Singapore Treaty on the Law of Trademarks*, opened for signature 27 March 2006, [2012] UKTS 32 (entered into force 16 March 2009).
[69] See Kennedy, above n 20, 4–18; Kamperman Sanders and Shabalala, above n 55, 60–61.
[70] Ricketson discusses the value of the *Nice Agreement* and the *Vienna Agreement*: Ricketson, above n 16, 638–641. See Leaffer, above n 67.
[71] Kennedy, above n 20, 9–12.
[72] *TRIPS* art 2.1, which incorporates Articles 1 through 12 and Article 19 of the *Paris Convention* (1967).
[73] Henning Grosse Ruse-Khan, *Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 92–93. This was recognised in *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1768]-[7.1769], although the Panel rejected the way in which Honduras applied this approach to its arguments in relation to Article *6quinquies*: at [7.1772]-[7.1773]. See Ricketson, above n 16, 150–151.
[74] Grosse Ruse-Khan, above n 73, 92–93.
[75] *TRIPS* art 2(1). The *Agreement* also incorporated the relevant provisions of the *Paris Convention*.

- expansion of the definition of a trade mark;[76]
- the introduction of the presumption of registrability;[77]
- protection for well-known service marks; and
- protection for distinctiveness acquired through use.[78]

Other features of the overall structure and objects and principles of *TRIPS* have been analysed in Chapter 3. The linking of *TRIPS* to the WTO Dispute Settlement regime and a broad range of penalties was perceived to be highly significant for the effectiveness of the agreement in harmonising standards.[79] This harmonising capacity was further enhanced by the requirement of most favoured nation protection for future intellectual property protection agreed in relation to *TRIPS* subject matter.[80] The impact of this has been amplified by the further development of bilateral and regional trade agreements incorporating *TRIPS*-plus intellectual property provisions, which will be considered in the case study and Chapter 10.

Importantly for Australia and other WTO members, Article 1.1 retains some provision for members to determine appropriate implementation methods.[81] Interpretation of this article in the WTO dispute settlement process of the WTO has limited its scope.[82] Kennedy suggests that this discretion will be limited if it results in protection that is lower than the minimum standards required.[83] It can permit flexibility within the scope of the prescribed standards.[84] Flexibility is relevant to the ability of states to exercise domestic regulatory autonomy.

6.2.2.1 TRIPS trade mark requirements

Part II, Section 2, of *TRIPS* details the minimum requirements for the protection of trade marks by WTO Member States. Part II, Section 2 of TRIPS also sets out the relevant specific requirements for trade mark law. They are relevant to the tobacco plain packaging case study in Chapter 8. Previous interpretation of the trade marks provisions contained in *TRIPS* within the WTO dispute settlement bodies will be discussed in the following section. These decisions are not binding precedents for future dispute settlement bodies but provide valuable guidance for

[76] Ricketson describes the definition of protectable subject matter as possibly the most significant achievement under *TRIPS*: Ricketson, above n 16, 645.
[77] Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* (Australian Government Publishing Service, 1992) 41–42.
[78] Christopher J Arup, 'The Prospective GATT Agreement for Intellectual Property Protection' (1993) 4 *Australian Intellectual Property Journal* 181, 189–191.
[79] Ibid 185, 200–203.
[80] Kamperman Sanders and Shabalala, above n 55, 68.
[81] *TRIPS* art 1(1).
[82] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS50 AB/R, AB-1997-5 (19 December 1997). See Gervais, above n 47, 181.
[83] Kennedy, above n 20, 121–123.
[84] Ibid 123.

likely interpretation of the agreement.[85]

Article 15 describes protectable subject matter, outlining the type of signs that may be registered as a trade mark and permitting registration through distinctiveness where a sign is not inherently adapted to distinguish the relevant goods or services.[86] It is significant that a definition was agreed[87] and that the definition is by reference to function or purpose – the capability to distinguish.[88] Function is important to theoretical justifications for trade mark law. For example, the reduction of consumer search costs is the primary justification for utilitarian theories justifying trade mark law.[89] Article 15 does not preclude registration on other grounds where permitted by the *Paris Convention*.[90] States are still able to rely on the exceptions provided in the *Paris Convention*.[91] Members may require that the sign be visibly perceptible[92] and may require use for the continuation of registration, no earlier than three years from the date of application.[93] Registration should not be prevented by the nature of the goods or services to which a trade mark is to be applied.[94] The inclusion of service marks within the scope of trade marks is significant as it requires states to make marks for both goods and services eligible for registration.[95] Member States are required to publish the mark and provide the opportunity for both oppositions to registration and petitions to cancel the registration.[96] However, while Article 15 governs eligibility for registration, it does not require registration of eligible marks.[97]

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[85] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2 (4 October 1996) 14–15.

[86] *TRIPS* art 15(1). Some flexibility has been removed for many countries as a result of *TRIPS*-plus provisions in the trade agreements: Burton Ong, 'The Trademark Law Provisions of Bilateral Free Trade Agreements' in Graeme B Dinwoodie and Marc D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 229.

[87] Gervais, above n 47, 318.

[88] Ricketson, above n 16, 645.

[89] See Chapter 2, Section 2.3.

[90] *TRIPS* art 15(2).

[91] Ricketson, above n 16, 647.

[92] *TRIPS* art 15(1).

[93] Ibid art 15(3).

[94] Ibid art 15(4). This article should not confer broader rights to use a trade mark. The Panel did not interpret the provision to require states to permit use of non-inherently distinctive marks, in order for distinctiveness to be obtained even if they have the potential to develop that capacity: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1913], [7.1864]. This affirmed recognition of limited domestic regulatory autonomy in *US – Section 211 Omnibus Appropriations Act of 1998* as cited in *Australia – Plain Packaging Measures* at [7.1842]-[7.1843].

[95] Ricketson distinguishes this from the obligation in the *Paris Convention* to register marks for goods (all that is required for service marks pursuant to 6*sexies* is for protection not registration): Ricketson, above n 16, 646.

[96] *TRIPS* art 15(5).

[97] Gervais, above n 47, 324. *United States – Section 211 Omnibus Appropriations Act of 1998* determined that Article 15.1 explains qualifications for registration but does not provide for automatic registration for conforming marks: Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WTO Doc WT/DS176/AB/R, AB-2001-7 (2 January 2002) [155] ('*US – Section 211*'); Ricketson,

Article 16 outlines the rights that Member States are required to provide to owners of trade mark registration.[98] This contrasts with the *Paris Convention* and related agreements, for which this was a matter of national treatment.[99] The key exclusive right is 'to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in the likelihood of confusion.'[100] This is generally described as a negative right, not a positive right, to use the trade mark.[101] Although the positive right to use a trade mark was not the primary basis for the complainants' arguments in relation to Article 16.1 in *Australia – Plain Packaging Measures*, a limited right to use, in order to maintain stronger infringement protection, was sought.[102] The Panel affirmed the findings in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* ('*EC – Geographical Indications*') and *United States – Section 211 Omnibus Appropriations Act of 1998* ('*US – Section 211*') and did not find a positive right to use.[103]

Article 16(1) limits registration for signs where there is a likelihood of confusion with registered marks.[104] It does not set out a requirement for actual confusion, nor does it define the scope of unauthorised use, except to the extent that it is used in the course of trade.[105] This right should not prejudice prior existing rights, nor should it affect the requirement of rights based on use of a sign.[106] Article 16(2) extends Article 6*bis* of the *Paris Convention* protection for well-known marks to services, establishing criteria for assessing whether a trade mark is well known, a matter that is not reliant on registration in the territory.[107] Article 16(3) also extends protection for well-known marks to limit registration by third parties for goods or services not similar to those for which the trade mark is registered, where a connection is indicated, and use is likely to damage the interests of the owner of the registered mark.[108] *Australia – Plain Packaging Measures* emphasised that this obligation did not require Member States to provide a right to

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above n 16, 648.; *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1839]-[7.1840].
[98] *TRIPS* art 16.
[99] Ricketson, above n 16, 650.
[100] *TRIPS* art 16 (1).
[101] Ricketson, above n 16, 655–657.; *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2098].
[102] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1966], [7.1971]-[7.1978]. See Indonesian argument: *Australia – Plain Packaging Measures* at [7.1950].
[103] Ibid [7.1975]-[7.1980], [7.2000]-[7.2002], [7.2015], [7.2017]-[7.2032], [7.2040], [7.2050], [7.2051].
[104] Gervais, above n 47, 330.
[105] Ricketson, above n 16, 651.
[106] Gervais, above n 47, 331.
[107] *TRIPS* art 16(2); ibid 331–332.
[108] *TRIPS* art 16(3).

owners to maintain their well-known status or 'provide a "minimum opportunity" to use a trademark in the market.'[109]

Ricketson argues that, although this provision provides scope for protection against extended confusion, where a consumer might believe there is a connection between the mark and unrelated goods and services, it is not clear that this extends to instances of dilution or tarnishment where a consumer realises there is no likelihood of such a connection.[110] Indonesia's characterisation of Article 16.3 as a right of protection against dilution was not adopted in *Australia – Plain Packaging Measures*.[111] This distinction is important to understanding the extent to which dilution and tarnishment protection reflects *TRIPS* standards.

Article 17 provides states some flexibility by permitting limited exceptions to the rights conferred by a trade mark where those exceptions consider the legitimate interests of both the owner of the trade mark and third parties.[112] Legitimate interests should be 'supported by relevant public policies or other social norms.'[113] This permits a range of interests and stakeholders to be recognised in trade mark law through the provision of limited exceptions, although decisions of the dispute settlement bodies regarding the term 'limited exception' have emphasised that these exceptions should be narrow in nature.[114] Legitimate interests are not interpreted to be equivalent to the full enjoyment of legal rights by a trade mark owner.[115] In *Australia – Plain Packaging Measures*, analysis of Article 16.1 and Article 20 distinguishes between a positive right to use of a mark and interests of trade mark owners that may be relevant to exceptions contained in Article 17 and the application of Article 20.[116] The interpretation of these interests is not confined to the interest of the owner in using the mark to

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[109] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2123].
[110] Ricketson, above n 16, 654. Cf suggestion by Gervais that some instances of dilution may be addressed: Gervais, above n 47, 333.
[111] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2068].
[112] *TRIPS* art 17.
[113] Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WTO Doc WT/DS114/R (17 March 2000) [7.69] ('*Canada — Pharmaceutical Patents*'); approved in Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs. Complaint by Australia*, WTO Doc WT/DS290/R (15 March 2005) [7.663] ('*EC – Geographical Indications Australia*'). Cf recognition of societal interests in relation to Article 20: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2429].
[114] *Canada — Pharmaceutical Patents*, WTO Doc WT/DS114/R, [7.30]; *EC – Geographical Indications Australia*, WT/DS290/R, [7.650]; Panel Report, *United States – Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000) ('*US – Section 110*'); Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs. Complaint by United States*, WTO Doc WT/DS174/R (15 March 2005) [7.69] ('*EC – Geographical Indications US*').
[115] *EC – Geographical Indications US*, WTO Doc WT/DS174/R, [7.69]; Gervais, above n 47, 333.
[116] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2016]-[7.2019]. In relation to *TRIPS* art 16(3), see [7.2120].

distinguish their product from the product of another,[117] and the Panel does not read these rights narrowly in its interpretation of Article 20.[118]

Article 18 provides that the term of protection provided for initial registration and renewals be for not less than seven years.[119] Article 19 acknowledges the significance of use to protection for trade marks and provides minimum standards for cancellation of marks based on non-use of the mark, permitting authorised use by third parties to be considered 'use' for those purposes.[120] It requires that cancellation should be permitted only after no less than three years of continuous non-use unless valid reasons provide obstacles to use, such as government import restrictions.[121] This mechanism balances trade mark owner rights against the interests of the public and other traders in having access to signs that are not being used to distinguish goods and services.

Article 20 is a key provision for understanding the permissible external limitations on trade marks and is analysed in *Australia – Plain Packaging Measures*. It prohibits unjustifiable encumbrance of the use of a trade mark by special requirements, use in a special form or use in a manner detrimental to its capacity to distinguish goods or services.[122] *Australia – Plain Packaging Measures* shows that some encumbrances may be justified which can protect interests other than the interests of trade mark owners.[123] The plain packaging case study will consider the extent to which this provides flexibility for states to regulate the rights of owners. *Australia – Plain Packaging Measures* uses interpretation of Article 17 as relevant guidance for the owner interests that are balanced in an Article 20 assessment,[124] and characterises these as 'the legitimate interest of trademark owners in using their trademarks in the marketplace,'[125] which includes interests in extracting economic value from trade marks.[126] Consequently, *TRIPS*

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[117] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2281]-[7.2286] especially [7.2285].
[118] Ibid [7.2532]-[7.2534], [7.2556]-[7.2574].
[119] *TRIPS* art 18. Registrations are renewable indefinitely. Gervais suggests that renewable trade mark terms reflect the inefficiencies associated with placing time limits on a form of protection that 'protect[s] the mental link between product or service and its perceived source': Gervais, above n 47, 342.
[120] *TRIPS* art 19. Requirements referred to in Article 19 and Article 20 are not mutually exclusive notions: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2230].
[121] *TRIPS* art 19(1).
[122] Ibid art 20 provides:

> 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. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

[123] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2598], [7.2604].
[124] Ibid [7.2425]-[7.2429].
[125] Ibid [7.2429].
[126] Ibid [7.2604].

can be used to support protection of the use of a trade mark in a 'wider range of commercial, advertising and promotional activities.'[127] Article 20 is balanced against latitude for Member States to introduce measures to protect 'societal interests.'[128]

Article 21 provides that Member States may determine conditions on the licensing and assignment of trade marks.[129] This can limit and strengthen the rights of owners. It prohibits the compulsory licensing of trade marks and requires Member States to provide owners with the right to assign a trade mark with or without the transfer of the business to which the trade mark belongs.

6.2.2.2 TRIPS anti-counterfeiting requirements

Requirements that Member States provide mechanisms to address counterfeiting provide additional protection available for trade marks and copyright.[130] The anti-counterfeiting protection regime provides rights that strongly benefit owners of trade marks who engage in international trade.[131] It complements the international trade mark registration system. The mechanisms should protect consumers from products that bear deceptive marks, limiting consumer confusion and better protecting consumers from non-genuine products that may not conform to domestic safety standards and may be harmful or unsafe.[132] Notably, the provisions permit but do not require Member States to regulate the products that they export in relation to counterfeiting.[133]

Prevention of counterfeit activities focuses on border control and the provisions of *TRIPS* establish mechanisms for border control.[134] Part III of *TRIPS* addresses general obligations for enforcement procedures in Section 1[135] and specific requirements in Section 2.[136] Specific

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[127] Ibid [7.2285].
[128] Ibid [7.2598], [7.2604].
[129] *TRIPS* art 21.
[130] Although some Member States also prohibit counterfeiting in relation to other forms of intellectual property such as patents, these protections are permitted but not required by *TRIPS*. The relevance of Article 51 in relation to the right to health is evident from India and Brazil's resolved claims against the European Union regarding seizure of generic products. Although focus was on the application of counterfeiting provisions to patent law, there are trade mark implications as trade marks are usually the way that customs might identify these products: Duncan Matthews, 'Counterfeiting and Public Health' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2011) 42, 50–58.
[131] Yu questions the effectiveness of this enforcement: Yu, 'Achilles Heel', above n 20.
[132] Carsten Fink, Keith E Maskus and Yi Qian, 'The Economic Effects of Counterfeiting and Piracy: A Review and Implications for Developing Countries' (Policy Research Working Paper No 7586, World Bank Group, 29 February 2016).
[133] *TRIPS* art 51.
[134] Ibid pt III.
[135] Ibid art 41.
[136] Ibid art 49 extends the principles of Section 2 to cases where a civil remedy is ordered as a result of administrative procedures on the merits of a case.

requirements include that civil judicial procedures be fair and equitable;[137] and that Member States provide judicial authority to make orders regarding production of evidence,[138] injunctions,[139] compensatory damages and indemnification of legal fees,[140] as well as other remedies to deter infringement.[141] Member States may provide judicial authorities with a right of information regarding the identity of third parties involved in infringing activities.[142] Article 48(1) provides measures to protect against potential abuse of the system by owners of trade marks[143] and public authorities and officials not acting in good faith.[144] It is required that judicial authorities have powers to make provisional arrangements in relation to certain infringing or suspected infringing activities.[145]

There are special requirements related to border measures regarding the importation of counterfeit trade mark or pirated copyright goods.[146] Article 51 requires the Member State to provide mechanisms to enable a right holder to lodge a written application with competent authorities, administrative or judicial. The application is for the suspension by the customs authorities of the release into free circulation of allegedly counterfeit goods, where the right holder has valid grounds for suspecting that the importation of counterfeit trade mark or pirated copyright goods may take place.[147] In Australia, this requirement is implemented through the Notice of Objection scheme that will be analysed in greater detail in Chapter 9. Any resulting suspension pursuant to Article 51 should lead to prompt notification of the applicant and the importer.[148] If action is not initiated within ten days of the service of notification on the applicant, the goods should be released.[149] Member States can permit ex officio action by competent authorities in good faith for the suspension of this release where there is prima facie evidence of an intellectual property infringement.[150]

The provisions require Member States to provide strong protections for right holders who use these mechanisms, subject to procedures designed to prevent abuse of process. Section 4 of Part

[137] Ibid art 42.
[138] Ibid art 43.
[139] Ibid art 44.
[140] Ibid art 45.
[141] Ibid art 46.
[142] Ibid art 47.
[143] Ibid art 48(1); Gervais, above n 47, 592–593. Article 48(1) provides that judicial authorities shall have the authority to make orders for adequate compensation where an abuse of enforcement procedures occurs.
[144] *TRIPS* art 48(2).
[145] Ibid art 50.
[146] Ibid pt III s 4.
[147] Ibid art 51.
[148] Ibid art 54.
[149] Ibid art 55. A further ten day extension is permissible.
[150] Ibid art 58.

III then regulates applications by right holders.[151] Applicants and importers should have the right to inspect detained goods and, if an application is upheld, authorities can require that information about the quantity of goods and the identities of the consignor, importer and consignee must be provided to the applicant.[152] Remedies should include the authority for the destruction or disposal of infringing goods outside the channels of commerce,[153] with re-exportation of infringing trade mark goods allowed in exceptional circumstances.[154] States must vest competent authorities with the power to require security or equivalent assurance to protect the defendant and authorities and prevent abuse, so long as the assurance does not unreasonably deter use of the procedures.[155] The relevant authorities can order the applicant to compensate the importer, the consignee and the owner of the goods for resulting injury if these authorities make a finding of wrongful detention of goods.[156] Member States are permitted to exclude small numbers of imports of a non-commercial nature from the relevant requirements.[157]

The nature of activities that should be subject to criminal remedies is controversial.[158] States are required to make provision for criminal remedies in the case of wilful trade mark counterfeiting or copyright piracy on a commercial scale.[159] These remedies include imprisonment, monetary fines or both, consistent with the gravity of the offence.[160] Where appropriate, remedies can include the seizure, forfeiture and destruction of infringing goods.[161] These remedies can also be applied to other types of intellectual property infringement, but Member States are not required to do so.[162] Chapters 9 and 10 of this thesis will consider how plurilateral agreements signed by Australia but not yet in force could reduce the flexibility provided by *TRIPS* for parties in respect of discretion to apply criminal penalties and other remedies.[163]

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[151] Ibid art 52. This requires prima facie evidence of infringement and a description of the relevant goods for competent authorities, which should respond with the outcome of the application within a reasonable period and set out the period of any action.
[152] Ibid art 57.
[153] In accordance with Article 46. In each case where destruction or disposal of infringing goods is required or permitted, orders requiring the destruction or disposal of the means of production of these goods are also permitted: ibid arts 46, 59 and 61.
[154] Ibid art 59.
[155] Ibid art 53.
[156] Ibid art 56.
[157] Ibid art 60.
[158] See Kimberlee Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"' (2016) 16 *Melbourne Journal of International Law* 257, 274–275; Jonathan Griffiths, 'Criminal Liability for Intellectual Property Infringement in Europe: The Role of Fundamental Rights' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012) 191.
[159] *TRIPS* art 61.
[160] Ibid art 61.
[161] Ibid art 61.
[162] Ibid art 61.
[163] See Weatherall, above n 158, 280–282.

6.2.3 Synthesis

These provisions indicate the strong protection available for owners under *TRIPS*. Flexibilities that support other interests include the limited exceptions provided by the balancing and standards mechanisms contained in Article 17. Textual silence about the interpretation of 'unjustifiably' in Article 20 can also permit the inclusion of public interests. The plain packaging dispute discussed in Chapter 8 will consider the relevance of Articles 7 and 8 and the Preamble, which have been analysed in Chapter 3.

6.2.4 Dispute Settlement Board Interpretation

A small number of cases provide guidance about the provisions of *TRIPS* that are relevant to the regulation of trade mark legislation. The analysis will consider the extent to which these cases support strong owner protection or emphasise flexibility to recognise other interests, such as obligations in international human rights law.

6.2.4.1 Indonesia – Certain Measures Affecting the Automobile Industry

In *Indonesia Automobile Industry*, Indonesia's National Car Programme granted benefits to motor vehicles that displayed a unique Indonesian trade mark that was owned by Indonesian nationals.[164] Aspects of this were alleged to constitute special requirements that unjustifiably encumbered use of the trade marks of foreign car companies.[165] The decision determined that the knowing and voluntary basis on which foreign car companies entered into agreements with Indonesian enterprises meant that the program did not impose any trade mark-related requirements, so Article 20 was not breached.[166] A claim of breach of Article 3 of *TRIPS* regarding the conditions for maintenance, acquisition and use of trade marks was not substantiated.[167]

The decision indicates that *TRIPS* can be sufficiently flexible to permit special legislation that promotes a specific industry and permits the grant of benefits for the use of a trade mark that clearly indicates national origin. This decision does not interpret the restrictions on Member States in Article 20 expansively and, as a result, Indonesia's ability to make the legislation was

[164] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WTO Doc WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998, adopted 23 July 1998) ('*Indonesia – Automobile Industry*').
[165] Ibid [14.277].
[166] Andrew D Mitchell, 'Australia's Move to the Plain Packaging of Cigarettes and Its WTO Compatibility' (2010) 5 *Asian Journal of WTO and International Health Law and Policy* 405, 412; Alberto Alemanno and Enrico Bonadio, 'Do You Mind My Smoking? Plain Packaging of Cigarettes under the TRIPS Agreement' (2010) 10 *John Marshall Review of Intellectual Property Law* 450, 464.
[167] *Indonesia – Automobile Industry*, WTO Doc WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, [14.269].

not limited by this provision of *TRIPS*.

6.2.4.2 US – Section 211 Omnibus Appropriations Act of 1998

The Appellate Body decision considered the consistency of American legislation regarding the ownership of state-acquired Cuban trade marks with, among other provisions, Article 6*quinquies* of the *Paris Convention* and Articles 15 and 16 of *TRIPS*.[168] The legislation had been applied only to the Havana Club trade mark, the ownership of which was the subject of litigation in the United States at the time that the legislation entered into force.[169] Article 6 of the *Paris Convention* permits each state considerable discretion 'to determine for themselves the conditions for filing and registration of trademarks,' and America was able to refuse registration on the basis that the marks had been acquired as a result of the Cuban revolution.[170] The decision established that the exceptions for refusal of trade mark registrations in Article 6*quinquies* were not exhaustive.[171] Bhala and Gantz argue that the narrow interpretation of Article 6*quinquies* 'arguably expands the discretion of Members in refusing registration of trademarks, which could adversely affect U.S. interests abroad in the future.'[172] This highlights the interests of Member States, such as the United States, who are net exporters of products protected by intellectual property, in restricting domestic regulatory autonomy for other states.

The Appellate Body determined that Article 15 did not require protection of all signs meeting the distinctiveness criteria:[173] 'Article 15.1 limits "conditions" imposed by national legislation only with regard to the distinctiveness requirements set out in that article.'[174] National discretion was again emphasised in interpretation of the application of Article 16 to legislation regarding the regulation of ownership of the marks. Despite the emphasis in the decision on the domestic regulatory autonomy to determine ownership that *TRIPS* permits states,[175] the legislation was found to be inconsistent with the national treatment and most favoured nation requirements in *TRIPS* because of the way in which Cuban nationals and non-Cuban nationals were treated by

[168] *US – Section 211*, WTO Doc WT/DS176/AB/R.
[169] See Raj Bhala and David A Gantz, 'WTO Case Review 2002' (2003) 20 *Arizona Journal of International and Comparative Law* 143, 219–220.
[170] Mark Davison, 'The Legitimacy of Plain Packaging under International Intellectual Property Law' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) 81, 86–87.
[171] Gervais, above n 47, 320.
[172] Bhala and Gantz, above n 169, 218.
[173] Ibid 209.
[174] Ibid. See *US – Section 211*, WTO Doc WT/DS176/AB/R, [165].
[175] The legislation was found 'not inconsistent with *TRIPS* because neither Article 16 nor any other *TRIPS* article specifies how national legislation must determine the ownership of a trademark': Bhala and Gantz, above n 169, 279.

the legislation.[176]

6.2.4.3 EC - Geographical Indications

The same Panel considered separate challenges by Australia and the United States to the European Communities' regime for geographical indications.[177] This thesis does not consider geographical indications but notes the relevance of the decision to interpretation of other trade mark provisions in *TRIPS*. Both reports characterise trade mark rights as negative in character.[178] The relationship between geographical indications and trade marks is such that the two regimes coexist except where there are very well-known trade marks.[179] The interpretation of what constitutes a limited exception in Article 17 suggests that the Panel can recognise more flexibility in considering the public interest than was evident in the *Canada – Patents* and the *US – 110(5)* decisions.[180] This is supported by the interpretation of Article 8 in *Australia – Plain Packaging Measures*.[181] The *China Enforcement* decision, considered below, also indicates this.[182] However, Chapter 8 will argue that the plain packaging decision potentially permits broad interpretation of owner interests, although it recognises that these should be balanced against public interests. The Panel derives support for this interpretation from *EU - Geographical Indications*.[183]

6.2.4.4 China Enforcement

This decision addressed the implementation of both the copyright and trade mark provisions of *TRIPS*. The relevant alleged trade mark breaches related to the way in which China dealt with seized counterfeit goods by donating them to charitable organisations and auctioning them after removal of the infringing trade marks.[184] Donations to charitable organisations, which included agreements with them that there would be no commercial reuse of those goods, were considered to be consistent with the requirement in Article 59 that 'authorities shall have the authority to

[176] *US – Section 211*, WTO Doc WT/DS176/AB/R, [296], [319].
[177] *EC – Geographical Indications Australia*, WTO Doc WT/DS290/R; *EC – Geographical Indications US*, WTO Doc WT/DS174/R.
[178] *EC – Geographical Indications Australia*, WTO Doc WT/DS290/R, [7.246]; *EC – Geographical Indications US*, WTO Doc WT/DS174/R, [7.210]; Dreyfuss and Frankel argued there was evidence of recognition of flexibilities: Dreyfuss and Frankel, above n 5, 565–566.
[179] Kennedy, above n 20, 431. Gervais suggests that it is unresolved whether states '*must* provide that prior trademarks must be allowed to coexist with later indications': Gervais, above n 47, 397.
[180] Dreyfuss and Frankel, above n 5, 564–566, citing *US — Section 110*, WTO Doc WT/DS160/R and *Canada — Pharmaceutical Patents*, WTO Doc WT/DS114/R.
[181] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1975]-[7.1976].
[182] Dreyfuss and Frankel, above n 5, 565–566.
[183] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2426] citing *EC – Geographical Indications Australia*, WTO Doc WT/DS290/R, [7.662]-[7.663] citing *Canada – Pharmaceutical Patents*, WTO Doc WT/DS114/R, [7.69].
[184] Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R (26 January 2009) ('*China — Enforcement*').

order disposal [of counterfeit goods] outside the channels of commerce in such a manner as to avoid any harm caused to the right holder.'[185] However, the auction of goods (from which infringing marks were removed) in relation to approximately 1% of goods seized was inconsistent with the requirement that 'the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.'[186] Stoianoff notes that the relevant trade mark law provisions have been changed, in response to the adverse findings regarding counterfeit goods, which is indicative of China's responsiveness to the WTO in relation to intellectual property.[187]

Breach was also claimed in relation to an alleged failure of China to provide criminal remedies for counterfeit trade marks consistent with Article 61.[188] Article 61 imposes a positive obligation to implement criminal penalties for all wilful trade mark counterfeiting on a commercial scale.[189] The threshold in Chinese criminal law of applying criminal penalties where 'the circumstances are serious' was argued to be insufficient to meet this requirement. [190] The United States was unable to establish through quantitative evidence that there were infringements on a commercial scale that did not meet the Chinese standards, so the claim was unsuccessful.[191]

This decision permitted China reasonable flexibility for interpretation of the relevant *TRIPS* provisions.[192] This facilitated the recognition of Chinese public interests, which the United States alleged were inconsistent with owner interests.[193] It was not clear whether there were any health and safety mechanisms ensuring that the redistributed counterfeit goods in question did not present any health threats. This would impact on an assessment of the relevant public interests engaged by the case and human rights concerns relevant to the anti-counterfeiting case study in Chapter 9.

6.2.4.5 Dispute Settlement Body decisions and regulatory autonomy

In each of the decisions considered, the Dispute Settlement Body (DSB) permits Member States flexibility to interpret provisions to include interests other than those of rights holders, sometimes including broader public interests. This provides context for understanding the extent

[185] Ibid [7.453].
[186] Ibid; *TRIPS* art 46.
[187] Natalie P Stoianoff, 'The Influence of the WTO over China's Intellectual Property Regime' (2012) 34(1) *Sydney Law Review* 65, 82.
[188] *China — Enforcement*, WTO Doc WT/DS362/R, [7.538], [7.728].
[189] *TRIPS* art 61.
[190] *China — Enforcement*, WTO Doc WT/DS362/R, [7.710], [7.726].
[191] Ibid [7.739]-[7.740].
[192] Dreyfuss and Frankel, above n 5, 565–566. Yu argues that in relation to both articles 59 and 61, the relevant terminology was sufficiently broad to permit flexibility for the Chinese practices: Yu, 'Achilles Heel', above n 20, 495.
[193] *China — Enforcement*, WTO Doc WT/DS362/R; Dreyfuss and Frankel, above n 5, 565–566.

to which a state may be able to incorporate human rights concerns into intellectual property policy. Analysis in Chapter 8 will show that although human rights concerns were not considered in *Australia – Plain Packaging Measures,* human rights obligations can be relevant to interpretation.[194]

6.2.5 Synthesis

TRIPS expanded the rights of trade mark owners that could be enforced internationally. Trade mark rights protected by the *Paris Convention* had gradually expanded throughout the 20th century through the revision conferences. A key feature of *TRIPS* is the provision of stronger mechanisms for international enforcement of those rights. This means that states are likely to place greater emphasis on international compliance, which can restrict domestic regulatory autonomy to recognise national interests, or complicate the way in which other international obligations, including human rights obligations, are recognised. Analysis of protection of trade marks in the DSB decisions suggests that WTO member states retain some flexibility to include other state interests in their domestic trade mark legislation. Human rights concerns have not yet been considered by the DSB in relation to intellectual property.[195]

6.3 CHANGING NATURE OF TRADE MARK RIGHTS

Multilateral agreements have expanded trade mark owner rights. The case studies will show the way in which bilateral and plurilateral trade and investment agreements compel further compliance with protection of the interests of trade mark owners, partly resulting from international obligations of national treatment and most favoured nation requirements for intellectual property. In some cases, states seek to expand protection for trade mark owners beyond minimum standards found in *TRIPS* and the *Paris Convention*. If they do so, national treatment obligations compel states to provide this protection for foreign nationals. For net exporters of intellectual property and net importers with strong export markets, it is advantageous for expanded protection to operate in other jurisdictions.[196] When strong exporters

[194] Although the case study focuses on Article 20, interpretation of article 6*quinquies*, 15 and 16 in *Australia – Plain Packaging Measures* arguably supports Australia's domestic regulatory autonomy in relation to plain packaging measures: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1758]-[7.1775], [7.1815]-[7.1913], [7.1966]-[7.2051], [7.2088]-[7.2130].

[195] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Adverse Human Rights Impact of International Investment Agreements and Multilateral Free Trade Agreements, Including the Human Rights Impacts of WTO Law and Practice*, UN GAOR, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/40 (12 July 2016) 33–34.

[196] Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 452–455. For recent statistics about major exporters and importers of charges for the use of intellectual property, see World Trade Organization, *World Trade*

enter bilateral or plurilateral agreements they can negotiate for these to include expanded intellectual property protection.[197] Parties to these agreements have incentives to include these obligations in subsequent trade agreements, as they are already obliged to provide this protection for all foreign nationals of WTO Member States as a result of most favoured nation obligations.[198] This contributes to an expansion of intellectual property rights. These expanded protections become important if they restrict the ability of states to meet their international human rights obligations. There is no evidence available of systematic human rights analysis of these often secretly negotiated trade agreements, so conflicts are foreseeable. Analysis of anti-counterfeiting legislation and agreements in Chapters 9 and 10 of this thesis will identify potentially negative human rights implications of expanded protection rights for trade mark owners. The plain packaging case study will show the additional complications that can be posed by investor-state dispute mechanisms (ISDMs). The following section of this chapter will consider normative justifications for expanded protection of trade marks that should be balanced against normative justifications for human rights protection when conflicts occur.

Related to a perceived increase in protection for trade mark owners is the impact of increasing protection for well-known marks.[199] This impact has been most evident in the United States,[200] but such protection has also increased in other jurisdictions, including Europe.[201] This reflects increased emphasis on brand value and interests in protecting trade mark rights.[202] The high value attributed to branding and trade marks has given trade mark owners strong incentives to seek expansive protection.[203] These interests can influence legislative development that responds to well-resourced lobbying.[204] Courts can respond to this by interpreting legislation narrowly, although this can also prompt corrective legislation.[205]

This link between trade mark protection and brand protection is used to justify expansion of

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Statistical Review 2017 (World Trade Organization, 2017) 135 <https://www.wto.org/english/res_e/statis_e/wts2017_e/wts17_toc_e.htm>.

[197] Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP', above n 196, 452–455.

[198] *TRIPS* arts 3, 4.

[199] Michael Handler, 'What Can Harm the Reputation of a Trademark? A Critical Re-Evaluation of Dilution by Tarnishment' (2016) 106(3) *Trade Mark Reporter* 639.

[200] Trademark Dilution Revision Act, 15 USC § 1125(c) (2006).

[201] Dev Gangjee and Robert Burrell, 'Because You're Worth It: L'Oreal and the Prohibition on Free Riding' (2010) 73(2) *Modern Law Review* 282; Handler, above n 199, 643–647.

[202] Arguably the emphasis is more appropriately placed on the increase in the value of brands and, consequently, interests in protecting trade mark rights: Jennifer Davis, 'The Value of Trade Marks: Economic Assets and Cultural Icons' in Ysolde Gendreau (ed), *Intellectual Property: Bridging Aesthetics and Economics - Propriété Intellectuelle: Entre L'Art et L'Argent* (Editions Themis, 2006) 97.

[203] Jennifer Files Beerline, 'Anti-Dilution Law, New and Improved: The Trademark Dilution Revision Act of 2006' (2008) 23(1) *Berkeley Technology Law Journal* 511, 514.

[204] Ibid 523–524; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 61–63.

[205] Beerline, above n 203, 521–522.

rights domestically but has also been criticised. Decisions of the European Court of Justice have generated debates questioning increasing protection for well-known marks in Europe.[206] Gangjee and Burrell argue that even where the essential function of the mark as 'a guarantee of origin and thus consistent quality' is not harmed, the European Court of Justice is prepared to protect the image of a mark from free riders.[207] This guarantee of origin rationale originally balanced concerns that trade marks impede the free movement of trade.[208] Davis argues that the European Court of Justice should maintain the distinction between trade marks and branding.[209] It should not be influenced by the 'need to protect brand values at all costs,' in part because brand valuation should be treated with caution.[210]

The literature suggests a trend towards increasing rights of trade mark owners internationally. The recognition that Article 20 can protect broader economic interests of trade mark owners than rights to distinguish products from other products in *Australia – Plain Packaging Measures* is consistent with recognition of broader owner interests.[211] Ong identifies two areas where the United States has used bilateral free trade agreements to export domestic trade mark obligations.[212] Firstly, agreements require strong protection for non-visually perceptible marks such as sound marks.[213] The second, more controversial, area is additional protection for well-known marks including protection against tarnishment, dilution and misappropriation of associated goodwill.[214] Ong suggests that this expands the protection provided for well-known marks in *TRIPS* to include the first six articles of the 'Joint Recommendation Concerning Provision of the Protection of Well-Known Marks', adopted by the General Assembly of WIPO and the Assembly of the Paris Union in 1999.[215] This recommendation encouraged states to protect well-known marks beyond protection later enshrined in *TRIPS*. Ong argues that the *US-Jordan Free Trade Agreement* and the *US-Singapore Free Trade Agreement* oblige the signatory states to give effect to these recommendations.[216]

A strong approach to protecting trade mark rights should be scrutinised. It is only appropriate

[206] Gangjee and Burrell, above n 201.
[207] Ibid 294–295.
[208] Ibid.
[209] Davis, above n 202.
[210] Ibid 122.
[211] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2290]-[7.2291], [7.2279]-[7.2286].
[212] Ong, above n 86, 240–242.
[213] Ibid. See *Australia-United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) art 17.2.2 ('*Australia-United States Free Trade Agreement*').
[214] Ong, above n 86, 242–248.
[215] Ibid 242.
[216] Ibid.

for certain economic conditions.[217] International obligations that are not sensitive to these variations and restrict domestic regulatory autonomy can have a significant impact on a broad range of interests and concerns, including but not limited to sustainable development and human rights.[218] There are also concerns about the economic justifications for expanded trade mark rights, which are discussed in the following section.

6.4 JUSTIFICATIONS FOR EXPANDED PROTECTION

Are there normative justifications for expansion of trade marks? Chapter 2 of this thesis has argued that expanded protection of trade marks has only limited basis in more traditional justifications for the protection of intellectual property. It can be linked to justifications for protection of property rights. However, Bently has demonstrated that the term property has been historically used in relation to trade marks in the United Kingdom, although the meaning attached to that term might have varied.[219] It appears that the emphasis for this expanded protection has shifted towards protection of the investment that has been made in the trade mark or the associated brand, or protection of trade marks or brands as business assets.[220]

These increases in protection for trade mark owners appear to be influenced by statutory changes to national and regional protection of trade mark rights and trends in litigation that influence judicial interpretation of those rights.[221] This is not necessarily a direct result of changes in international agreements protecting trade mark law. The next chapter will consider relevant international influences on Australian trade mark law. In some instances, international agreement can result in increased protection. *TRIPS* introduced a broader definition of trade marks, which potentially strengthened the rights of trade mark owners in many states.[222] It extended protection for well-known marks.[223] Arguably, the consumer protection associated with this extended protection could have been provided for consumers through other actions,

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[217] Beerline describes amendments to the *Trademark Dilution Revision Act* as a compromise between interests in the United States: Beerline, above n 203, 523–524.
[218] Kamperman Sanders and Shabalala address development impact at both regional and international levels: Kamperman Sanders and Shabalala, above n 55. Matthews considers this in the context of involvement by non-government organisations: Duncan Matthews, *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Edward Elgar, 2011) 25–26.
[219] Lionel Bently, 'From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property' in Graeme B Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 3, 30–41.
[220] Dreyfuss and Frankel, above n 5; Davis, above n 202.
[221] Stylianos Malliaris, 'Protecting Famous Trademarks: Comparative Analysis of US and EU Diverging Approaches - The Battle Between Legislatures and the Judiciary. Who Is the Ultimate Judge?' (2010) 9(1) *Chicago-Kent Journal of Intellectual Property* 45; Beerline, above n 203; Gangjee and Burrell, above n 201.
[222] *TRIPS* art 15.
[223] Ibid art 15.

such as passing off and unfair competition.[224] Extending protection for well-known marks recognised interests that are closely related to rewarding investment in brand development.[225] Protecting brand development encourages investment in the development of goodwill, which is beneficial for consumers.[226] However, high economic brand investment can generate aggressive protection of trade mark rights in Europe and the United States.[227] Some trends in domestic and regional litigation indicate that expanded protection for trade marks extends beyond consumer-focused rationales for trade mark protection, such as search costs theory, which was explored in Chapter 2. Despite these trends, the following chapter will identify areas in Australian law where there is only limited expansion of rights for well-known trade mark owners.

TRIPS does permit the recognition of other interests through a range of flexibility mechanisms identified in Chapter 3. However, these have not been aggressively exploited during the implementation of *TRIPS*.[228] Although the WTO decisions considered suggest that there is scope for domestic regulatory autonomy, this flexibility has not necessarily restricted increasing emphasis on the rights of trade mark owners in domestic and regional jurisprudence.[229] Decisions of the European Court of Justice have protected the rights of trade mark owners when there was no strong evidence that the use of the relevant mark to describe qualities of the product would confuse consumers.[230] Subsequently, perceived conflicts between European trade mark protection and fundamental rights of freedom of expression and protection from unfair competition have prompted recommendations for the strengthening of specific and general exceptions to trade mark rights.[231] This recognises a change in focus from the role of trade marks as indicators of origin and quality that protect consumers to their role in protection of economic investment in valuable brands.[232] This change is reinforced by the recognition that Article 20 can protect broader economic interests of trade mark owners than rights to

[224] Michael D Pendleton, 'Excising Consumer Protection: The Key to Reforming Trade Mark Law' (1992) 3 *Australian Intellectual Property Journal* 110.
[225] Davis, above n 202.
[226] Andrew Griffiths, 'A Law-and-Economics Perspective on Trade Marks' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press, 2008) 241, 265.
[227] Beerline, above n 203, 514; Tan, above n 6, 225, 245–247; Burrell and Gangjee, above n 6, 544. Halabi describes aggressive trade mark strategies of tobacco companies, alcohol and packaged food producers: Halabi, above n 6, 365–367.
[228] Antony Taubman, 'Australia's Interests Under TRIPS Dispute Settlement: Trade Negotiations by Other Means, Multilateral Defense of Domestic Policy Choice, or Safeguarding Market Access' (2008) 9(1) *Melbourne Journal of International Law* 217, 234.
[229] *Anheuser-Busch Inc v Portugal (Merits)* (2007) I Eur Court HR 39 ('*Anheuser-Busch*').
[230] See Gangjee and Burrell, above n 201.
[231] See Martin RF Senftleben et al, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trademark Law* (Kooijmans Institute for Law and Governance, 2014).
[232] See Gangjee and Burrell, above n 201; Tan, above n 6, 245–247; Burrell and Gangjee, above n 6, 544.

distinguish products from other products in *Australia – Plain Packaging Measures*.[233]

Although there is evidence of the inclusion of *TRIPS*-plus protection for trade marks in free trade agreements involving the United States,[234] there have been limits to the inclusion of requirements of *TRIPS*-plus protection for trade marks in bilateral and regional trade agreements involving Australia.[235] The *Australia-United States Free Trade Agreement* ('*AUSFTA*') increased protection for trade mark owners by requiring registration of marks that are not visually perceptible.[236] The next chapter will consider the role of *AUSFTA* in subsequently influencing the increased scope of protection available for owners of well-known trade marks. There has also been a strong emphasis on enforcing trade mark rights by strengthening anti-counterfeiting protections.[237] Chapters 9 and 10 will consider this in relation to relevant plurilateral agreements.

There are concerns about the impact of the international system on domestic regulatory autonomy regarding intellectual property protection. However, Gervais argues that domestic calibration of interests remains possible within the *TRIPS* system.[238] Dreyfuss and Frankel consider domestic calibration in the international system and argue that the flexibilities provided by the *TRIPS* system are being constrained by the increasing number of bilateral and regional trade agreements that include standards for intellectual property.[239] Sell argues that these agreements continue to ratchet up intellectual property standards.[240]

The role of trade and investment treaties on the nature of trade mark rights has been considered by Dreyfuss and Frankel, who argue that there has been a change in the character of intellectual property rights from incentives to maintain quality to tradeable commodities.[241] More recently, trade marks are becoming characterised as an asset, partly as a result of the increasing inclusion of ISDMs in investment treaties.[242] This change is argued to strengthen the rights of trade mark

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[233] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2290]-[7.2291], [7.2279]-[7.2286].
[234] Ong, above n 86.
[235] See Weatherall, above n 158.
[236] *Australia-United States Free Trade Agreement* art 17.2.2. This was not a mandatory requirement of *TRIPS*: *TRIPS* art 15.
[237] See discussions of these approaches in Kimberlee Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties' (2016) 32(1) *American University International Law Review* 211; Weatherall, above n 158; Peter K Yu, 'The RCEP and Trans-Pacific Intellectual Property Norms' (2017) 50(3) *Vanderbilt Journal of Transnational Law* 673.
[238] Gervais, above n 3.
[239] Dreyfuss and Frankel, above n 5, 566–602. See also Ong, above n 86.
[240] Susan K Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play' (Program on Information Justice and Intellectual Property Research Paper Series No 15, American University Washington College of Law, October 2010) 2–4 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>.
[241] Dreyfuss and Frankel, above n 5, 557–566.
[242] Ibid 566–602.

owners further and restrict the potential to balance those rights against other public and national interests, as many agreements exclude state-to-state negotiations once investor state disputes are initiated.[243] This has a potentially high impact on effective domestic regulatory autonomy, which will be considered further in the following chapters.

International compliance is an increasingly relevant consideration for states developing intellectual property law.[244] There was a strong initial emphasis on the importance of compliance with *TRIPS* as a result of its perceived enforceability.[245] This was because it was linked to the *WTO Dispute Settlement Understanding* ('*DSU*'),[246] which permitted a range of remedies, including retaliatory trade sanctions, to be used in circumstances where states were found to be non-compliant with *TRIPS*.[247] The effectiveness of this linkage may not yet be proven, given the small number of proceedings that have been finally decided using the DSU. [248] A number of other disputes have been initiated but resolved through negotiation.[249] This small number of decisions means guidance for the implementation of *TRIPS* is limited for WTO Member States.[250] This can contribute to a chilling regulatory environment where states are unwilling to test whether policy can be shaped to use the flexibility mechanisms of *TRIPS* to privilege justifiable domestic interests.[251] The impact of these factors may mean that states are either unable or unwilling to legislate in a manner that uses *TRIPS* flexibility mechanisms or emphasises national interests where it is not clear that these are consistent with *TRIPS*. This is despite evidence in this chapter that the dispute settlement bodies have granted reasonable levels of flexibility to states in their interpretation of the trade marks provisions in *TRIPS*. Chapter 10 will further consider chilling regulatory impacts. The explicit recognition of the relevance of Articles 7 and 8 to the interpretation of Article 20 in *Australia – Plain Packaging Measures* may also have future influence.

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[243] There are some exceptions: Anthea Roberts and Richard Braddock, *Protecting Public Welfare Regulation through Joint Treaty Party Control: A ChAFTA Innovation* (Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues, No 176 (20 June 2016)) <https://academiccommons.columbia.edu/catalog/ac:201614>.

[244] See Dreyfuss and Frankel, above n 5.

[245] In 2008, Taubman argued that many countries had been noncompliant for extended periods: Antony Taubman, 'TRIPS Jurisprudence in the Balance: Between the Realist Defense of Policy Space and a Shared Utilitarian Ethic' in Christian Lenk, Nils Hoppe and Roberto Andorno (eds), *Ethics and Law of Intellectual Property: Current Problems in Politics, Science and Technology* (Ashgate, 2007) 113. See also Taubman, above n 228; Peter K Yu, 'TRIPS and Its Achilles' Heel' (2016) 18(2) *Journal of Intellectual Property Law* 479.

[246] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*DSU*').

[247] See Kennedy, above n 20, 4–8, 28.

[248] Yu, 'Achilles Heel', above n 20, 508–511.

[249] See Kennedy, above n 20, xxxiv–xxxvi.

[250] Taubman, above n 228, 234.

[251] Lukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigation and Regulatory Chilling Effect' (2014) 5(2) *European Journal of Risk Regulation* 242.

6.5 CONCLUSION

This chapter considers the degree to which states are permitted to exercise domestic regulatory autonomy and acknowledge relevant interests and stakeholders within the international legal structures. This is important for understanding the extent to which states may perceive that they are restricted from implementing human rights obligations where they conflict with intellectual property obligations domestically. Multilateral agreements can restrict the ability of states to exert sufficient domestic regulatory autonomy to balance other important domestic interests effectively.[252] The perceived enforceability of *TRIPS* encourages international compliance with the legal framework. The protection of these interests is relevant to legitimacy and the way in which domestic trade mark legislation is consistent with the underpinning theoretical objectives identified in Chapter 2. Analysis of the relevant international agreements and interpretation of them by WTO dispute settlement bodies suggest that there is a level of domestic regulatory autonomy available to states to recognise a range of relevant interests in trade mark law within the multilateral regime. However, regional and bilateral trade agreements can threaten this, and the multilateral regime provides a strong basis for protection of trade mark owners. Recent international legal developments and jurisprudence suggest continued expansion of the rights of trade mark owners, which may not be of economic benefit to countries that are not net exporters of products protected by intellectual property. Prioritisation of ownership rights is not necessarily consistent with the theoretical justifications for trade mark law outlined in Chapter 2 and should be subject to scrutiny to enhance the legitimacy of the international and domestic systems of regulation. Human rights analysis provides a valuable tool for scrutiny and will be used in the case studies. The following chapter will give a more detailed explanation of the Australian system of trade mark regulation, which underpins the laws scrutinised in each of the case studies.

[252] See an Australian perspective: Australian Government Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No 78 (23 September 2016) 542–543.

CHAPTER SEVEN THE AUSTRALIAN TRADE MARK SYSTEM AND POTENTIAL IMPACTS ON HUMAN RIGHTS

7.1 INTRODUCTION

Despite the harmonisation of trade mark laws described in the previous chapters, trade mark regimes remain national systems and scope remains for domestic differences.[1] This chapter analyses Australian trade mark law and contributes to previous analysis of trade mark legislation by assessing the way in which domestic calibration of interests occurs in Australia, using contemporary and historical doctrinal analysis. It identifies the balance between protection of relevant stakeholder interests and international influences in Australian trade mark legislation and the impact of this on domestic regulatory autonomy. This impact influences the capacity of the Australian trade mark system to incorporate human rights concerns. As discussed in Chapter 1, harmonisation is the preferred approach for addressing overlaps between intellectual property and human rights. Harmonisation depends on states being permitted sufficient regulatory autonomy to be able to comply with their human rights obligations. Domestic regulatory autonomy depends on the international trade marks system described in Chapter 6 permitting self-determination for states.

The underlying justifications for, and structure of, the Australian trade mark protection system provide valuable context for understanding the impact of international regulation on legislative development. Chapter 2 linked underpinning justifications of trade mark law to stakeholder interests. The second section of this chapter identifies relevant stakeholders and interests in the Australian system. These are linked to objectives identifiable from legislative and policy material and key features of the Australian trade mark system. Neither legislative materials nor policy documents explicitly recognise human rights interests. However, the interaction between section 60 of the *Trade Marks Act 1995* (Cth) ('*1995 Act*') and the protection of certain pharmaceutical marks containing International Non-Proprietary Name (INN) stems shows that Australian trade mark law potentially implicates the right to health. The third section of the chapter focuses on the international influences on Australian trade mark legislation up until the enactment of the *1995 Act*. It identifies historical limitations on domestic regulatory autonomy from multilateral and bilateral agreements. The fourth section of the chapter identifies the

[1] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C, Preamble ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS*').

influence of international law on subsequent changes and the impact of these changes on key stakeholders and interests. The chapter concludes with an assessment of the impact of international influences on Australia's domestic regulatory autonomy, noting the limitations on the inclusion of human rights obligations.

7.2 Important Influences on Australian Trade Mark Law

Australia's federal structure influences the structure of trade marks legislation and policy. This section of the chapter considers this structure and identifies the justifications for intellectual property within Australian law. Further, the section investigates relevant stakeholder interests in Australian trade mark law.

7.2.1 Federal Legislative Structure

In Australia, the federal government can validly legislate only with specific constitutional authority. The federal government has specific legislative powers to legislate in respect of 'copyrights, patents of inventions and designs, and trade marks.'[2] Where State parliaments legislate on these matters, the Commonwealth law prevails to the extent of an inconsistency.[3] Although the scope of these powers for trade marks was originally interpreted narrowly,[4] Australia's obligations under international agreements concerning intellectual property have progressively expanded the permissible field for Commonwealth legislators.[5] Laws implementing these agreements can be adopted pursuant to the external affairs head of power.[6] Although related areas, such as passing off, remain the subject of common law, trade marks are governed by federal legislation. In contrast, there is considerable overlap between Commonwealth and State legislation relevant to human rights, deriving authority from this external affairs power.[7]

[2] *Australian Constitution* s 51(xviii).
[3] Ibid s 108.
[4] *A-G (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW* (1908) 6 CLR 469 ('*Brewery Employees*').
[5] See Explanatory Memorandum, Trade Marks Bill 1995 (Cth) cl 1.
[6] *Australian Constitution* s 51(xxix).
[7] See, eg, overlap between *Sex Discrimination Act 1984* (Cth) and *Anti-Discrimination Act 1977* (NSW) in relation to prevention of discrimination against women. Explanatory Memorandum, Sex Discrimination Bill 1983 (Cth) cl 3 cites potential implementation of obligations relevant to the *Convention for the Elimination of All Forms of Discrimination Against Women*, opened for signature 19 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

7.2.2 Current Australian Intellectual Property Law: Theoretical Justifications and Policy

Multiple theoretical justifications shape intellectual property law in Australia, resulting from different influences with varying impact at different periods in time.[8] Public health, the human right to health and other human rights concerns have very little explicit influence on trade marks policy.[9] The *Tobacco Plain Packaging Act 2011* (Cth) is exceptional in this respect.[10]

Australian intellectual property legislation can incorporate a range of relevant interests. Intellectual property legislation may be varied for individual categories of goods or services to accommodate interests specific to those fields.[11] Policy analysis and development acknowledge the need to balance competing interests.[12] Balancing mechanisms in Australian intellectual property legislation recognise fair dealing defences for copyright infringement,[13] the requirement for use as a trade mark for trade mark infringement,[14] and experimental use exceptions for patent infringement.[15] However, these mechanisms use specific exceptions rather than general balancing mechanisms that might be expressed in an objects clause.[16] The explicit interests the legislation seeks to balance are usually identified from case law and explanatory materials, as opposed to explicit legislative provisions.[17] This chapter interprets relevant stakeholder interests disclosed by trade mark protections in Australia.

Reports commissioned by the Australian government to guide policy development frequently affirm the need for Australian intellectual property laws to engage in a balancing exercise, but do not always consider a broad range of interests in their analysis.[18] Interests are frequently influenced by the terms of the government reference and the nature of the body undertaking the

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[8] Mark J Davison, Ann L Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press, 3rd ed, 2016) 4.
[9] This chapter considers other potential links between health and trade marks in Section 7.4.3.1.
[10] *Tobacco Plain Packaging Act 2011* (Cth) s 3.
[11] Australian Government Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No 78 (23 September 2016) 145-152 ('*Productivity Commission Report*').
[12] There are numerous references to balance in Australian intellectual property policy reports. See, eg, Intellectual Property and Competition Review Committee, Parliament of Australia, *Review of Intellectual Property Legislation under the Competition Principles Agreement: Final Report to Senator the Hon Nicholas Minchin, Minister for Industry, Science and Resources and the Hon Daryl Williams AM QC MP Attorney-General* (September 2000) ('*Ergas Report*'); Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report No 122 (November 2013).
[13] *Copyright Act 1968* (Cth) ss 40, 41, 41A, 42, 103A, 103AA, 103B, 103C.
[14] *Trade Marks Act 1995* (Cth) s 120.
[15] *Patents Act 1990* (Cth) s 119C.
[16] See recent discussion and recommendations in *Productivity Commission Report*, above n 11, 217–219.
[17] See, eg, Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 (Cth).
[18] University of Technology Sydney Educators, Submission No 564 to Productivity Commission, *Intellectual Property Arrangements: Draft Report*, 13 June 2016, 6.

analysis.[19] The recent Productivity Commission report, *Intellectual Property Arrangements*, identified four principles to guide the government in its formulation of intellectual property policy: effectiveness, efficiency, adaptability and accountability.[20] These Productivity Commission Principles demonstrate a policy-based identification of relevant interests to Australian intellectual property law that highlights the importance of utilitarian interests.[21] These should not be considered to be an exhaustive expression of relevant interests.[22]

Legislation and explanatory materials may need to more explicitly identify the range of relevant interests that influence the 'balance of rights and obligations' the legislation seeks to realise.[23] Chapter 3 of this thesis argued that human rights obligations are included in the balance of rights and obligations to which protection and enforcement of intellectual property rights in the World Trade Organization (WTO) should contribut. The case studies will use examples of Australian trade mark legislation to assess how the legislation and explanatory material engage those obligations.

7.2.3 Judicial Interpretation of Legislative Objectives

The primary piece of legislation currently regulating trade marks in Australia is the *1995 Act*. It does not explicitly protect specific interests. In *Campomar Sociedad Limitada v Nike International Ltd (2000)* ('*Campomar*'), the High Court identified three types of competing interests in trade mark legislation:

i) the owner's property rights in the use of the trade mark;
ii) the public's interest in open communication and competition; and
iii) the consumer's interest in the badge of origin function of the trade mark.[24]

Although the High Court was analysing the *Trade Marks Act 1955* (Cth), *Campomar* was handed down several years after the introduction of the *1995 Act*.[25] The scope of trade mark rights for registered owners and owners of well-known marks in Australia was significantly

[19] For example, the emphasis of the historically influential *Ergas Report* on the crucial '[b]alance between providing incentives to invest in innovation on one hand, and for efficient diffusion of innovation on the other' reflected the focus of the report on the relationship between intellectual property and competition: Intellectual Property and Competition Review Committee, Parliament of Australia, above n 12, 24.
[20] *Productivity Commission Report*, above n 11, 60–74.
[21] University of Technology Sydney Educators, above n 18, 6.
[22] Ibid.
[23] Ibid.
[24] *Campomar Sociedad Limitada v Nike International Limited* (2000) 202 CLR 45, 67 ('*Campomar*'). See Patricia Loughlan, 'The Campomar Model of Competing Interests' (2005) 27(8) *European Intellectual Property Review* 289, 292.
[25] Loughlan argues that in certain fields of trade mark law the interests of the owner, the public and the consumer are dynamic insofar as the strengthening of one interest will diminish the other relevant interests: Loughlan, above n 24, 275–287.

expanded by the *1995 Act*.[26] In *Registrar of Trade Marks v Woolworths Ltd (1999),* French J recognised the increasing emphasis of legislative objectives 'towards the identification and protection of commercial products and services rather than the protection of consumers, although the latter remains an objective.'[27]

The 1992 report of the of the Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* ('*Working Party Report*'), which heavily influenced the development of the *1995 Act*, did not explicitly consider a need to balance increased rights for trade mark owners with mechanisms that might facilitate consideration of the interests of consumers, other traders or the general public.[28] The *Trade Marks Bill 1995* was described as serving complementary objectives of 'identification and protection of a business's products, and protection of the consumer.'[29] Despite this acknowledgment, there is no express reference to stakeholder interests in the legislation.

Scardamaglia argues that the emphasis on consumer confusion in the key infringement provisions of the *1995 Act* indicates the consumer-oriented focus of trade mark law.[30] *Campomar* suggests that Australian trade mark legislation has accommodated both commercial interests and the interests of the consuming public.[31] More recently, French CJ's decision in *JT International SA v Commonwealth of Australia* ('*JT International*') affirmed that both property and instrumental rights are relevant to trade mark law.[32] Noting *Campomar*, French CJ acknowledged that the statutory creation of intellectual property rights is informed by 'purposive elements reflecting public policy.'[33] Subsequent considerations have emphasised rights of owners and users rather than the public's interest.[34] The absence of explicit recognition of public interest concerns in the *1995 Act* can limit purposive interpretation of legislation that might introduce human rights concerns. [35]

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[26] Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* (Australian Government Publishing Service, 1992) 35–38.
[27] *Registrar of Trade Marks v Woolworths Ltd* (1999) 93 FCR 365, 381 [47] (French J).
[28] Working Party to Review the Trade Marks Legislation, above n 26, 74–78.
[29] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1995, MC1910 (Michael Lee).
[30] Amanda Scardamaglia, 'The Colonial Trade Mark Regime: Parallel Rationales, Theories and Frameworks' (2011) 22(3) *King's Law Journal* 259, 263.
[31] *Campomar* (2000) 202 CLR 45, 67 [42].
[32] *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v Commonwealth of Australia* (2012) 250 CLR 1, 27-28 (French CJ) ('*JT International*').
[33] Ibid 27. See Daniel Fletcher, 'JT International SA v Commonwealth: Tobacco Plain Packaging' (2013) 35 *Sydney Law Review* 827, 832–833.
[34] *Seiko Epson Corp v Calidad Pty Ltd* [2017] FCA 1403, [346]-[348] (Burley J).
[35] For a discussion of the problems of literal interpretation of section 58A of the *Trade Marks Act 1995*, see Michael Handler and Robert Burrell, 'Reconciling Use-Based and Registration-Based Rights within the Trade Mark System: What the Problems with Section 58A of the Trade Marks Act Tell Us' (2014) 42(1) *Federal Law Review* 91.

7.2.4 Trade Marks Act 1995 (Cth)

This section focuses on the interests of stakeholders in Australian trade mark legislation identified in Section 7.2.3: owners, other traders, consumers and the public. The nature of protected rights is primarily defined by restrictions on registration, the scope of the monopoly provided to owners of trade marks, defences to infringement and the requirements for maintenance of registration.

Fundamentally, trade marks are signs which are 'used or intended to be used to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services dealt with by any other person.'[36] Restrictions on registration are addressed in examination of the mark[37] and any opposition to the registration of the mark.[38] They restrict the grant of monopoly rights to unsuitable marks, such as marks containing terms that other traders would reasonably wish to use to describe their competing goods and services.[39] Suitable marks that continue to meet use requirements can be permitted to maintain registration for an unlimited term.[40] However, marks that become generic can be revoked.[41] This ensures that the public and other traders are not prevented from using marks that have lost their ability to distinguish goods or services and become descriptive.

Use as a trade mark underpins the nature of the trade mark monopoly and the balance of relevant interests inherent to Australian trade mark law. Use is a requirement for maintenance of registration.[42] Trade mark owners are generally required to use registered marks in the course of trade or the mark can be removed from the Register through a non-use action.[43] Although this requirement is not actively enforced by the relevant body overseeing the Register, IP Australia,[44] it is utilised by other persons to some extent, often competitors.[45] This can restrict an unfair monopoly of signs that might otherwise be used or registered by other traders without confusing the public.[46] Where confusion might occur, the Registrar can protect consumers and exercise their discretion against removal.[47]

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[36] *Trade Marks Act 1995* (Cth) s 17.
[37] Ibid pt 4
[38] Ibid pt 5.
[39] *F H Faulding & Son Ltd v Imperial Chemical Industries of Australia and New Zealand Ltd* (1965) 112 CLR 537, 555 (Kitto J).
[40] *Trade Marks Act 1995* (Cth) pt 7. Registration is renewed by the payment of fees every ten years.
[41] Ibid ss 24, 87.
[42] Ibid ss 7, 17.
[43] Ibid pt 9.
[44] *Productivity Commission Report*, above n 11, 386.
[45] See, eg, *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144.
[46] *Productivity Commission Report*, above n 11, 377–388.
[47] *Trade Marks Act 1995* (Cth) s 101(3).

Registered trade marks are signs that identify goods and services[48] and become part of a searchable public register.[49] The integrity of this Register is a public interest.[50] Marks must be capable of graphical representation to facilitate a functional searchable trade mark register.[51] Public interests influence restrictions on registration.[52] Marks that are scandalous or contrary to law engage public interest considerations.[53] Public interests in competition and consumer protection justify excluding non-distinctive trade marks from the Register.[54] Consequently, registrable marks must be inherently adapted to distinguish specified goods and services.[55] This requirement, with all other requirements, is governed by a presumption of registrability when it is uncertain whether a mark should be registered. [56] Distinctiveness of a mark is inherent and cannot be acquired.[57] Distinctiveness engages whether other traders would reasonably wish to use the relevant mark for their good and services.[58] For example, descriptive signs such as 'apples' or the colour green cannot be adapted to distinguish green apples.[59] Some signs, such as the term 'Batlow Red Delicious 4015' for apples, are somewhat adapted to distinguish a mark.[60] Trade mark examiners then consider other relevant factors, including whether distinctiveness has been acquired through use.[61] This permits registration of marks that have become, or are likely to become, capable of distinguishing the relevant goods or services, despite the potential desirability of the mark for other traders.[62] This mechanism can reward owners who build goodwill in marks that are somewhat adapted to distinguish goods and services, which also benefits consumers.

Registration for marks that are likely to deceive or cause confusion is also restricted.[63] This protects the interests of consumers who might be deceived or confused by some connotation in

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[48] Ibid s 17.
[49] Ibid pt 20.
[50] *Health World Ltd v Shin-Sun Australia Pty Ltd* (2010) 240 CLR 590, 597 [22] (French CJ, Gummow, Heydon and Bell JJ).
[51] *Trade Marks Act 1995* (Cth) s 40.
[52] Ibid ss 39, 18; *Trade Marks Regulations 1995* (Cth) reg 4.15.
[53] *Trade Marks Act 1995* (Cth) s 42.
[54] Ibid s 41.
[55] Ibid s 41. Section 41 first permits registration of marks that are inherently adapted to distinguish the relevant goods and services from other goods and services in the same or similar classes.
[56] Section 41 was amended in *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) to clarify that the presumption of registrability applied: Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 (Cth) 146. See also IP Australia, Australian Government, *Trade Marks Office Manual of Practice and Procedure* (1 August 2018) pt 22.2 <http://manuals.ipaustralia.gov.au/trademarks/trade_marks_examiners_manual.htm>.
[57] *Clark Equipment Co v Registrar of Trade Marks* (1964) 111 CLR 511, 513–516.
[58] Ibid 513–514.
[59] *Trade Marks Act 1995* (Cth) s 41(3).
[60] Australian Trade Mark Registration Number 1171490.
[61] *Trade Marks Act 1995* (Cth) s 41(4).
[62] Ibid s 41(3).
[63] Ibid ss 44, 60.

the mark,[64] or marks that are substantially identical or deceptively similar to other marks registered for the same goods or services, or similar goods or closely related services.[65] Substantially identical marks are compared side by side for comparison of similarities and differences.[66] Deceptively similar marks so nearly resemble other marks that they are likely to deceive or cause confusion.[67] Registration can also be restricted if there is a likelihood of confusion between the mark and other marks that are well-known in Australia, including unregistered marks.[68]

Examiners of the mark consider these restrictions, but opposition procedures are available for interested persons after the mark is advertised.[69] This primarily protects the interest of other traders, usually potential competitors. Opponents can also allege that registration should not occur because the applicant is not the owner of the mark[70] or that they have previously used a similar mark before the applicant.[71] Opposition grounds exist if the applicant does not intend to use the mark in connection with the goods or services specified at the time of application,[72] or the application is made in bad faith.[73] Opponents can also object where a mark consists of a false geographical indication,[74] or the application is defective.[75] Opposition can protect the public interest in the integrity of the Register.

Trade mark monopolies confer limited enforceable rights for registered marks. These constitute rights of exclusion.[76] Infringement actions protect owner interests and also protect consumers from false indications of trade connections. Infringement actions require an infringing mark to be used as a trade mark[77] to suggest 'a connection in the course of trade between goods and the person who applies the mark to the goods.'[78] Actions can address use on goods or services of the same description[79] or use on similar goods or closely related services.[80] Although actions can be brought against users of a mark substantially identical to or deceptively similar to a well-known

[64] Ibid s 43.
[65] Ibid s 44.
[66] *Shell Co of Australia Ltd v Esso Standard Oil (Australia) Ltd* (1963) 109 CLR 407, 414 (Windeyer J).
[67] *Trade Marks Act 1995* (Cth) s 10.
[68] Ibid s 60.
[69] Ibid s 57.
[70] Ibid s 58.
[71] Ibid s 58A.
[72] Ibid s 59.
[73] Ibid s 62.
[74] Ibid s 61.
[75] Ibid s 62A.
[76] *JT International* (2012) 250 CLR 1, 105-106 (Crennan J).
[77] *Trade Marks Act 1995* (Cth) s 120.
[78] *Coca-Cola Co v All-Fect Distributors Ltd* (1999) 96 FCR 107, 115 [19].
[79] *Trade Marks Act 1995* (Cth) s 120(1).
[80] Ibid s 120(2).

mark on unrelated goods or services,[81] limited judicial interpretation means that the scope this protection confers is uncertain.[82] Available remedies for infringement actions include: awards of damages or account of profits; additional damages; injunctions; and declarations.[83]

The primary mechanism for balancing the interests of unauthorised users of signs registered as trade marks against those of owners is the provision of defences to infringement. Section 122 of the *1995 Act* lists several good faith uses when a trade mark is not infringed as the mark used: is descriptive of function or characteristic; [84] or uses a person's own name or place of business; [85] or compares products in advertising;[86] or engages pre-existing rights.[87] The *1995 Act* also protects use of a mark in cases of prior continuous use[88] or where the mark has been applied with the consent of a trade mark owner in another jurisdiction.[89]

While the *1995 Act* strengthened trade mark owner uses, section 122 was only expanded to introduce a comparative advertising defence.[90] Rimmer characterises these defences as fragmented.[91] Some defences, including expressive use of a culturally significant mark, are not protected and these type of uses can constitute infringement when they meet the use as a trade mark in the course of trade threshold requirement for infringement proceedings.[92]

The notice of objection system expands enforcement rights given to trade mark owners.[93] Registered trade mark owners must lodge notices with Customs.[94] These notices specify marks in relevant classes of protection and authorise Customs officials to seize relevant goods that

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[81] Ibid s 120(3).
[82] Tyrone Berger, 'Trade Mark Dilution in Australia Revisited: How Far Have We Come?' (2012) 23 *Australian Intellectual Property Journal* 19; M Gonsalves and P Flynn, 'Dilution Down Under: The Protection of Well-Known Trademarks in Australia' (2006) 28(3) *European Intellectual Property Review* 174; Michael Handler, 'Trade Mark Dilution in Australia?' (2007) 70 *Intellectual Property Forum* 36; Sarah Lux, 'Evaluating Trade Mark Dilution from the Perspective of the Consumer' (2011) 34(3) *UNSW Law Journal* 1053. See *Lone Star Steakhouse & Saloon Inc v Zurcas* (2000) 48 IPR 325; *San Remo Macaroni Co Pty Ltd v San Remo Gourmet Coffee Pty Ltd* (2000) 50 IPR 321; *Nintendo Co Ltd v Care* (2000) 52 IPR 34; *Australian Associated Motor Insurers Ltd v Australian Automotive Motor Inspection Centre Pty Ltd* (2003) 60 IPR 92; *Virgin Enterprises Ltd v Virgin Star Pty Ltd* (2005) 67 IPR 557.
[83] *Trade Marks Act 1995* (Cth) s 126.
[84] Ibid ss 122(1)(b), 122(1)(c).
[85] Ibid s 122(1)(a).
[86] Ibid s 122(1)(d).
[87] Ibid ss 122(1)(e), 122(1)(f), 122(1)(fa).
[88] Ibid s 124.
[89] Ibid s 123.
[90] *Registrar of Trade Marks v Woolworths Ltd* (1999) 93 FCR 365, 381 [47] (French J).
[91] Matthew Rimmer, '"Breakfast at Tiffany's'': EBay Inc., Trade Mark Law, and Counterfeiting"' (2011) 21(1) *Journal of Law, Information and Science* 128.
[92] See Jason Bosland and Megan Richardson, 'Competing Discourses of "Rights" and "Harms" in Trade Mark Law' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 103, 106–107; Megan Richardson, 'Trade Marks and Language' (2004) 26(2) *Sydney Law Review* 193, 216–220.
[93] *Trade Marks Act 1995* (Cth) pt 13.
[94] Ibid s 132.

appear to bear counterfeit marks.[95] The relevant importers are notified and must confirm that the relevant goods are not counterfeit before they can be released.[96] If this is disputed, trade mark owners can elect to proceed with infringement proceedings.[97]

7.2.5 Trade Marks Act and Identifiable Interests

This section identified key interests protected by the *1995 Act*. The legislation provides a restricted monopoly of lengthy duration for trade marks that are in use and do not become descriptive. Infringement provisions provide expansive protection for trade mark owners against use of a trade mark in the same or related class. However, formal enforcement of those rights can be prohibitively expensive.[98] Costly litigation may deter defendants from asserting their rights, even where strong defences apply.[99] This chilling effect may limit competition and expressive uses of trade marks, which can both support public interests.[100] Initiating a non-use action may also be prohibitively expensive.[101]

Several provisions considered support consumer protection. Enforcement rights for owners protect consumers from confusion. It is unclear whether owners' rights could be expanded by section 120(3) to protect against dilution and tarnishment, despite international trends supporting this type of protection, as identified in Chapter 6.[102] The following section will consider the extent to which Australian legislation responds to the influence of international law.

Notably, no human rights concerns are articulated in the materials analysed in this section. As noted in Chapter 2, in other jurisdictions freedom of expression concerns have been identified in relation to trade mark legislation.[103] These concerns are also relevant to features of the Australian trade mark system, such as restrictions on scandalous marks or defences to trade mark infringement that protect expressive use, but there is no policy or judicial discourse addressing freedom of expression in Australia, in contrast to other jurisdictions.[104] Potential

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[95] Ibid s 133.
[96] Ibid s 134.
[97] Ibid ss 137, 138.
[98] Jason Bosland, Kimberlee Weatherall and Paul Jensen, 'Trade Mark and Counterfeit Litigation in Australia' (2006) 4 *Intellectual Property Quarterly* 347, 347–348, 371.
[99] Ibid 347–348.
[100] William McGeveran, 'Rethinking Trademark Fair Use' (2008) 94 *Iowa Law Review* 49, 61.
[101] Ibid. See discussion of impact of expense of litigation in William Gallagher, 'Trademark and Copyright Enforcement in the Shadow of IP Law' (2012) 28(3) *Santa Clara High Technology Law Journal* 453.
[102] See Berger, above n 82; Gonsalves and Flynn, above n 82; Handler, above n 82; Lux, above n 82.
[103] See Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 283–312.
[104] See discussion of approaches in other jurisdictions in: ibid; Marc J Randazza, 'Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights' (2015) 16(1)

implications of the use of section 60 for the human right to health will be considered in relation to INN trade marks in section 7.4.3 of this chapter.

7.3 International Influences on Australian Trade Mark Law

The history of Australian trade mark law indicates the growing influence of international law. This section considers the legislative approach and justifications for trade marks in relation to separate colonial acts and Commonwealth legislation following federation. Colonial influences on Australia's legal system mean that similarities between the *Trade Marks Act 1905* (Cth) and the *Trade Marks Act 1955* (Cth) and corresponding English legislation are unsurprising. Divergence occurred as the United Kingdom became increasingly bound by European Union directives regarding trade mark laws.[105] English influence was replaced by increasing interest in compliance with multilateral agreements, culminating in the introduction of the *Trade Marks Act 1995* (Cth).

7.3.1 Colonial

Although Australian colonies were directed to adopt legislation that harmonised with the early English trade mark legislation, they chose to adopt individual regimes.[106] Trade mark regimes developed separately in each colony.[107] This system was codified in Victoria, firstly pursuant to the *Trade Marks Act 1876* and the *Merchandise Marks Act 1876*.[108] These were subsequently consolidated in the *Trade Marks Act 1890*.[109] In New South Wales (NSW), the registration system developed pursuant to the *Trade Marks Act 1865*.[110] This Act was modified by legislation designed to make NSW law consistent with the 1883 *Paris Convention*, the

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Nevada Law Journal 107, 134–138; Christophe Geiger and Leonardo Machado Pontes, 'Trade Mark Registration, Public Policy, Morality and Fundamental Rights' (Centre for International Intellectual Property Studies (CEIPI) Research Paper No 2017-01, 2017); Andreas Rahmatian, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 335, 344; Marco Ricolfi, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 453; Jonathan Griffiths, 'Is There a Right to an Immoral Trademark?' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 425.

[105] Justice William Gummow 'Foreword' in Mark Davison, *Shanahan's Australian Law of Trade Marks and Passing Off* (Thomson Reuters, 5th ed, 2012).

[106] Amanda Scardamaglia, *Colonial Australian Trade Mark Law: Narratives in Lawmaking, People, Power and Place* (Australian Scholarly Publishing, 2015), citing Jeremy Finn, 'Particularism versus Uniformity: Factors Shaping the Development of Australasian Intellectual Property Law in the Nineteenth Century' (2000) 6(1–2) *Australian Journal of Legal History* 113.

[107] Suzanne C Betink Byrne, 'Trade Marks' (1987) 17(4) *Federal Law Review* 251, 257.

[108] *Trade Marks Act 1876* (Vic); *Merchandise Marks Act 1876* (Vic).

[109] *Trade Marks Act 1890* (Vic).

[110] *Trade Marks Act 1865* (NSW).

International Trade-Marks and Patents Arrangement 1897.[111] This arrangement required national treatment for England and foreign states that had agreed formally to reciprocal protection with England.[112] In *Parsons v Gillespie (No 3)* [1896], the court found that the relevant Victorian law was essentially the same as English law.[113] This finding and the NSW legislation suggest that there was a reasonably strong influence from international and English law in colonial time, despite some autonomy.

At least three justifications for trade mark law are evident in colonial periods. Scardamaglia considers colonial Hansard reports, colonial newspapers and academic material from the United Kingdom and the United States.[114] She identifies explicit and implicit references by colonial legislators to natural law and the Lockean theory of property.[115] Scardamaglia also identifies use of utilitarian theory in colonial times to justify trade mark legislation.[116] This required legislators to find balance by limiting exclusive rights that 'encourage and stimulate innovative activity and entrepreneurship' so that the public can benefit from that innovative activity and entrepreneurship.[117] The third justification was a pragmatic response to an increase in the fraudulent marking of goods and imitation of trade marks to protect manufacturer interests.[118] Scardamaglia argues that consumer protection was not the focus of legislation at the time[119] and that manufacturers and traders were central.[120] However, there is not sufficient evidence to definitively establish whether one of these three rationales dominated the colonial trade mark regimes.[121]

7.3.2 Trade Marks Act 1905 and Amendments

The *Trade Marks Act 1905* (Cth) established a national registration system for trade marks which replaced colonial systems. The Act closely followed the contemporaneous English legislation.[122] The reading speeches for the 1905 Act[123] and the 1955 Act[124] identify legislative objectives, firstly to protect consumers by providing reliable information about source of origin

[111] *International Trade-Marks and Patents Arrangement 1897* (NSW).
[112] Ibid s 2(1).
[113] *Parsons v Gillespie (No 3)* [1896] NSWLR 95.
[114] Scardamaglia, above n 30.
[115] Ibid 265–271.
[116] Ibid 271–276.
[117] Ibid 272.
[118] Ibid 276.
[119] Ibid 288.
[120] Ibid 283.
[121] Ibid.
[122] *Trade Marks Act 1905* (Cth) s 5.
[123] Commonwealth, *Parliamentary Debates,* Senate, 27 July 1904, 3538 (Gregor McGregor, Vice-President of the Executive Council).
[124] Commonwealth, *Parliamentary Debates*, Senate, 20 April 1955, v 85, 16 (John Spicer, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 27 April 1955, v 55, 34 (Nicholas McKenna, Leader of the Opposition).

and quality,[125] and secondly to permit businesses to protect their valuable goodwill.[126] Byrne suggests that the primary motivations for introduction of the legislation were the quality and business asset protection functions, as protection for source of origin was already losing its importance at the time of introduction.[127]

The *A-G (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW* (1908) ('*Brewery Employees*') case demonstrates the influence of international law on both colonial and early Commonwealth trade marks legislation.[128] The majority considered the *Paris Convention* and legislation and decisions of the United Kingdom and the colonies to determine the scope of the legislative rights conferred by the *Constitution* in relation to 'copyrights, patents of inventions and designs, and trade marks.' Griffiths CJ focused his consideration on 'both of the Statute law of England and the Australian Colonies up to 1900 and of the authoritative expositions of the law with respect to trade marks in British Courts of Justice.'[129] Neither Griffiths CJ nor Barton J considered American trade mark protection for workers marks to support a change of meaning in Australia.[130] These judgments recognise the importance of English law to contemporaneous interpretation of Australian trade mark legislation and the potential relevance of other jurisdictions and the *Paris Convention*. However, O'Connor J recognised that if there were disparity, interpretation would be bound by any separate understanding of the term trade mark in Australian territory at the time the *Australian Constitution* was drafted.[131] The Knowles Report reviewed Australian trade mark law around 1938 but was only implemented in relation to assignment and licensing of the use of trade marks.[132] Many recommendations of the

[125] Shanahan argues it at least indicates 'the origin of that quality', if not quality: Dan Shanahan, 'The Trademark Right: Consumer Protection or Monopoly' (1982) 72(3) *Trademark Reporter* 233, 238.
[126] Commonwealth, *Parliamentary Debates*, Senate, 20 April 1955, v 85, 16 (John Spicer, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 27 April 1955, v 55, 34 (Nicholas McKenna, Leader of the Opposition).
[127] Byrne, above n 107, 260–262. See Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs* (Kluwer Law International, 3rd ed, 2014) 197–198.
[128] *Brewery Employees* (1908) 6 CLR 469.
[129] Ibid 512 (Griffiths CJ).
[130] Griffiths CJ determined that provision for workers' marks in American trade mark legislation was considered to be controversial by the Supreme Courts of numerous jurisdictions within the United States and did not suggest a change of a meaning of the term trade mark in the British Empire: ibid 514 (Griffiths CJ). Barton J determined that the American legislation was interesting but not relevant because it did not interpret an analogous provision of the *American Constitution*: ibid 530 (Barton J).
[131] Ibid 535 (O'Connor J).
[132] Knowles Committee, *Report of Committee Appointed During 1938 by the Then Attorney-General (the Right Honourable R. G. Menzies K.C., M.P.) to Consider What Alterations Are Desirable in the Trade Marks Law of the Commonwealth* (1938).

Knowles Report were adopted by the subsequent *Dean Report*.[133] Changes were carried into effect by the *Trade Marks Act 1948* (Cth), which amended the *Trade Marks Act 1905*.

7.3.3 Trade Marks Act 1955 and Amendments

The *Dean Report* formed the basis for the *Trade Marks Act 1955* (Cth). It made a number of recommendations for substantive and procedural changes including division of the register into four parts.[134] There were also recommendations for changes to the definition of trade mark and protection for defensive trade marks.[135] Constitutional restrictions constrained amendments: trade marks were to be interpreted as they were understood at the time of Federation and the Commonwealth power did not extend to the related field of passing off.[136] Although the Dean Report did not justify its recommendations by reference to considerations that are explicitly relevant to natural law or utilitarianism,[137] it identified the interests of consumers and the interests of trade mark owners.[138]

The *Dean Report* demonstrates Australian responsiveness to international developments in trade mark law, noting new legislation and associated reports in the United Kingdom, Canada and the United States.[139] A register for marks not inherently adapted to distinguish but capable of becoming distinctive was recommended because such registration was required for protection for marks of this nature in some foreign jurisdictions, including Germany and the United States of America.[140] The *Dean Report* emphasised the benefits of retaining uniformity with the United Kingdom laws.[141] For trade mark laws, uniformity was increasingly desirable as a result of the further development of business and trade relations between Great Britain and Australia.[142] Consistency would permit more effective use of English decisions in interpretation and application of the law.[143] These matters restricted the Committee's ability to draw up a whole new code. However, in some cases of 'overriding considerations' the report departs from

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[133] *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations Are Desirable in the Trade Marks Law of the Commonwealth* (Australian Government Publishing Office, 1954) 3 ('*Dean Report*').
[134] Ibid 4–7. Australia became party to the *Nice Agreement* in 1957, consistent with the recommendation of the *Dean Report*: at 31.
[135] Ibid 8–9.
[136] Ibid 5–6.
[137] Compare Scardamaglia's findings in relation to Colonial legislation: Scardamaglia, above n 30, 265–276.
[138] *Dean Report*, above n 133.
[139] Ibid 4.
[140] Ibid 8.
[141] *Dean Report*, above n 133: the 1911 Imperial Conference agreed increased intellectual property uniformity was desirable.
[142] Ibid.
[143] This was also cited as a reason for adhering to British law provisions in earlier analysis: Knowles Committee, above n 132, 33–34.

English law 'in substance and in form.'[144] An example of this is 'Yeast-vite infringement,' actions that involved infringement through advertising where the product is described as a substitute.[145] This cause of action had been recommended in the preceding *Knowles Report* but was rejected by the *Dean Report*, citing criticisms of the provision by the English judiciary.[146]

7.3.4 Working Party Report

The *Working Party Report* was the primary policy document used to reform Australian trade mark law so that it would be consistent with *TRIPS*. This resulted in the *Trade Marks Act 1994* (Cth), which never entered into force,[147] and the *1995 Act*, which continues to operate today. The Discussion Paper that preceded the *Working Party Report* included a draft of the *TRIPS* provisions and made detailed reference to the international sources.[148] Registration requirements by the *Trademark Law Treaty*, such as period of registration and renewal, were recognised and introduced into the new legislation.[149]

The *Working Party Report* made numerous recommendations to ensure that Australian law was compliant with TRIPS. These included:

[144] *Dean Report*, above n 133, 4.
[145] Ibid 11.
[146] Ibid 11.
[147] *Trade Marks Act 1994* (Cth).
[148] The *Working Party Report* explicitly considered *TRIPS*, discussions on the harmonisation of trade mark law considered by WIPO, the *Madrid Protocol*, the *European Communities Directive*, and contemporaneous discussion papers about trade mark law reform from the United Kingdom and New Zealand: Working Party to Review the Trade Marks Legislation, above n 26, citing the *UK White Paper on the Reform of Trade Marks Law* (September 1990) and the *New Zealand Discussion Paper on Trade Mark Law Reform* (July 1990).
[149] Ibid 109. At that time the treaty was still in draft form: see Australian Government Department of Foreign Affairs and Trade, *Trademark Law Treaty, Done at Geneva on 27 October 1994 [1997] ATNIA 14* (1997).

1. Expansion of the definition of a trademark;[150]
2. Creating a presumption of registrability by reversal of the onus;[151]
3. Relief of the requirement of inherent capability of distinguishing, so that marks that acquired distinctiveness could be protected;[152]
4. A new form of notification and a stronger test of infringement in order to further the protection of marks well known in commerce in Australia as belonging to a certain enterprise;[153]
5. A broader infringement test generally;[154]
6. Changes to the provisions for removal for non-use, including recognition of a three-year period of non-use;[155] and
7. Amendments to the requirements for a forgery offence and to seizure procedures. [156]

These recommendations were not uncontroversial. The *Working Party Report* identified concerns about adopting wider infringement laws that included protection against infringing use on similar goods and services. These concerns included uncertainty about the interpretation of 'similar' and 'perceived difficulties … in dealing with an unreasonable extension of rights gained by existing trade mark registrations.'[157] The representatives of the Institute of Patent Attorneys of Australia (IPTA) argued that the existing infringement provisions could comply with *TRIPS* without reform. However, the *Working Party Report* noted that there was majority support for the changes in the comments received.[158] There was also dispute about whether or not it was necessary to incorporate Part B of the Register, which protected words that were capable of acquiring distinctiveness, into Part A of the Register, which protected marks that were distinctive or had acquired distinctiveness.[159] The IPTA representatives and the Law Council of Australia representatives recommended maintaining the distinction as it did not consider it to be inconsistent with the provisions of *TRIPS*,[160] but the alternative recommendation of the members of the Trade Marks Office, that the distinction be abolished, prevailed.[161]

Debate about the continued role of consumer protection under the legislation at the time of the introduction of the *Trade Marks Act 1994* and the *Trade Marks Act 1995* considered a

[150] Working Party to Review the Trade Marks Legislation, above n 26, 35-37.
[151] Ibid 41-42.
[152] Ibid 42-43.
[153] Ibid 53-55.
[154] Ibid 74-78.
[155] Ibid 87-92.
[156] Ibid 113. Christopher J Arup, 'The Prospective GATT Agreement for Intellectual Property Protection' (1993) 4 *Australian Intellectual Property Journal* 181, 190–191.
[157] Working Party to Review the Trade Marks Legislation, above n 26, 74.
[158] Ibid 75.
[159] Ibid 67-73.
[160] Ibid 70-73.
[161] Ibid 67-71.

potentially shifting focus of the objectives of trade mark law. Pendleton argues that *TRIPS* gave support to the excision of consumer protection from trade mark law and enhanced protection for trade mark rights as property.[162] Arup argues that it was not clear that *TRIPS* excised consumer protection and there was no indication in the statute or explanatory materials that consumers are not protected.[163] The introduction of the *Trade Marks Bill 1995* described the laws proposed as serving complementary objectives of 'identification and protection of a business's products and protection of the consumer.'[164] The *1995 Act* affirms trade marks as property,[165] consistent with the *Patents Act 1990*.[166]

7.3.5 Synthesis

The historical approach taken in Australia to trade mark law protection has been generally consistent with the intellectual property systems of other developed countries. English law has been influential. Other jurisdictions, particularly other Commonwealth jurisdictions such as Canada and New Zealand, as well as the United States and Europe, have influenced policy development. The *Working Party Report* indicates the influence of contemporaneous international agreements, most notably *TRIPS*, on the development of the *Trade Marks Act*. Legal and political international influences identified in this section that have guided the development of Australian trade mark law include:

- the reciprocal national treatment requirements of the *Paris Convention*;
- the agreements that facilitate international recognition for national trade mark registrations;
- the preference of influential trade partners for increased protection for well-known marks and geographical indications; and
- the development of harmonised minimum standards in the broader context of international trade law.

The key relevant interests explicitly protected since Federation are the interests of owners, consumers and other traders. Public interests are protected to a lesser extent through requirements for registration, such as inherent distinctiveness. Human rights interests have not been explicitly recognised.

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[162] Michael D Pendleton, 'Excising Consumer Protection: The Key to Reforming Trade Mark Law' (1992) 3 *Australian Intellectual Property Journal* 110.
[163] Arup, above n 156, 186.
[164] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1995, MC1910 (Michael Lee).
[165] *Trade Marks Act 1995* (Cth) s 21.
[166] *Patents Act 1990* (Cth) s 13(2).

7.4 AUSTRALIAN TRADE MARK LEGISLATION FOLLOWING TRIPS AND DOMESTIC REGULATORY AUTONOMY

This section considers developments in Australian law following the implementation of *TRIPS*, the relevant stakeholder interests protected, and the extent to which these developments are consistent with trends in international law and other comparable jurisdictions. The previous section outlined the influence of international law on Australian trade mark legislation up to and including *TRIPS*. The *Trademark Law Treaty* also influenced the content of the *1995 Act*. Subsequent legislative change has been influenced by entry into multilateral agreements, such as the *Madrid Protocol*, and bilateral agreements, such as the *Australian-United States Free Trade Agreement* ('*AUSFTA*'). It has also been influenced by policy reviews by the government agency responsible for intellectual property law administration, IP Australia,[167] and the now defunct Advisory Council on Intellectual Property (ACIP).[168] These prompted significant changes, implemented through the *Trade Marks Amendment Act 2006 (Cth)* and the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012 (Cth)*.

7.4.1 Increasing Harmonisation of International Registration Systems

Australian registration procedures increasingly harmonise with international procedures. A key example of this is the adoption of the *Madrid Protocol*.[169] Australia also became a party to the *Singapore Treaty on the Law of Trademarks*,[170] which updated the *Trademark Law Treaty* in relation to administrative procedure that did not require legislative change.[171] Divergent opinion regarding increasing international harmonisation is apparent from the Bill Digest for the *Trade*

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[167] IP Australia, *Trade Marks Legislation Review, Paper 3* (30 September 2004) <http://www.wipo.int/wipolex/en/text.jsp?file_id=179965>; IP Australia, *Trade Marks Legislation Review, Paper 2* (March 2004) <http://www.wipo.int/wipolex/en/text.jsp?file_id=179964>; IP Australia, *Trade Marks Legislation Review, Legislation Issues, Version 6* (13 October 2003) <http://www.wipo.int/edocs/lexdocs/laws/en/au/au162en.pdf>.

[168] For example: Advisory Council on Intellectual Property, *Review of Trade Mark Enforcement* (April 2004) <https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_final_report_review_of_trade_mark_enforcement.pdf>; Advisory Council on Intellectual Property, *Should the Jurisdiction of the Federal Magistrates Service Be Extended to Include Patent, Trade Mark and Design Matters?* (November 2003) 3 <https://www.ipaustralia.gov.au/sites/g/files/net856/f/final_report_extending_jurisdiction_of_federal_magistrates.pdf>.

[169] Australian Government Department of Foreign Affairs and Trade, *National Interest Analysis [2000] ATNIA 23: Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, Done at Madrid on 27 June 1989* (2000).

[170] Australian Government Department of Foreign Affairs and Trade, *National Interest Analysis [2008] ATNIA 1: Singapore Treaty on the Law of Trademarks, Regulations and a Supplementary Resolution by the Diplomatic Conference (Singapore, 27 March 2007)* (2008).

[171] This did not prompt legislative change.

Marks Amendment (Madrid Protocol) Bill 2000 (Cth).[172] It identified three primary concerns.[173] Firstly, increased registration of overseas marks could increase the administrative burden on the Australian Trade Marks Office and reduce efficiency.[174] Secondly, local agents could have reduced local applications.[175] Thirdly, searching would require consideration of a larger number of marks and become more difficult.[176] The Bill Digest noted that these perceived difficulties were not insurmountable and were, it could be inferred, outweighed by three considerations.[177] These were the risks of Australia becoming isolated from international developments in trade mark law and practice; Australia being overlooked by overseas trade mark owners filing international registration applications; and a more 'cumbersome and costly' system for Australian trade mark owners seeking international protection.[178] This analysis suggests an Australian interest in implementing international law and being part of an integrated international trade mark system. However, the concerns raised in the Bill Digest suggest that these benefits were not perceived to be universally beneficial.

7.4.2 Registration

Amending legislation emphasised that the presumption of registrability found in section 33 of the *1995 Act* applied to Section 41 of the *1995 Act*, following judicial interpretation in *Blount Inc v The Registrar of Trade Marks* (1998) to the contrary.[179] This change benefits prospective owners of marks.[180] As this potentially results in the registration of more marks that are not inherently adapted to distinguish, it may clutter the Register, restricting available signs that can be used by the public and competitors.[181]

The Working Party Group had recommended the adoption of a presumption of registrability. This corresponded with European law, *TRIPS* and contemporaneously proposed legislative amendments in New Zealand and the United Kingdom.[182] Subsequent explanatory material did

[172] Rosemary Bell, 'Trade Marks Amendment (Madrid Protocol) Bill 2000' (2000) *Bills Digest* No 20 2000-01.
[173] Explanatory Memorandum, Trade Marks Amendment (Madrid Protocol) Bill 2000 (Cth).
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] *Blount Inc v The Registrar of Trade Marks* (1998) 83 FCR 50; *Trade Marks Act 1995* (Cth) s 41 inserted by *Intellectual Property Laws Amendment (Raising the Bar) Act* 2012 (Cth) sch 6 item 113.
[180] IP Australia, *Trade Marks Office Manual of Practice and Procedure* (2018) pt 22.2 <http://manuals.ipaustralia.gov.au/trademarks/trade_marks_examiners_manual.htm>.
[181] Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011(Cth) 146.
[182] Working Party to Review the Trade Marks Legislation, above n 26, 41.

not emphasise this relationship.[183] The Productivity Commission recently attributed cluttering of the Register to the introduction of the presumption of registrability,[184] although this conclusion remains contested.[185] International agreements also influenced the 2006 amendment of the ownership provision contained in section 27(2) of the *1995 Act* to permit associations to own a collective trade mark.[186] This strengthened the rights of relevant trade mark owners.

7.4.3 Opposition

Some amendments to opposition procedures are closely linked to registration. Section 58A was introduced as a ground of opposition so that section 44 could function to more effectively permit users of signs who have accrued common law trade mark rights to oppose the registration of these marks.[187] This amendment potentially strengthened the rights of Australian owners of common law trade marks, subject to the limitations imposed by section 60.[188]

Amendments to section 60 exemplify further strengthened rights of trade mark owners. Article 6*bis* of the *Paris Convention* originally provided protection for well-known marks.[189] This was addressed in Australia by section 28(1) of the *Trade Marks Act 1955* (Cth).[190] *TRIPS* provided protection for well-known marks and extended the protection provided by article 6*bis* to services.[191] *TRIPS* further required protection for well-known marks where goods or services were not similar to those for which the mark was registered.[192] Section 60 of the *1995 Act* accordingly provided grounds for opposition where the mark applied for was substantially identical or deceptively similar to a mark that had previously acquired a reputation in Australia, and consequently the mark applied for was likely to deceive.[193] These well-known marks with a previous reputation did not need to be registered, benefiting owners of marks registered overseas without relevant Australian registrations. This protection further expanded in 2006 so

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[183] Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 (Cth), 146.
[184] *Productivity Commission Report*, above n 11, 377-388.
[185] GiIbert and Tobin, Submission to the Australian Government Productivity Commission, *Inquiry into Intellectual Property Arrangements*, 10 June 2016.
[186] Explanatory Memorandum, Trade Marks Amendment Bill 2006 (Cth).
[187] Ibid.
[188] *McCormick v McCormick* demonstrates the constraints that section 60 can place on the operation of section 44: *McCormick & Co Inc v McCormick* (2000) 51 IPR 102.
[189] This was introduced in the 1925 agreements for revision of the *Paris Conven*tion and subsequently revised. See Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press, 2015) 551.
[190] In *Campomar v Nike* the Court characterised the use of section 28 in the claim to '[involve] the use of that provision as an "anti-dilution" device to protect the goodwill of the respondents in "NIKE"': *Campomar* (2000) 202 CLR 45, 66 [44].
[191] *TRIPS* art 16.2.
[192] Ibid art 16.3.
[193] *Trade Marks Act 1995* (Cth) s 60 later amended by *Trade Marks Amendment Act 2006* (Cth) sch 1 pt 1 item 31.

that it was no longer necessary to establish that the two marks were substantially identical or deceptively similar to each other, just that the well-known mark had acquired a reputation before the priority date.[194] This strengthened the rights of owners.

International expansion of protection for trade mark owners can be linked to these amendments. The Explanatory Memorandum referenced both the *Paris Convention* and *TRIPS* as sources for the amendment.[195] It cited several cases in which it was established that registration of a mark would deceive or cause confusion, even though it could not be established that the mark was substantially identical or deceptively similar to the relevant mark that had acquired a reputation in Australia.[196] The source of the wording of the amendment appears to be in a submission to ACIP by Baker and McKenzie, in the broader context of discussions about changes to section 120(3).[197] The issue had not been identified in three reports of consultations by IP Australia following ten years of operation of the Act and the ACIP report on Trade Mark Enforcement.[198]

The Explanatory Memorandum amending section 60 emphasises that the provision, rather than creating a new class of well-known marks, requires that the mark has acquired a reputation in Australia. Despite this, the amendment clearly benefits overseas trade mark owners.[199] There were no amendments to the *1995 Act* in the legislation implementing *AUSFTA*.[200] However, *AUSFTA* required the application of Article 6*bis* in cases where use of the mark would provide a connection between goods or services and the owner of the mark that was likely to damage the interests of the owner.[201] The possible broad scope of connection may have supported the amendment introduced to section 60 at the apparent suggestion of an international law firm with its head office in the United States of America.[202]

Section 61 of the *Trade Marks Act 1995* (Cth) was limited by amendments to clarify that it applied only where there was a likelihood of deception or confusion.[203] This limitation strengthened consumer and public interests. Consumer and trade mark owner interests were

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[194] *Trade Marks Amendment Act 2006* (Cth) sch 1 pt 1 item 31.
[195] Explanatory Memorandum, Trade Marks Amendment 2006 (Cth) Bill 8.
[196] Explanatory Memorandum, Trade Marks Amendment 2006 (Cth) Bill 9.
[197] Baker & McKenzie (Australia), Submission to the Advisory Council on Intellectual Property, *Review of Enforcement of Trade Marks*, 7 June 2002.
[198] IP Australia (September 2004), above n 167; IP Australia (March 2004), above n 167; IP Australia (October 2003), above n 167; Advisory Council on Intellectual Property (March 2004), above n 168, 22–23.
[199] Explanatory Memorandum, Trade Marks Amendment 2006 (Cth) Bill 8.
[200] Although it removed a *TRIPS* flexibility by requiring marks need not be visually perceptible: *Australia-United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) art 17.2.2 ('*AUSFTA*').
[201] Ibid art 17.2.6.
[202] Baker & McKenzie (Australia), above n 197.
[203] *Trade Marks Amendment Act 2006* (Cth) sch 1 pt 1 item 1; Explanatory Memorandum, Trade Marks Amendment Bill 2006 (Cth) 9-10.

strengthened by the introduction of the section 62A ground of opposition where the application for registration is made in bad faith.[204] These amendments appear to respond to the experience of the Registrar rather than international developments.[205] As the provision was intended to limit the activities of people who 'identify trade marks used overseas but with no Australian use as yet who then apply to register the trade marks in Australia for the express purpose of selling them to the overseas owners', the provision also benefits overseas trade mark owners.[206]

7.4.3.1 Section 60, INN stems and human rights impacts

The potential impact of broad section 60 protection for trade marks on health can be seen from registration practice involving INNs. INNS are the terms internationally used to describe pharmaceuticals and identify pharmaceutical ingredients. INN stems are names that demonstrate the relationship between pharmacologically-related substances by using a common 'stem'.[207] The World Health Organization (WHO) has stated that it is inadvisable to permit trade marks containing INNs and particularly to permit trade mark for INN stems.[208] Registration of INNs and INN stems for patented pharmaceuticals as trade marks can result in an unfair monopoly for patent holders once a patent expires.[209] However, this WHO advice has not been uniformly adopted.[210] This can have negative impacts on cost-effective access to medicine and realisation of the right to health.[211]

The policy and practice of the Australian Trade Marks Office has been not to register trade marks that are substantially identical to INN stems.[212] Where marks contain part of INN stems they are usually registered on the condition that they be used only in relation to products containing the INN substance.[213] However, sometimes the registration of these INN derivatives can engage section 60. In *Sanofi v Eremad Pty Ltd* (2013) the applicant applied to register the

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[204] Explanatory Memorandum, Trade Marks Amendment Bill 2006 (Cth) 10.
[205] Ibid.
[206] Ibid.
[207] As the WHO Guidelines state: '[b]y the use of common stems the medical practitioner, the pharmacist, or anyone dealing with pharmaceutical products can recognize that the substance belongs to a group of substances having similar pharmacological activity.' World Health Organization, Division of Drug Management and Policies, *Guidelines on the Use of INNs for Pharmaceutical Substances*, WHO/PHARMS/NOM 1570 (1997) 1.
[208] Ibid.
[209] Kappoori M Gopakumar and Nirmalya Syam, 'International Nonproprietary Names and Trademarks: A Public Health Perspective' (2008) 11(2) *Journal of World Intellectual Property* 63, 96.
[210] Ibid 79.
[211] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12 ('*ICESCR*'); Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [17], [43] ('*General Comment 14*').
[212] IP Australia, above n 180, pt 24.3.2.
[213] See, eg, *Aventis Pharma SA v Alphapharm Pty Ltd* (2005) 65 IPR 634 (Williams J).

mark CLOVIX 75 in relation to pharmaceutical products with the active ingredient clopidogrel besylate.[214] The originator of the drug, Sanofi Aventis opposed the application, referencing its trade mark registrations for PLAVIX and COPLAVIX, which it used in relation to pharmaceutical products with the active ingredient clopidogrel besylate. [215] The Trade Marks Office accepted that the reputation of the PLAVIX mark meant that section 60 was established.[216] The original registration is one of a number of registrations in which the Australian Trade Marks Office has registered a mark that has a close connection to an INN stem, such as the registration of ROXIMYCIN as a mark for goods containing ROXITHROMYCIN.[217] These registrations could restrict the registration of later marks with a connection to INN stems. This was not the case in *Sanofi v Eremad* because the well-known mark was PLAVIX not COPLAVIX. If the well-known mark is closely linked to the INN stem, which the ROXIMYCIN example suggests would be possible in Australia, section 60 could operate to exclude a broad range of other marks seeking to incorporate references to the INN stem. This arguably creates a more uneven playing field for generic competitors if originator advertising has used branding and referenced INNs.[218] If the mark that is registered is very close to the INN stem and is registered with Customs in the notice of objection system, the operation of the notice of objection system could mean that a generic competitor who uses the INN stem to describe their goods may risk their goods being seized for using a mark deceptively similar to a registered mark, when they are in fact describing the relevant goods.[219] Although there would be clear grounds for defence by the generic producer, the potential cost and interruption associated with dealing with the claim remains significant.

Obstacles to generic competition can present obstacles to access to medicine.[220] Arguably, there should be a broader exclusion of marks containing part of INN stems than the current Australian

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[214] *Sanofi v Eremad Pty Ltd* (2013) 104 IPR 283 (Murray J).
[215] Ibid.
[216] Reference was made in this decision to the Federal Court decision in *Pfizer Products Inc v Karam* (2006) 237 ALR 787. INN stems were not in issue. However, Justice Gyles refused the trade mark applications for HERB-AGRA, HERBAGRA and HERB AGRA in relation to class 5, accepting the application of section 60 because of the likelihood that the marks could deceive or cause confusion as a result of the reputation of the well-known mark, VIAGRA, a product that was also registered in class 5: at 799 [47] (Gyles J).
[217] See *Aventis Pharma SA v Alphapharm Pty Ltd* (2005) 65 IPR 634 (T Williams); *Eremad Pty Ltd v Sanofi-Aventis* (2009) 84 IPR 647 (Wilson J) (OXALATIN and OXALIPLATIN). Note table in *Health World Limited* [2013] ATMO 43 (12 June 2013) at [22] (N Worth). See registration of Celgene despite link between Cel prefix and INN stems: *Celgene Corporation* [2013] ATMO 10 (30 January 2013) (B Irgang).
[218] Gopakumar and Syam, above n 209, 96. Generic marks, entering the market after the expiry of patent rights, are more likely to be negatively impacted by a system, which permits marks to include some reference to the descriptive INN stem.
[219] *Trade Marks Act 1995* (Cth) s 133.
[220] Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Knowledge' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development*

Trade Mark Office approach.[221] Gopakumar and Syam advocate stronger accountability mechanisms and broader exclusion of the use of INN stems in trade marks.[222] The World Health Assembly has required states to regulate the use of INNs.[223] Gopakumar and Syam argue that the use of INNs as part of trade marks can have serious ramifications for the effectiveness of the INN system and may even result in confusion among doctors prescribing medication, resulting in potential risks to health and safety.[224] These types of concerns and potential restrictions on affordable access to medicine are relevant to state obligations regarding the highest attainable standard of health, as detailed in Chapter 4 of this thesis.

7.4.4 Infringement

A key difference between Australian law and other developed countries appears to be the limited protection given against dilution or tarnishment of trade marks. Section 120(3) was introduced in the original *1995 Act*.[225] It refers specifically to registered marks that are well-known in Australia and permits a finding of infringement where use of the mark on unrelated goods or services would be likely to be taken as indicating a connection between the unrelated goods or services and the registered owner of the trade mark because the trade mark is well-known.[226] There is significant debate about the extent to which this provision extends the scope of rights for owners of well-known marks.[227] In contrast to the frequently used section 60, there is uncertainty about the scope of section 120(3) and the protection that it provides for owners of well-known trade marks.[228] The Australian provisions are not as extensive as the protection provided against dilution and tarnishment of well-known trade marks in the United States. However, fair use defences for infringement that do not exist in Australian law balance American protections.[229] A key difference appears to be the focus of section 120(3) on use on unrelated goods or services. This creates a more narrow action.

(Palgrave Macmillan, 2002) 161, 174–175, citing Joe Staten Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Harvard University Press, 1956).

[221] IP Australia, above n 180, pt 24.3.2.

[222] Gopakumar and Syam, above n 209, 98–100. This is relevant to state obligations in relation to healthcare quality and to protect individuals through 'control the marketing of medical equipment and medicines by third parties': *General Comment 14*, UN Doc E/C.12/2000/4, [12], [35].

[223] World Health Assembly, *Resolution 46.19: Nonproprietary Names for Pharmaceutical Substances* (12 May 1993).

[224] Gopakumar and Syam, above n 209, 73.

[225] *Trade Marks Act 1995* (Cth) s 120(3).

[226] Ibid.

[227] Berger, above n 82; Gonsalves and Flynn, above n 82; Handler, above n 82; Lux, above n 82.

[228] Berger, above n 82; Gonsalves and Flynn, above n 82; Handler, above n 82; Lux, above n 82. See discussion of section 60 in Andrew Fox, 'Reputation Runaround - Limitations, Advantages and Reach of Section 60 of the "Trade Marks Act 1995" (Cth)' (2017) 108 *Intellectual Property Forum* 28.

[229] *Trademark Dilution Revision Act*, 15 USC § 1125(c) (2006). But see criticisms of the American system: McGeveran, above n 100, 51–53. Loughlan notes absence of free speech protections in Australian

Chapter 6 noted that the extension of trade mark rights internationally has been emphasised following the introduction of *TRIPS*. There is evidence of an increasing scope of trade mark owner rights in Europe, beyond the function of consumer protection.[230] In the United States, the 1995 *Federal Trademark Dilution Act* extended scope of rights for 'famous trade mark' owners to protect against uses that diluted their distinctiveness or tarnished the mark.[231] There has been significant policy discussion about the extent to which Australia provides protection for dilution, including dilution by blurring or tarnishment, of famous marks.[232] The difference between Australian protection and more extensive overseas protection has been noted.[233] The government accepted the recommendation of ACIP that 'the Government should support research into the economic and legal benefits of, and costs associated with, extended protection of well-known marks.'[234] However, this has not prompted legislative change and was not addressed in the recent Productivity Commission draft report. This suggests that Australia is retaining a degree of regulatory autonomy despite protection inconsistencies with major trading partners. However, future autonomy may be influenced by the finding in *Australia – Plain Packaging Measures* that use protected by Article 20 is 'not limited to the use of a trademark for the specific purpose of distinguishing the goods and services of one undertaking from those of other undertakings' and includes 'a wider range of commercial, advertising and promotion activities.'[235] Arguably, this recognition of broader ownership interests may influence future Australian legislative and judicial recognition of the rights of trade mark owners.

7.4.5 Anti-Counterfeiting Protection

Recognition that counterfeiting regulation was not working effectively and was restricting the ability of trade mark owners to enforce their rights and protect their marks from counterfeiting

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trade mark law: Patricia Loughlan, 'Protecting Culturally Significant Uses of Trade Marks (Without a First Amendment)' (2000) 22(7) *European Intellectual Property Review* 328, 329–332.

[230] This corresponds to the additional protection available in the European Community for trade marks with a reputation, an approach that is questioned by Burrell and Handler: Robert Burrell and Michael Handler, 'Reputation in European Trade Mark Law: A Re-Examination' (2016) 17(1) *ERA Forum* 85, 87–98. See Dev Gangjee and Robert Burrell, 'Because You're Worth It: L'Oreal and the Prohibition on Free Riding' (2010) 73(2) *Modern Law Review* 282.

[231] *Trademark Dilution Revision Act,* 15 USC § 1125(c) (2006).

[232] Berger, above n 82; Gonsalves and Flynn, above n 82; Handler, above n 82; Lux, above n 82.

[233] See Advisory Council on Intellectual Property (March 2004), above n 168, 21.

[234] *Government Response - Review of the Enforcement of Trade Marks* (20 April 2016) Australian Government, IP Australia <https://www.ipaustralia.gov.au/about-us/public-consultations/archive-ip-reviews/ip-reviews/Government-Response-review-of-the-enforcement-of-trade-marks/government-response>.

[235] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018) [7.2286] ('*Australia – Plain Packaging Measures*'). See discussion in Chapter 8 at 8.4.1.2.

activities prompted amendments to anti-counterfeiting legislation.[236] Changes were introduced in 2013 to make the system more effective for trade mark owners.[237]

Australia has also demonstrated a commitment to increased enforcement of trade marks. Perceived difficulties with enforcement of intellectual property rights, which first prompted the development of *TRIPS* within the WTO, have subsequently influenced the inclusion of *TRIPS*-plus protections in bilateral and plurilateral agreements.[238] Australia signed the *Anti-Counterfeiting Trade Agreement* ('*ACTA*'), which was an agreement between countries that strongly support enforcement of trade mark rights. However, this agreement was criticised in Australia on a number of grounds,[239] and failure to achieve legislative support for the agreement in the United States and the European Union meant that it has not entered into force and is unlikely to do so.[240] One of the grounds for criticism of *ACTA* was its failure to incorporate other concerns that are protected by international law, including human rights concerns.[241] Further changes have been proposed in the *Comprehensive and Progressive Trans Pacific-Partnership Agreement* ('*TPP-11*') which constitute *TRIPS*-plus provisions for enforcement, including a significant expansion of the existing criminal liability and penalties.[242] This will be considered in more detail in Chapters 9 and 10 of this thesis.

7.4.6 Synthesis

Despite general consistency with international developments, Australia maintains some regulatory autonomy in areas directly and indirectly relevant to trade marks. Although it agreed to *TRIPS*-plus provisions removing flexibility regarding visual perceptibility of marks in *AUSFTA*, it did not agree to investor-state dispute settlement mechanisms in that agreement, which is unusual for free trade agreements with the United States.[243] Originally used in investment treaties with developing countries where there was a perceived need to strengthen

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[236] IP Australia (October 2003), above n 167, 27; Advisory Council on Intellectual Property (March 2004), above n 168, 22–23.
[237] *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth).
[238] Peter K Yu, 'TRIPS and Its Achilles Heel' (2011) 18(2) *Journal of Intellectual Property Law* 479.
[239] See Matthew Rimmer, 'Trick Or Treaty?: The Australian Debate Over The Anti-Counterfeiting Trade Agreement 2011' in Pedro Roffe and Xavier Seuber (eds), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press, 2014) 169.
[240] Susan K Sell, 'The Dynamics of International IP Policymaking' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 76, 77–80.
[241] See Matthew Rimmer, Supplementary Submission No 1.1 to the Joint Senate Committee on Treaties, *Inquiry into Anti-Counterfeiting Trade Agreement 2011* (21 November 2011) 7-8.
[242] For analysis of provisions in the earlier agreement, see Kimberlee Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"' (2016) 16 *Melbourne Journal of International Law* 257, 264, 274–275.
[243] Andrew D. Mitchell and Tania Voon 'Introduction,' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 1, 3.

protection for Australian companies engaging with foreign investment,[244] the approach to investor-state dispute mechanisms has varied.[245] Australia has agreed to investor-state dispute settlement mechanisms subsequently, including in the recently agreed *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.[246] As the arbitration between Australia and Philip Morris regarding tobacco plain packaging legislation considered in Chapter 8 demonstrates, investor-state disputes can involve trade mark legislation. This has potentially significant economic implications where that legislation is impugned as inconsistent with protections for investors pursuant to these agreements.

Amendments to sections 60 and 61A also strengthened the rights of overseas owners. However, in other respects, Australia has not strengthened the rights of owners of well-known marks. Despite policy recognition of the differences between Australian protection against dilution and tarnishment,[247] Australian law has not expansively incorporated this type of protection. This remains an important point of difference for Australia and trade mark legislation in wealthy trading partners, given the centrality of dilution and tarnishment to debates about the expanding nature of trade mark rights, as discussed in Chapter 6.

The Australian Productivity Commission has raised concerns about domestic regulatory autonomy in relation to Australia's approach to negotiating increasing intellectual property obligations in bilateral and regional trade agreements.[248] Concerns include the extent to which agreeing to *TRIPS*-plus and investor-state dispute provisions in bilateral and plurilateral trade agreements restricts domestic regulatory autonomy and potentially impedes economic development.[249] The economic impact of increasing intellectual property standards as a result of these agreements relates in part to Australia's position as a net importer of intellectual property.[250] Greater benefit may result from less extensive protection for intellectual property for Australia than for a country that is a net exporter of intellectual property.[251] Nonetheless, Australia has maintained strong intellectual property rights for owners.[252] Evidently, intellectual property interests and attempts to balance them are not isolated from other governmental policy

[244] Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements - Productivity Commission Research Report* (November 2010) 265–271.
[245] Mitchell and Voon, above n 243, 3.
[246] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force).
[247] See Advisory Council on Intellectual Property (March 2004), above n 168, 21.
[248] Australian Government Productivity Commission, above n 244.
[249] *Productivity Commission Report*, above n 11, 527–548. See, eg, criticism of copyright term: at 128–129.
[250] Ibid 615.
[251] Ibid 615–629.
[252] For example, it has agreed to a 70 years plus the life of the author copyright term, unlike New Zealand: ibid 128–129.

interests.[253] In recent decades, a number of trading partners who are valued as important economic and political allies have embedded intellectual property in trading partnerships, and our interest in maintaining those relationships has outweighed our interests in realising a domestic balance that reflects the greatest overall benefit for Australians.[254] A further justification for high intellectual property standards relates to the broader objectives for intellectual property. Any model considering the relationship between intellectual property and human rights should recognise intellectual property's function of stimulating socially valuable innovation in science and the arts.[255] Nevertheless, this approach needs to be effective to ensure benefit for Australia in practice.[256] Embedding intellectual property agreements within trade may have beneficial outcomes, such as the removal of trade barriers.[257] However, these linkages can also result in the adoption of intellectual property standards that do not permit states to mediate between stakeholder interests to achieve a nationally appropriate outcome.[258] This can impact on broader economic welfare, which in turn limits resources available for the realisation of human rights.[259] The inclusion of intellectual property in trade agreements may influence amendments to legislation that strengthen owner rights, such as the amendments to section 60. This can intensify the impact of provisions of this nature in diverse areas, such as the use of INN stems in marks associated with pharmaceuticals, which may have impacts on human rights, such as the human right to health.

7.5 CONCLUSION

Understanding historical international influences guides our understanding of the likely influence of future multilateral, plurilateral and bilateral agreements on Australian trade mark

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[253] For an excellent discussion of the relationship between FTAs and intellectual property in Australia, see Christopher Arup, 'The Governance of Patents and Pharmaceuticals: The Regional FTA Contribution' in Christoph Antons and Reto M Hilty (eds), *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region* (Springer, 2015) 287, 288–295. See also John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012) 364–366.

[254] Arup discusses the one-sided relationship between Australian and the United States in relation to the intellectual property chapter in *AUSFTA*: Arup, above n 253, 295. See Matthew Kennedy, *WTO Dispute Settlement and the TRIPS Agreement* (Cambridge University Press, 2016) 96–103, 105.

[255] *Productivity Commission Report*, above n 11, 82–83, 87–88.

[256] Ibid 128–129.

[257] Keith E Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century* (Peterson Institute for International Economics, 2012) 11.

[258] Kimberlee Weatherall, Isabella Alexander and Michael Handler, Submission No 99 to the Australian Government Productivity Commission, *Intellectual Property Arrangements: Issues Paper*, 14 December 2015, 14.

[259] J Janewa Osei Tutu, 'Value Divergence in Global Intellectual Property Law' (2012) 87(4) *Indiana Law Journal* 1640, 1681. See recognition of centrality of resource assessment to a rights-based approach to health in Alicia Ely Yamin, 'Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care' (2008) 10(1) *Health and Human Rights* 45, 48–49. See also J Janewa Osei Tutu, 'Corporate "Human Rights" to Intellectual Property Protection?' (2015) 55 *Santa Clara Law Review* 1; J Janewa Osei Tutu, 'Private Rights for the Public Good?' (2013) 66(4) *SMU Law Review* 767.

legislation. Although there is evidence of ongoing influence from international intellectual property law, the limited protection for dilution and tarnishment means that Australia has partially limited the expansion of trade mark owner rights which the previous chapter identified as prevalent in many developed countries. The case studies and Chapter 10 will further examine both the WTO system and the potential impact of bilateral and plurilateral agreements on Australian domestic regulatory autonomy and the implementation of other international obligations, including human rights obligations.

International human rights obligations have not been explicitly recognised in Australian trade marks legislation or policy material, despite the potential links between them evidenced in the analysis of the potential human rights impact of the operation of section 60 of the *Trade Marks Act* in relation to INN stems. Chapter 4 of this thesis has concluded that although there are overlaps between public health and the right to health, there are benefits for considering the different implications of trade mark law that are part of a human rights-based analysis. Chapter 5 identified some human right to health implications in relation to Australian trade agreements that include provisions relevant to trade mark law. These are usually framed as public health concerns. Consequently, it is beneficial to use the human rights-based methodology developed in Chapter 4 to analyse Australian trade mark legislation and international agreements that influence Australian legislation. This analysis will occur in the two case studies. Given recognition of other human rights implications for trade marks, such as freedom of expression, in other jurisdictions, it is appropriate that the approach is not restricted to right to health analysis. Recognition of both intellectual property and human rights interests in domestic legislation is essential to finding an approach that harmonises intellectual property and human rights, and to building a human rights culture.

CHAPTER EIGHT TOBACCO PLAIN PACKAGING CASE STUDY

8.1 INTRODUCTION

This chapter contributes a detailed human rights-based analysis of the trade mark provisions of Australian plain packaging legislation to the literature. The legislation operates within the broader context of trade mark legislation identified in the previous chapter. The human right to health implications of tobacco control have been considered,[1] but these analyses did not focus closely on Australian plain packaging legislation.[2] This chapter contributes analysis of the human rights implications of the World Trade Organization (WTO) findings in *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* ('*Australia – Plain Packaging Measures*'), particularly in relation to Article 20.[3] The chapter also contributes detailed analysis about the relevant rights of children and uses a rights-based approach that has not been previously applied to the dispute, considering progressive realisation and prohibitions on retrogression, interdependence of rights, and obligations of international cooperation and

[1] See Chuan-feng Wu, 'State Responsibility for Tobacco Control: The Right to Health Perspective' (2008) 3 *Asian Journal of WTO & International Health Law & Policy* 379; Stephen P Marks, 'Normative Expansion of the Right to Health and the Proliferation of Human Rights' (2016) 49(1) *George Washington International Law Review* 101; Carolyn Dresler and Stephen P Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28(3) *Human Rights Quarterly* 599; David Reubi, 'Making a Human Right to Tobacco Control: Expert and Advocacy Networks, Framing and the Right to Health' (2012) 7(Suppl 2) *Global Public Health* S176.

[2] Marks, above n 1; Dresler and Marks, above n 1; Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7(3) *International Journal of Law in Context* 285; Oscar A Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52(Suppl 2) *Salud Publica De Mexico* S288.

[3] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018) [7.2575]-[7.2606] ('*Australia – Plain Packaging Measures*'). Limited analysis of WTO disputes surrounding the legislation prior to the publication of the decision has identified the relevance of the human right to health: see Henning Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health' (2013) 9(2) *Journal of Private International Law* 308; Ernst-Ulrich Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes' (2015) 10 *Asian Journal of WTO & International Health Law and Policy* 27; Sam Ricketson, 'Plain Packaging Legislation for Tobacco Products and Trade Marks in the High Court of Australia' (2013) 3(3) *Queen Mary Journal of Intellectual Property* 224, 239; Samuel Murumba, 'Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property' (2012) 38(1) *Monash University Law Review* 119; Henning Grosse Ruse-Khan, *Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 9–11, 47–48, 62–63; Brigit Toebes, 'Human Rights and Public Health: Towards a Balanced Relationship' (2015) 19(4) *The International Journal of Human Rights* 488, 495.

assistance.[4] Primarily, analysis of the health aspects of the legislation has focused on public health concerns, and this corresponds to the analysis in *Australia – Plain Packaging Measures*.[5] Public health is relevant to human right to health concerns but does not address all of the relevant standards required by a human rights-based analysis focused on health. This chapter uses detailed analysis of relevant explanatory legislative materials, including parliamentary human rights scrutiny, to analyse evidence of a human rights-based approach to the health aspects of tobacco plain packaging legislation. It uses this analysis to argue that a human rights approach to the interpretation of the Article 20 complaint in the WTO dispute has advantages over the approach utilised by Australia in its arguments.[6] The availability of human rights arguments in the WTO disputes is contrasted with the narrow exceptions available in the dispute about tobacco plain packaging legislation between Philip Morris and Australia to suggest that bilateral trade agreements present further challenges for consistent interpretation between intellectual property law and human rights law.

This chapter studies the case of Australia's tobacco plain packaging legislation. The chapter considers key features and relevant background of the legislation in the context of Australia's obligations in international law. Consistent with the limited explicit recognition of human rights obligations in Australian trade mark legislation, plain packaging legislation emphasises public health, as opposed to the human right to health. Reference to binding human rights obligations significantly strengthens the basis for plain packaging legislation in international law. The chapter uses the methodology developed in Chapters 4 and 5 of this thesis to analyse the human rights implications of the legislation. Relevant human rights engaged by the legislation are not limited to the human right to health but include freedom of expression, and creators' rights to moral and material benefits of intellectual creations, property and development.

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[4] Hunt identifies interdependence of rights, progressive realisation and international assistance and cooperation as important features of a rights-based approach to health: Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) *Health and Human Rights* 109.

[5] See, for example, analysis of justification for special requirements: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2575]-[7.2606]. See generally Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012). See also Sam Halabi, 'International Trademark Protection and Global Public Health: A Just-Compensation Regime for Expropriations and Regulatory Takings' (2012) 61(1) *Catholic University Law Review* 325; Valentina S Vadi, 'Trade Mark Protection, Public Health and International Investment Law: Strains and Paradoxes' (2009) 20(3) *European Journal of International Law* 773; Jonathan Liberman, 'Combating Counterfeit Medicines and Illicit Trade in Tobacco Products: Minefields in Global Governance' (2012) 40(2) *Journal of Law, Medicine and Ethics* 326.

[6] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging. Integrated Executive Summary of Australia's Submissions*, WTO Doc WT/DS435/441/458/467 (23 March 2016) ('*Summary of Arguments*').

Plain packaging legislation has been contested in Australian courts, investment dispute arbitration and the WTO. These attacks threaten the ability of the legislation to realise its health objectives. This is relevant to Australia's right to health obligations. Chapters 4, 6 and 7 have previously considered potential restrictions that intellectual property law can pose for the ability of states to recognise human rights obligations. This chapter identifies further restrictions apparent from the operation of investor-state dispute mechanisms and the WTO dispute settlement processes.

8.2 FEATURES OF AUSTRALIAN TOBACCO PLAIN PACKAGING LEGISLATION

This section explains the purpose, function and history of tobacco plain packaging legislation. The legislation creates a specific exception to the trade mark rights conferred by the *Trade Marks Act 1995* (Cth). The exception restricts trade marks used on tobacco packaging. The primary relevant legislation is the *Tobacco Plain Packaging Act 2011* (Cth), the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth), the *Tobacco Plain Packaging Regulations 2011* (Cth) and the *Tobacco Plain Packaging Amendment Regulation 2012* (Cth) ('*Plain Packaging Legislation*').

8.2.1 Purpose of Act

Tobacco consumption is recognised as a global health epidemic.[7] A 2008 discussion paper released by the Australian Government National Preventative Health Taskforce ('*National Health Taskforce Paper*') identified plain packaging as a key priority for reducing rates of tobacco consumption in Australia, emphasising that packaging continued to permit tobacco advertising.[8] Subsequently, *Plain Packaging Legislation* introduced requirements for the packaging of tobacco-related products. The Human Rights Compatibility Statement ('HRCS') for the *Tobacco Plain Packaging Amendment Regulation 2012* acknowledges that the legislation promotes realisation of the right to health.[9] It also addresses potential restrictions that the legislation poses for the right to freedom of expression and argues that the restrictions are reasonable, proportionate and necessary.[10]

[7] Andrew D Mitchell and Tania Voon, 'Introduction,' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 1, 1.
[8] National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020. A Discussion Paper* (2008) 11, 23–4 ('*National Health Taskforce Paper*').
[9] Explanatory Statement, Tobacco Plain Packaging Amendment Regulation 2012 (No 1) (Cth) 14-15.
[10] Ibid 10-14.

The protection of public health and the implementation of the *World Health Organization Framework Convention on Tobacco Control* ('*FCTC*') are primary policy concerns for *Plain Packaging Legislation*.[11] Parliamentary debate introducing the legislation supported its emphasis on health concerns, including special concerns regarding young smokers.[12] The legislation permitted marks to continue to be used by trade mark owners in a restricted way to denote the source of the product.[13] The legislation also permitted trade marks to stay on the register, even where they might be susceptible to non-use actions as a result of the legislation.[14]

8.2.2 Function of Act

The legislation restricts the ability of owners of tobacco-related trade marks to use their marks on packaging.[15] The legislation permits only the use of word marks in a prescribed size, font and colour in a designated position on the packet.[16] Word marks must denote the brand, business or company name or variant name.[17] There are separate requirements for wrappers.[18] Section 10 also clarifies that the legislation is not intended to interfere with legislation 'in relation to the appearance of graphic health warnings on packaging.'[19] Graphics or device marks not required by this legislation cannot be used. Word trade marks can still fulfil their function as an indication of origin and quality for consumers.[20]

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[11] *World Health Organization Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) ('*FCTC*'); *Tobacco Plain Packaging Act 2011* (Cth) s 3. Significantly, 'Clause 3 is not intended to be an exhaustive list of ways in which public health may be improved or Australia's obligations under the WHO FCTC may be met': Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 7.
[12] Commonwealth, *Parliamentary Debates,* Senate, 13 June 2006, 250 (Santo Santoro).
[13] *Tobacco Plain Packaging Act 2011* (Cth) s 21.
[14] Ibid s 28. Similar provisions apply where the operation of the legislation results in failure to make a product that embodies a registered design: at s 29. Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 15.
[15] *Tobacco Plain Packaging Act 2011* (Cth) s 20; Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 9.
[16] *Tobacco Plain Packaging Act 2011* (Cth) s 21.
[17] Ibid s 20(3)(c).
[18] Ibid ss 21(5), 22.
[19] Ibid s 10.
[20] Crennan J noted the importance of brand names to recognition in *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v Commonwealth of Australia* (2012) 250 CLR 1, 103 [288] (Crennan J) ('*JT International*'). See Crawford Moodie et al, 'Young Women Smokers' Perceptions and Use of Counterfeit Cigarettes: Would Plain Packaging Make a Difference?' (2013) 22(3) *Addiction Research and Theory* 263.

8.2.3 History of Act

8.2.3.1 Australian regulation of tobacco

Tobacco packaging is considered to be a vehicle for tobacco advertising.[21] Tobacco advertising has been historically subject to heavy regulation in Australia.[22] In Australia, the *Tobacco Advertising Prohibition Act 1992* (Cth) banned most forms of tobacco advertising with the objective of improving public health.[23] This legislation was amended in 2010 to clarify that the relevant prohibitions extended to internet advertising.[24] These bans reflected a belief that '[m]essages and images promoting the use of tobacco products can "normalise" tobacco use, increase uptake of smoking by youth and act as disincentives to quit.'[25]

Another important feature of tobacco regulation has been government excises charged on tobacco products. Recent excise increases are relatively contemporaneous to *Plain Packaging Legislation*. In April 2010, tobacco excises were increased by 25 per cent.[26] The *Customs Tariff Amendment (Tobacco) Act 2014* (Cth) introduced further increases.[27] The increased cost of cigarettes can contribute to both reduced rates of tobacco consumption and the increased prevalence of illicit tobacco, which section 8.3.1.4 below will discuss.

8.2.3.2 FCTC obligations

Section 3 of the *Tobacco Plain Packaging Act 2011* (Cth) explicitly references Australia's obligations under the *FCTC*.[28] The World Health Assembly unanimously adopted the *FCTC* in May 2003. Australia signed the *FCTC* in 2003.[29] Treaty scrutiny noted Australia's prominent

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[21] National Preventative Health Taskforce, *Australia: Healthiest Country by 2020. Technical Report 2 - Tobacco Control in Australia: Making Smoking History, Including Addendum for October 2008 to June 2009* (2009) 20 ('*Technical Report*').
[22] Explanatory Memorandum, Tobacco Advertising Prohibition Amendment Bill 2010 (Cth). For the importance of a comprehensive approach to tobacco regulation see: Henry Saffer and Frank Chaloupka, 'The Effect of Tobacco Advertising Bans on Tobacco Consumption' (2000) 19(6) *Journal of Health Economics* 1117.
[23] Ibid 1.
[24] Ibid 1–2.
[25] Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 1. See also Matthew Thomas, 'Tobacco Plain Packaging Bill 2011' (2011) 35 of 2011–2012 *Bills Digest* 26.
[26] Arguably this is a key driver for increases in illicit tobacco: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1018].
[27] *Customs Tariff Amendment (Tobacco) Act 2014* (Cth).
[28] *Tobacco Plain Packaging Act 2011* (Cth). The reference to the *FCTC* may have been emphasised because the power relied on by the Commonwealth to make the law is the foreign affairs power: at s 51(xxix), *Australian Constitution*. The explanatory memorandum emphasises that the Commonwealth also relies on its powers pursuant to section 51(xx) with respect to corporations; section 51(i) with respect to international and interstate trade and commerce; and section 122 of the *Australian Constitution*, with respect to the Territories: Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 11.
[29] United Nations, *WHO Framework Convention on Tobacco Control* (12 September 2018) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IX-4&chapter=9&clang=_en >.

role in the negotiation of the agreement, consistent with its global leadership role in tobacco-related public health policies.[30] The National Impact Analysis found that Australia would not need to change its existing legislation and policies to be consistent with the obligations under the *FCTC*.[31] Nonetheless, it noted that the government was considering changes to packaging regulation.[32] The *FCTC* was tabled in parliament on 30 March 2004 and entered into force on 27 February 2005.[33] The health impacts of tobacco consumption globally and Australia's interest in reducing global harm resulting from tobacco use have been consistently identified as an important motivation for implementing the *FCTC* in Australia.[34]

Plain Packaging Legislation was based on guidelines developed to interpret article 11 of the *FCTC*.[35] Article 11 of the *FCTC* requires parties to the treaty to adopt and implement effective packaging and labelling measures within three years of becoming a party, including measures requiring minimum sizing of graphic warnings about the negative health impacts of tobacco on tobacco packaging. Part of the guidelines recommends that parties adopt plain packaging measures.[36] The governing body of the *FCTC*, the Conference of Parties (COP), adopted the Guidelines to Article 11 in November 2008.[37] They were 'intended to assist Parties in meeting their obligations under Article 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures.'[38] The COP adopted these guidelines through a process of negotiation and consensus.[39] The Explanatory Memorandum for the *Tobacco Plain Packaging Act 2011* cites articles 5, 11 and 13 of *FCTC*,

[30] Commonwealth, *Parliamentary Debates*, Senate, 5 August 2004, 25783 (Linda Kirk); Joint Standing Committee on Treaties, Parliament of Australia, *Report 62: Treaties Tabled on 30 March 2004* (August 2004) 25.
[31] Australian Government Department of Foreign Affairs and Trade, *National Interest Analysis [2004] ATNIA 7: World Health Organization Framework Convention on Tobacco Control, Done at Geneva on 21 May 2003* (2004) [8] ('*National Interest Analysis [2004] ATNIA 7*').
[32] Ibid [15].
[33] Commonwealth, *Parliamentary Debates*, Senate, 30 March 2004, 22373.
[34] For example: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2003, 14635 (Lyn Allison); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 2010, 4804–4807 (Yvette D'Ath).
[35] WHO FCTC, Conference of the Parties, *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and Labelling of Tobacco Products)*, Decision FCTC/COP3(10) (2 November 2008).
[36] Ibid 24.
[37] WHO FCTC, Conference of the Parties, above n 35.
[38] WHO FCTC, *Conference of the Parties to the Who Framework Convention on Tobacco Control, Third Session, Decisions and Ancillary Documents*, Decision FCTC/COP/3/REC/1 (2009) 17–18.
[39] Ibid 17; Chang Fa Lo, 'Guidelines and Protocols under the Framework Convention' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 32, 41.

noting that the guidelines adopted by the COP for Articles 11 and 13 recommend the introduction of plain packaging.[40]

8.2.3.3 Taskforce Report

The National Health Taskforce Report followed the *National Health Taskforce Paper* and identified plain packaging as an important early measure in its proposals for reducing tobacco consumption in 2010-2013 ('*Taskforce Report*').[41] It noted the health benefits of the measure, quoting the underlying technical report, which stated a policy intention of eliminating all remaining forms of tobacco promotion, based on scientific evidence regarding the role of tobacco promotion in tobacco consumption.[42] The National Health Taskforce Technical Report 2 ('*Technical Report*') references the 2008 guidelines regarding the interpretation of Article 11 as support for *Plain Packaging Legislation*.[43] The *Taskforce Report* noted that the potential impact of *Plain Packaging Legislation* on the rights of trade mark owners was justifiable and proportionate as trade mark law protects broader public interests rather than providing absolute property rights.[44] The proposal was considered not inconsistent with international trade agreements as they contained flexibilities and exceptions to protect public health.'[45] The *Taskforce Report* proposed the adoption of plain packaging of tobacco to implement the policy.[46]

8.2.3.4 JT International

In *JT International SA v Commonwealth of Australia* ('*JT International*'), owners of tobacco-related trade marks challenged the constitutionality of the legislation before its implementation.[47] The primary issue in the case was whether or not *Plain Packaging Legislation* constituted an acquisition of property owned by the two applicant tobacco companies contrary to section 51(xxxi).[48] Section 51 (xxxi) of the *Australian Constitution* provides the Commonwealth with the power to make laws concerning 'the acquisition of property on just

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[40] The Explanatory Memoranda provides that 'Clause 3 is not intended to be an exhaustive list of ways in which public health may be improved or Australia's obligations under the WHO FCTC may be met': Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 7.
[41] National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020. National Preventative Health Strategy: The Roadmap for Action* (2009) 19–20, 181-182 ('*Taskforce Report*').
[42] *Technical Report*, above n 21, 18, citing Ronald M Davis et al (eds), 'Part 5: Media, Tobacco Control Interventions, and Tobacco Industry Mitigation Efforts' in *The Role of the Media in Promoting and Reducing Tobacco Use* (National Cancer Institute Smoking and Tobacco Control Monograph No 19, US Department of Health and Human Services, National Institutes of Health, 2008).
[43] *Technical Report*, above n 21, 100-101.
[44] *Taskforce Report*, above n 41, 181–182.
[45] Ibid 181–182.
[46] Ibid 18, 20.
[47] *JT International* (2012) 250 CLR 1.
[48] Ibid 19 (French CJ).

terms from any State or person for any purpose in respect of which the Parliament has power to make laws.'[49] This power constitutes a constitutional guarantee of just compensation for property rights where the Commonwealth exercises it.[50] Section 10 of the *Tobacco Plain Packaging Act 2011* provides that, if restricting the use of trade marks on tobacco products or their packaging without providing compensation is contrary to section 51(xxxi), the trade marks can be used.[51] The applicants argued that the restrictions posed by *Plain Packaging Legislation* would constitute an acquisition of their property rights.[52] The legislation explicitly permitted the trade mark owners to continue to exclude others from using them, that is, exercise their negative exclusion rights.[53] The High Court majority found that the controls imposed by the legislation may have restricted some property rights but did not 'involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition' and rejected the application.[54]

8.2.4 Synthesis

Information about the object, key features and history of the legislation is relevant to understanding the influence of both human rights and intellectual property agreements on Australian trade mark legislation. Although the *FCTC* is not a human rights agreement, it has been characterised as guidance for the implementation of the human right to health.[55] Ownership rights asserted in *JT International* have been reasserted in international arbitration and the WTO, raising potential conflicts between *Plain Packaging Legislation* and Australia's trade obligations.

[49] *Australian Constitution* s 51 (xxxi).
[50] *JT International* (2012) 250 CLR 1, 33 [41] (French CJ), 87 [236] (Heydon J) reflecting *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 542 (Brennan CJ), 560 (Toohey J), 561 (Gaudron J), 571 (McHugh J), 589 (Gummow J), 653 (Kirby J).
[51] *Tobacco Plain Packaging Act 2011* (Cth) s 10. However, the regulations may prescribe restrictions (for example, on size and placement) for the purposes of this provision.'
[52] *JT International* (2012) 250 CLR 1, 27 (French CJ).
[53] *Tobacco Plain Packaging Act 2011* (Cth) s 28. Fletcher discusses rights of exclusion: Daniel Fletcher, 'JT International SA v Commonwealth: Tobacco Plain Packaging' (2013) 35 *Sydney Law Review* 827, 832.; *JT International* (2012) 250 CLR 1, 34-35 (French J), 105-106 (Crennan J).
[54] *JT International* (2012) 250 CLR 1, 34-5 (French CJ).
[55] Cabrera and Gostin, above n 2, 292.

8.3 THE HUMAN RIGHTS IMPLICATIONS OF PLAIN PACKAGING LEGISLATION

This section uses the methodology set out in Chapter 4 to make a human rights-based assessment of the health implications of *Plain Packaging Legislation*.[56] The rights-based analysis will also assess the operation of the legislation.

8.3.1 Implementation of Human Right to Health Obligations

8.3.1.1 Right to health obligations

The interpretation of the human right to health found in *General Comment 14* of the Committee on Economic, Social and Cultural Rights identifies several features that are relevant to a legitimate objective for plain packaging based in the human right to health. *General Comment 14* explains that the specific obligation in Article 12.2(b) for states to take steps to protect the right to healthy natural and workplace environments explicitly discourages the use of tobacco.[57] Other relevant obligations include steps to promote the healthy development of a child;[58] prevent, treat and control diseases;[59] and create conditions that would assure medical service and attention in the event of need.[60] Fulfilment of the human right to health involves adopting 'appropriate legislative, administrative, budgetary, judicial, promotional and other measures' towards the full realisation of the right.[61]

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[56] The questions set out in Chapter 4, Section 4.3.1 are:

1. How do the legislation and its operation contribute to the tripartite obligations to respect, protect and fulfil the right to health?
2. Is this consistent with progressive realisation of the right to health? Is the legislation effective in realising the human right to health?
3. Is the legislation consistent with obligations of international cooperation and assistance?
4. What other human rights are relevant to the legislation and its operation? Are these rights impacted positively or negatively by the legislation? Is this consistent with human rights obligations?
5. Whose rights are impacted positively and negatively by the legislation and its operation? Do the legislation and its operation permit participation of these stakeholders? Are the legislation and its operation consistent with principles of transparency and non-discrimination?
6. What system of monitoring, evaluation, accountability and redress exists to ensure that the legislation is progressing towards its intended human rights goals and that adverse effects can be addressed?

[57] Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [15] ('*General Comment 14*').

[58] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) 12(2)(a) ('*ICESCR*'). *General Comment 14* also recognises the importance of children's right to health: *General Comment 14*, UN Doc E/C.12/2000/4, [14], [22]-[24], [44]. See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24 ('*CRC*').

[59] *ICESCR* art 12(2)(c).

[60] Ibid art 12(2)(d); *General Comment 14*, UN Doc E/C.12/2000/4, [17], [59].

[61] *General Comment 14*, UN Doc E/C.12/2000/4, [33].

A key relevant obligation engaged by *Plain Packaging Legislation* is Australia's obligation to protect the right to health by taking 'all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties.'[62] The Committee on Economic, Social and Cultural Rights (CESCR) identifies violations of the obligation to include the failure of states to regulate the activities of corporations that will violate the right to health of others and the failure to protect consumers and workers from activities that are detrimental to health, including marketing and consumption of tobacco.[63] Well-documented evidence of intentional interference by the tobacco corporations in not disclosing the health impacts of tobacco obliges states to recognise their obligations to protect individuals from tobacco corporations.[64]

Australia has attempted to address this obligation through the legislative measures set out in Section 8.2 of this chapter, and as a member of the *FCTC*. Cabrera and Gostin suggest that the *FCTC* establishes 'specific content of the minimum obligations of these states with regard to the control of tobacco.'[65] Although the *FCTC* is not generally characterised as a human rights convention, it recognises the human right to health.[66] The *FCTC* provides obligations that CESCR has linked to states' obligations pursuant to the right to health. For example, CESCR connected smoke and the workplace and tobacco advertising to human right to health concerns and, accordingly, recommended that Brazil ratify the *FCTC*. [67] Cabrera and Madrazo suggest that failure to implement the minimum tobacco control measures outlined in the *FCTC* could constitute violations of right to health obligations.[68]

The *FCTC* was originally conceptualised as a governance framework that would guide states to make protocols that would include specific binding obligations.[69] Lo argues that the obligations found in guidelines on which Australia's *Plain Packaging Legislation* is based are non-

[62] Ibid [51].
[63] Ibid; Committee on Economic, Social and Cultural Rights, *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN ESCOR, 61st sess, UN Doc E/C.12/GC/24 (23 June 2017) [19] ('*General Comment 24*').
[64] Melissa Crow, 'Smokescreens and State Responsibility: Using Human Rights Strategies To Promote Global Tobacco Control' (2004) 29(1) *Yale Journal of International Law* 209, 211; Dresler and Marks, above n 1, 633, 644. See Thomas, above n 25, 6.
[65] Cabrera and Gostin, above n 2, 293.
[66] *FCTC* Preamble.
[67] Cabrera and Gostin, above n 2, 293. The CESCR used the *FCTC* as a standard to measure Brazil's compliance with its right to health obligations: Cabrera and Madrazo, above n 2, S293. See also Carolyn Dresler et al, 'Assessment of Short Reports Using a Human Rights-Based Approach to Tobacco Control to the Committee on Economics, Cultural and Social Rights' (2018) 27(4) *Tobacco Control* 385.
[68] Cabrera and Madrazo, above n 2, S288-297, applying *General Comment 14*, UN Doc E/C.12/2000/4, [51].
[69] Jonathan Liberman, 'The Power of the WHO FCTC: Understanding Its Legal Status and Weight' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 48, 50.

binding.[70] This may make it more difficult for parties to persuasively argue that they are bound to implement them.[71] However, the *FCTC* contains a number of binding obligations and is not merely a general governance framework.[72] Liberman disputes the use of a binding and non-binding dichotomy in relation to the agreement.[73] Liberman argues that guidelines adopted by the *FCTC* COP, by consensus, including the guidelines on Article 11, can constitute subsequent agreements.[74] Article 31(3) of the *Vienna Convention on the Law of Treaties* ('*VCLT*') permits subsequent agreements to be taken into account in the interpretation of a treaty.[75] Applying the *VCLT* permits individual provisions of the WHO *FCTC* to be read in the context of the treaty as a whole, 'taking into account its implementation guidelines and other relevant decisions of the COP.'[76]

8.3.1.2 Rights of the Child

A key priority of *Plain Packaging Legislation* is to 'reduce the attractiveness and appeal of tobacco products to young people.'[77] This corresponds to Australia's obligations to protect the rights of children to 'the enjoyment of the highest attainable standard of health'[78] and to ensure that the child has 'access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.'[79] In *General Comment 4 on Adolescent Health and Development*, the Committee of the Rights of the Child (COMRC) interprets this obligation to protect adolescents from information that is harmful to their health and development.[80] States should 'regulate or prohibit information and marketing of … tobacco, particularly when it targets children and adolescents.'[81] This obligation is directly relevant to the

[70] Lo, above n 39, 44.
[71] Ibid. This may be most relevant in relation to *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') art 22.
[72] Liberman, above n 69, 50–52. Liberman cites examples in articles 8, 11 (packaging and labelling of tobacco products), 12, 13, 14 and 16.
[73] Ibid 50.
[74] Ibid 56.
[75] Ibid; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(a) ('VCLT'). See recognition of paragraph 5 of the *Doha Declaration* as a subsequent agreement to *TRIPS* in *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2407]-[7.2411].
[76] Liberman, above n 69, 50.
[77] Explanatory Memorandum, Tobacco Plain Packaging Bill 2011, 1.
[78] *CRC* art 24.
[79] Ibid art 17.
[80] UN Committee on the Rights of the Child, *CRC General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33rd sess, UN Doc CRC/GC/2003/4 (1 July 2003) [6], [21] ('*CRC General Comment 4*').
[81] Ibid [21].

restrictions on marketing required by *Plain Packaging Legislation*. Scientific evidence regarding adolescents and plain packaging supports these restrictions. [82]

Toebes et al argue that children are particularly important stakeholders to acknowledge as they are considered to be 'replacement smokers' by the tobacco industry.[83] Toebes et al argue that insufficient attention has been given to the significance of children's rights in *FCTC* COP outcomes, although the rights of children protected by the *Convention on the Rights of the Child* ('*CRC*') are impacted in a number of ways by tobacco consumption.[84] This includes direct and indirect consumption of tobacco and the health impacts of this;[85] misleading tobacco advertising;[86] and children in tobacco production.[87] Dresler and Marks link their concerns about tobacco advertising and children to *CRC* obligations protecting rights to information, health and an adequate standard of living.[88] They set out numerous methods used by tobacco companies to engage children and young people in smoking, noting particular problems where there are limited regulations of tobacco regulation in the developing world.[89] They conclude that these concerns suggest 'egregious failings' of states to meet their obligations under the *CRC*.[90] As *Plain Packaging Legislation* is directed at reducing tobacco consumption in children and adolescents, it addresses these failings.

8.3.1.3 Operation of the legislation

In 2008, the *National Health Taskforce Paper* identified that decline rates of tobacco consumption in Australia were flattening out.[91] Plain packaging requirements formed part of the policy that responded to concerns of the negative health impacts of continuing tobacco consumption. The key health claims of *Plain Packaging Legislation* are that it will:

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[82] Toebes et al also identify packaging of cigarettes and misleading advertising on cigarettes as important issues for governments to address to protect children's rights: Brigit Toebes et al, 'A Missing Voice: The Human Rights of Children to a Tobacco-Free Environment' (2018) 27(1) *Tobacco Control* 3, 4, citing Sally Dunlop et al, 'Australia's Plain Tobacco Packs: Anticipated and Actual Responses among Adolescents and Young Adults 2010–2013' (2017) 26(6) *Tobacco Control* 617 and Richard Edwards et al, 'Impact of Removing Point-of-Sale Tobacco Displays: Data from a New Zealand Youth Survey' (2017) 26(4) *Tobacco Control* 392.

[83] Toebes et al, above n 82. See also Pamela M Ling and Stanton A Glantz, 'Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence from Industry Documents' (2002) 92(6) *American Journal of Public Health* 908.

[84] Reubi describes the limited success of attempts to frame tobacco control as a children's human rights issue in international organisations: Reubi, above n 1, S187; Toebes et al, above n 82.

[85] *CRC* art 24; Dresler and Marks, above n 1, 618.

[86] Dresler and Marks, above n 1, 618-622.

[87] Ibid 622–625.

[88] Ibid 618–625.

[89] Ibid.

[90] Ibid 622.

[91] *National Health Taskforce Paper*, above n 8, 2.

- ‘reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
- increase the noticeability and effectiveness of mandated health warnings;
- reduce the ability of the tobacco product packaging to mislead consumers about the harms of smoking; and
- through the achievement of these objectives in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.’[92]

The substantial scientific basis for these claims was set out in the *Technical Report*.[93] Additional scientific evidence supported the policy.[94] Competing reports questioned the effectiveness of the proposed measure.[95]

Following the introduction of *Plain Packaging Legislation*, early analysis indicated the success of the measure in reducing the appeal of tobacco packaging for adolescents,[96] influencing decisions to cease smoking in adult smokers[97] and causing smokers to conceal their packs.[98]

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[92] Explanatory Memorandum, Tobacco Plain Packaging Bill 2011, 1. See also Tasneem Chipty, *Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia* (Australian Government Department of Health, 24 January 2016) 2 (‘*Post-Implementation Review*’) <http://www.health.gov.au/internet/main/publishing.nsf/content/491CE0444F7B0A76CA257FBE00195BF3/$File/PIR%20of%20Tobacco%20Plain%20Packaging%20-%20with%20Addendum.pdf>.

[93] *Technical Report*, above n 21, 19-20, citing Janne Scheffels, ‘A Difference That Makes a Difference: Young Adult Smokers’ Accounts of Cigarette Brands and Package Design’ (2008) 17(2) *Tobacco Control* 118; M Wakefield et al, ‘The Cigarette Pack as Image: New Evidence from Tobacco Industry Documents’ (2002) 11(Suppl 1) *Tobacco Control* i73; Becky Freeman, Simon Chapman and Matthew Rimmer, ‘The Case for Plain Packaging of Tobacco Products’ (2008) 103(4) *Addiction* 580; MA Wakefield, D Germain and SJ Durkin, ‘How Does Increasingly Plainer Cigarette Packaging Influence Adult Smokers’ Perceptions about Brand Image? An Experimental Study’ (2008) 17(6) *Tobacco Control* 416; P Beede and R Lawson, ‘The Effect of Plain Packages on the Perception of Cigarette Health Warnings’ (1992) 106(4) *Public Health* 315; ME Goldberg et al, ‘The Effect of Plain Packaging on Response to Health Warnings.’ (1999) 89(9) *American Journal of Public Health* 1434; E Strahan et al, ‘Enhancing the Effectiveness of Tobacco Package Warning Labels: A Social Psychological Perspective’ (2002) 11(3) *Tobacco Control* 183; M Wakefield and T Letcher, ‘My Pack Is Cuter than Your Pack’ (2002) 11(2) *Tobacco Control* 154; Morgan Stanley Research Europe, *Tobacco: Late to the Party* (Morgan Stanley Research, 2007).

[94] Quit Victoria, Cancer Council Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (May 2011).

[95] British American Tobacco Australasia, *British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011* (6 June 2011) <http://www.ip-watch.org/weblog/wp-content/uploads/2011/06/BATA-Tobacco-Plain-Packaging-Bill-Submission.pdf>; Philip Morris Limited, *Commoditising Tobacco Products through Plain Packaging Will Harm Public Health, Violate Treaties, and Does Not Meet the Test of “Evidence-Based Policy”: A Submission by Philip Morris Limited on the Tobacco Plain Packaging Bill Exposure Draft* (June 2011) <http://webarchive.nla.gov.au/gov/20130329012345/http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/Phillip-Morris-Limited>. See also Thomas, above n 25, citing International Trademark Association, *Submission on the Draft Tobacco Plain Packaging Bill 2011* (3 June 2011).

[96] See Victoria White, Tahlia Williams and Melanie Wakefield, ‘Has the Introduction of Plain Packaging with Larger Graphic Health Warnings Changed Adolescents’ Perceptions of Cigarette Packs and Brands?’ (2015) 24(Suppl 2) *Tobacco Control* ii42.

[97] Melanie A Wakefield et al, ‘Introduction Effects of the Australian Plain Packaging Policy on Adult Smokers: A Cross-Sectional Study’ (2013) 3(7) *BMJ Open* e003175.

Although the benefits of *Plain Packaging Legislation* in effecting a decline in smoking are expected to be long-term,[99] further evidence establishes the short-term effectiveness of the measure.[100] Multiple tobacco control measures in place in Australia contribute to smoking rates.[101] However, the 2016 Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia ('*Post-Implementation Review*') concluded that all of the datasets examined demonstrated sustained drops in national smoking prevalence in Australia.[102] This included results from the Roy Morgan Single Source Survey Data that identified a statistically significant decline in smoking prevalence of 0.55 per cent,[103] equating to 108 228 fewer smokers.[104] This reduction was expected to have a significant long-term impact on public health outcomes and suggested that the legislation was fulfilling its aims.[105] Arguments that less restrictive measures than *Plain Packaging Legislation* could achieve the same outcome were unsuccessful in *Australia – Plain Packaging Measures*.[106] The *Post-Implementation Review* analysis did not assess whether alternative measures - other than not introducing the legislative measures at all - would have been more effective or equally effective.[107]

Claims that plain packaging has effected change in smoking prevalence have been criticised on several grounds. Davidson and de Silva criticise the failure of *Plain Packaging Legislation* to change the economic nature of the market.[108] This is based only on government data available from the first year following the introduction of the legislation.[109] Importantly, Davidson and de

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[98] Meghan Zacher et al, 'Personal Pack Display and Active Smoking at Outdoor Café Strips: Assessing the Impact of Plain Packaging 1 Year Postimplementation' (2015) 24(Suppl 2) *Tobacco Control* ii94.
[99] *Post-Implementation Review*, above n 92.
[100] Ibid app A [6].
[101] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.506], [7.1042], [7.1528]-[7.1531], [7.1720], [7.1730]; *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [150].
[102] *Post-Implementation Review*, above n 92. Cf Sinclair Davidson and Ashton de Silva, 'Did Recent Tobacco Reforms Change the Cigarette Market?' (2018) 37(1) *Economic Papers: A Journal of Applied Economics and Policy* 55, 68–70.
[103] *Post-Implementation Review*, above n 92, app A [6].
[104] Tasneem Chipty, *Addendum to Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia* (Australian Government Department of Health, 19 May 2016) [2] <http://www.health.gov.au/internet/main/publishing.nsf/content/491CE0444F7B0A76CA257FBE00195BF3/$File/Addendum%20to%20report%20of%20Dr%20Chipty.pdf>.
[105] *Post-Implementation Review*, above n 92. The analysis estimated that the 2012 packaging changes resulted in a 'statistically significant decline in smoking prevalence [among Australians aged 14 years and over] of 0.55 percentage points over the post-implementation period, relative to what the prevalence would have been without the packaging changes.' The analysis concludes that, 'given the ways in which the TPP Act was intended to work, the policy's effects on overall smoking prevalence and tobacco consumption are likely to grow over time' at 3, 15, 20.
[106] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2598]-[7.2604], [7.1324]-[7.1732]; *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [89]-[90].
[107] *Post-Implementation Review*, above n 92.
[108] Davidson and de Silva, 'Did Recent Tobacco Reforms Change the Cigarette Market?', above n 102, 70.
[109] Ibid.

Silva argue that '[d]ata limitations represent the clearest challenge to establishing the efficacy of the plain packaging policy and, indeed, most tobacco regulation.'[110] These criticisms do not address evidence of an increased decline in youth consumption initiation in 2013-2016.[111]

8.3.1.4 Counterfeit tobacco

There were additional objections to the introduction of *Plain Packaging Legislation* on the basis that it could facilitate increased production of counterfeit tobacco.[112] These objections have been accompanied by a documented increase of prevalence and consumption of illicit tobacco in Australia.[113] It is important to note that illicit trade in tobacco encompasses all tobacco outside of ordinary trade channels, not necessarily restricted to tobacco bearing counterfeit packaging.[114] All types of illicit tobacco may not be of the same quality as ordinary tobacco and may pose additional health risks of the nature considered in the anti-counterfeiting case study in the following chapter.[115] This engages an additional right to health protection obligation for Australia.[116] The issue is complex because contemporaneous increases in excise and duties have made tobacco more expensive.[117] Significant resources have been directed towards addressing

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[110] Sinclair Davidson and Ashton de Silva, 'The Plain Truth about Plain Packaging: An Econometric Analysis of the Australian 2011 Tobacco Plain Packaging Act' (2014) 21(1) *Agenda: A Journal of Policy Analysis and Reform* 27, 31. An earlier, related paper by Davidson and de Silva was stringently criticised: Cancer Council Victoria, 'Comments on Davidson S, and de Silva A. *Stubbing out the evidence of tobacco plain packaging efficacy: an analysis of the Australian National Tobacco Plain Packaging Survey*, Social Science Research Network' (Working Paper, Cancer Council Victoria, 3 June 2016) <www.cancervic.org.au/downloads/plainfacts/Davidson_working_paper_comments_3_June_2016.pdf>. See Sinclair Davidson and Ashton de Silva, 'Stubbing Out the Evidence of Tobacco Plain Packaging Efficacy: An Analysis of the Australian National Tobacco Plain Packaging Survey' (SSRN Scholarly Paper ID 2780938, Social Science Research Network, 17 May 2016) <https://papers.ssrn.com/abstract=2780938>.

[111] Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 - Key Findings* (2017) <https://www.aihw.gov.au/getmedia/89c0f030-65a1-4863-9846-969d995fb138/aihw-ndshs-2016-key-findings-tables-RSEs-MOEs.xlsx.aspx>. Stone and Peters attribute this to 'the value of policy innovation, plain tobacco packaging and sharp tobacco tax increases, on a background of comprehensive tobacco control policies over decades': Emily Stone and Matthew Peters, 'Young Low and Middle-Income Country (LMIC) Smokers—Implications for Global Tobacco Control' (2017) 6(Suppl 1) *Translational Lung Cancer Research* S44, S44.

[112] Thomas, above n 25, 10, 17–21.

[113] Mazoe Ford, 'Illegal Tobacco Imports on the Rise: Criminals Using High Heels, Fluffy Toys to Stash Cigarettes' *ABC News (online)*, 20 February 2017 <http://www.abc.net.au/news/2017-02-20/illegal-tobacco-cigarettes-smuggled-into-australia-fluffy-toys/8285470>. There is recent evidence that most illicit tobacco is not sold in packaging in Australia: Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 27 February 2017, 80-82 (Roman Quaedvlieg).

[114] WHO FCTC, *Protocol to Eliminate Illicit Trade in Tobacco Products*, Decision FCTC/COP5(1) (12 November 2012) arts 1, 3, 4, 14.

[115] See Liberman, above n 5, 338–342.

[116] Wu, above n 1, 404, 407.

[117] The potential link between illicit tobacco and taxation is recognised by the Panel: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1018], [7.1022]. The Panel also concludes that the plain packaging measures have not caused an increase in illicit tobacco to the extent that the public health objectives are undermined: at [7.1539], [7.993]-[7.1023].

illicit tobacco.[118] However, Australia has not yet signed the *FCTC Protocol to Eliminate Illicit Trade in Tobacco Products*, which has not yet entered into force.[119] An increase in illicit tobacco use as a consequence of *Plain Packaging Legislation* would be relevant to the effectiveness of the legislation in realising its right to health objectives.

8.3.2 Plain Packaging and Progressive Realisation of the Right to Health

Tobacco advertising is closely linked to tobacco consumption.[120] States have obligations to address the health impacts of tobacco consumption as part of the human right to health. Australian legislative policy regarding tobacco advertising has progressively restricted advertising to attempt to reduce tobacco consumption and its negative health-related impacts.[121] It has been argued that packaging is the final place where advertising of tobacco has been permitted.[122]

The effectiveness of the legislation is an important progressive realisation consideration. Effectiveness is linked to both the appropriateness of the means used by states to realise their obligations[123] and requirements that states move towards full realisation of the right to health 'as expeditiously and effectively as possible.'[124] Effectiveness has also been contested by countries challenging the legislation in the WTO.[125]

The *Technical Report* underlying the *Taskforce Report* has established the scientific justification for tobacco plain packaging.[126] Plain packaging was partly designed to ensure that existing

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See Chuan-feng Wu, 'Tobacco Control in Taiwan' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 279, 281.

[118] Australian Government Department of Immigration and Border Protection, *Annual Report: 2016-17* (September 2017) 42–43, 90–91 <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/annual-reports/complete-annual-report-2016-17.pdf>.

[119] United Nations, *Protocol to Eliminate Illicit Trade in Tobacco Products* (12 September 2018) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IX-4-a&chapter=9&clang=_en>.

[120] David Hammond, '"Plain Packaging" Regulations for Tobacco Products: The Impact of Standardizing the Color and Design of Cigarette Packs' (2010) 52(Suppl 2) *Salud Publica De Mexico* S226; Thomas, above n 25, 5, citing Philip Morris Limited, Philip Morris Limited's Submission to the Senate Community Affairs Legislation Committee, Inquiry into *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009*, 30 April 2010; *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [24]-[35].

[121] See Section 8.2.3.1.

[122] *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [10]. See debate between parties on this issue in *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.649].

[123] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant)*, UN ESCOR, 5th sess, UN Doc E/1991/23 (14 December 1990) [3] ('*General Comment 3*').

[124] Ibid [9].

[125] *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [76].

[126] *Technical Report,* above n 21, 20.

health measures, such as graphic health warnings, had increased effectiveness.[127] Although the 2016 review of the legislation presented evidence supporting the effectiveness of the measure, the justification and effectiveness of *Plain Packaging Legislation* remain contested on several grounds.[128]

If the measure is considered effective, this is relevant to the arguments supporting *Plain Packaging Legislation* in *Philip Morris-Australia* and the WTO. If disputes of this nature compel changes to effective Australian policy designed to protect health, this could constitute a retrogression in progressive realisation of Australia's human right to health obligations.[129] As part of its interpretation of progressive realisation, CESCR has stated that deliberately retrogressive measures must be carefully considered by states.[130] Retrogression 'would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'[131] Subsection 8.3.4 of this chapter identifies the way in which *Plain Packaging Legislation* engages other human rights in both the *International Covenant on Economic, Social and Cultural Rights ('ICESCR')* and the *International Covenant on Civil and Political Rights* (*'ICCPR'*) and concludes that the right to health objectives outweigh the other human rights objectives. Resource constraints would not drive the repeal of the legislation. Applying CESCR's approach to retrogression, it would be difficult to argue that retrogression compelled by trade agreements not grounded in human rights obligations could be justifiable.

The decision in *Australia – Plain Packaging Measures* has been appealed.[132] Successful appeals against *Plain Packaging Legislation* could prompt Australia to take a political approach and join with other *WTO* Members that have introduced plain packaging in order to introduce amendments to the *Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS')* that recognise human rights obligations.[133] *General Comment 14* clearly states that the

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[127] *Post-Implementation Review*, above n 92, 12–15; *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.628].
[128] *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [76]; Davidson and de Silva, 'The Plain Truth about Plain Packaging', above n 110; Davidson and de Silva, 'Did Recent Tobacco Reforms Change the Cigarette Market?', above n 102, 70.
[129] *General Comment 14*, UN Doc E/C.12/2000/4, [48].
[130] *General Comment 3*, UN Doc E/1991/23, [9].
[131] Ibid.
[132] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Notification of an Appeal by Honduras under Article 16.4 and Article 17 of the Understanding and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS435/23 (19 July 2018).
[133] Marceau argues that political action is more effective than relying on dispute settlement processes: Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *European Journal of International Law* 753, 792. Note prohibition on retrogression: UN Committee on the Rights of the Child,

WTO should 'cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates.'[134] CESCR reminds states that they should be mindful of their obligations to realise the right to health in their entry into other agreements.[135] 'Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in … preventable mortality.'[136] Examples include 'the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.'[137]

8.3.3 Plain Packaging Legislation and International Cooperation and Assistance

An international leadership role has been asserted by the Australian government in relation to *Plain Packaging Legislation*.[138] Australia's policy of global leadership in developing plain packaging as a health measure could provide valuable technical assistance to other countries seeking to develop and implement analogous legislation.[139] The 'essential role of international cooperation,' including technical assistance, is emphasised by CESCR.[140] The *FCTC* was praised on the basis that it would promote international acceptance of similar policies and enhance international cooperation.[141] Given the worldwide health impacts of tobacco consumption, Australia's role as the first introducer of plain packaging legislation may be even more important. Australia's defence of *Plain Packaging Legislation* in the WTO disputes may limit the chilling impact of this litigation on other countries seeking to introduce tobacco plain packaging legislation. This will be considered in Chapter 10 of this thesis. Alternatively, the chilling regulatory impact of regional and bilateral trade agreements identified in Chapter 10

General Comment No 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights, 62nd sess, UN Doc CRC/C/GC/16 (17 April 2013) [31] ('*CRC General Comment 16*').
[134] *General Comment 14*, UN Doc E/C.12/2000/4, [64].
[135] Ibid [50].
[136] Ibid.
[137] Ibid.
[138] *National Interest Analysis [2004] ATNIA 7*, above n 31, [6].
[139] Mariette Brennan's analysis of the impact of tobacco consumption in Canada and historical issues with regulating tobacco packaging demonstrates that leadership benefits extend to developed countries: Mariette Brennan, 'Canada's Next Step in Tobacco Control Laws: Is Plain Packaging Legislation a Viable Proposal?' (2013) 51(1) *Alberta Law Review* 23.
[140] *General Comment 14*, UN Doc E/C.12/2000/4, [32].
[141] *National Interest Analysis [2004] ATNIA 7*, above n 31.

may mean that states do not consider they have the resources needed to respond to legal challenges to associated legislation.[142]

Links between poverty and tobacco consumption suggest that there may be additional special justifications for Australia to take a leadership role in relation to *Plain Packaging Legislation*. Poverty is an underlying social determinant of health.[143] Poverty can increase through tobacco consumption.[144] Gostin and Cabrera note that 'smoking prevalence and the burden of tobacco-related diseases affect the poorest people in the world.'[145] The World Health Organization (WHO) explains the way in which tobacco addiction can entrench poverty, as it requires valuable family resources that could be used to support an adequate standard of living.[146] *General Comment 14* provides that it is incumbent on capable state parties to *ICESCR* to assist in providing economic and technical assistance and cooperation to other state parties, in order to assist them to fulfil their core obligations.[147] Relevant obligations to *Plain Packaging Legislation* include implementation of national health strategies;[148] ensuring child health care;[149] and prevention, treatment and control of diseases.[150]

8.3.4 Relevant Interrelated Human Rights

8.3.4.1 Right to freedom of expression

Australia is bound by the protection provided for freedom of expression in Article 19 of the *ICCPR* but confers only limited legislative protection.[151] The High Court recognises an implied constitutional right to freedom of expression, but *Plain Packaging Legislation* explicitly

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[142] Olivet and Villareal note the cost to Uruguay of the Philip Morris action against them, despite their victory: Cecilia Olivet and Alberto Villareal, 'Who Really Won the Legal Battle between Philip Morris and Uruguay?' *The Guardian (online)*, 28 July 2016 <https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts>. See Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership' (2017) 7(1) *Victoria University Law and Justice Journal* 76, 79–80; Eric Crosbie, Particia Sosa and Stanton A Glantz, 'Defending Strong Tobacco Packaging and Labelling Regulations in Uruguay: Transnational Tobacco Control Network versus Philip Morris International' (2018) 27(2) *Tobacco Control* 185.

[143] Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016) 264–267.

[144] Oscar Cabrera and Juan Carballo, 'Tobacco Control in Latin America' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 235, 236.

[145] Cabrera and Gostin, above n 2, 285–286.

[146] World Health Organization, *Tobacco Increases the Poverty of Individuals and Families* (2004) <http://www.who.int/tobacco/communications/events/wntd/2004/en/factsindividuals_en.pdf>; World Health Organization, *Tobacco and Poverty: A Vicious Cycle* (2004) <http://www.who.int/tobacco/communications/events/wntd/2004/en/wntd2004_brochure_en.pdf?ua=1>.

[147] *General Comment 14*, UN Doc E/C.12/2000/4, [45].

[148] Ibid [43].

[149] Ibid [44].

[150] Ibid.

[151] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

provides that the Act 'does not apply to the extent that it would infringe any implied constitutional freedom of political communication.'[152] Other legislation, such as certain defences to racial vilification provisions contained in the *Race Discrimination Act*,[153] can also support freedom of expression but this does not support a positive right to freedom of expression in commercial advertising.

The human right to freedom of expression enshrined in the *ICCPR*, as interpreted by the Human Rights Committee in *General Comment 34*, states that freedom of expression may include commercial advertising.[154] Arguably the freedom of expression rights of tobacco owners are restricted by *Plain Packaging Legislation* as owners cannot use the marks on packaging as a form of expression.[155] Is this a permissible restriction? Article 19(3) permits restrictions that are provided in law and necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals.[156] The Human Rights Committee confirms[157] that restrictions other than those specified in paragraph 3 are not allowed, 'even if such grounds would justify restrictions to other rights protected in the Covenant.'[158] There needs to be a direct relationship between the specified justification and the application of the restriction.[159]

The content of the legislation also suggests that it is necessary for the protection of public health.[160] This is one of the permissible restrictions set out in Article 19(3). However, a restriction does not meet the test of necessity 'if the protection could be achieved in other ways that do not restrict freedom of expression.'[161] *General Comment 34* does not provide further specific guidance on public health. *General Comment 34* interprets the rights referred to in Article 19(3) to include human rights, so any restriction on freedom of expression posed by *Plain Packaging Legislation* can be justified as necessary to achieve realisation of the human right to health.[162] The objective of protecting the human right to health has been identified in the

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[152] *Tobacco Plain Packaging Act* s 16; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[153] *Racial Discrimination Act 1975* (Cth) s 18D.
[154] UN Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [11] ('*HRC General Comment 34*').
[155] Explanatory Statement, Tobacco Plain Packaging Amendment Regulation 2012 (No 1) (Cth) 10-14. Brennan considers whether plain packaging legislation would be consistent with the broader freedom of expression protections found in the Canadian Charter: Brennan, above n 139, 35–48.
[156] *ICCPR* art 19(3).
[157] *HRC General Comment 34* replaced the earlier *General Comment 10*: UN Human Rights Committee, *General Comment No 10: Freedom of Expression (Article 19)*, 19th sess (29 June 1983).
[158] *HRC General Comment 34*, UN Doc CCPR/C/GC/34, [22].
[159] Ibid.
[160] *Tobacco Plain Packaging Act 2011* (Cth) s 3.
[161] *HRC General Comment 34*, UN Doc CCPR/C/GC/34, [33].
[162] Ibid [28].

HRCS for the *Plain Packaging Amendment Regulation 2012 (Cth)*.[163] Restrictive measures should not be overbroad and should be consistent with the principle of proportionality, which 'must also take account of the form of expression at issue as well as the means of its dissemination.'[164] Policy documents supporting the legislation, including the *National Health Taskforce Report*, and its supporting documentation, set out 'in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken.'[165] If *Plain Packaging Legislation* constitutes a restriction on freedom of expression, that restriction is provided by law and does not appear to be discriminatory to any particular group, so freedom of expression obligations should not be a basis to modify or restrict the legislation.

8.3.4.2 Right to benefit from science and culture

Chapter 1 of this thesis has suggested that, where trade marks constitute literary or artistic productions, *ICESCR* Article 15(1)(c) could confer rights on the authors of those trade marks. There may be a claim that word marks constitute literary productions. A stronger claim is available for marks that include artistic productions. There is provision for registration of word, device and fancy marks on the Australian trade mark register. A review of the register on 29 August 2018 suggests that there are 1749 registered device marks in class 34.[166] This number includes composite marks that also include word marks. Device marks and composite marks can constitute artistic productions. Accordingly, creators of trade marks could argue that they are impaired by *Plain Packaging Legislation*.[167] However, CESCR states that only individuals are able to assert their rights. A sample of the register on 29 August 2018 indicates that less than 5 per cent of tobacco-related device trade marks in Australia are owned by individuals rather than corporations.[168] It is unclear if these individuals also created the relevant marks.

What rights could authors assert? The human right provided in Article 15(1)(c) does not provide for ongoing remuneration,[169] so it may be assumed that creators of trade marks have already been compensated and their material interest in Article 15(1)(c) is not impaired. The moral rights of trade mark creators do not appear to have been directly impaired by the legislation as

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[163] Explanatory Statement, Tobacco Plain Packaging Amendment Regulation 2012 (No 1) (Cth) 10-15.
[164] *HRC General Comment 34*, UN Doc CCPR/C/GC/34, [34].
[165] Ibid [35].
[166] Based on ATMOSS search on 28 August 2018. Research on file with author.
[167] *Advantage-Rent-A-Car Inc v Advantage Car Rental Pty Ltd* (2001) 52 IPR 24 ('*Advantage-Rent-A-Car*').
[168] Based on ATMOSS search on 28 August 2018, 16 trade marks out of 350 marks (sampled from 1749 device marks registered in class 34) were owned by individuals. Research on file with author.
[169] Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15, Para 1(c) of the Covenant)*, UN ESCOR, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [16] ('*General Comment 17*').

there is no common practice of attributing trade mark creators.[170] It is assumed that creators of trade marks whose work constitutes copyright-protectable work have waived their rights.[171] Applying Helfer and Austin's approach to the core protection required for Article 15(1)(c), the restriction must 'be strictly necessary for the promotion of the general welfare in a democratic society' and employ the 'least restrictive measures ... when several types of measures may be imposed.'[172] If failure to permit attribution of creators of tobacco-related trade marks was restricted by *Plain Packaging Legislation*, it might be possible to provide a publicly available register of moral rights to satisfy that requirement. In any event, the legislation is not the direct cause of the loss of material or moral rights, so in the present assessment of interrelated rights it should not be the basis to restrict the operation of the legislation to realise the relevant right to health objectives.[173]

8.3.4.3 Right to property

Although property rights are relevant to disputes concerning *Plain Packaging Legislation*, this does not necessarily implicate a human right to property. The HRCS for the *Tobacco Plain Packaging Amendment Regulation* does not make reference to the human right to property. Appropriately, there is limited reference to the right to property in any HRCS,[174] as the right is not found in the seven key human rights agreements for which *Plain Packaging Legislation* requires consideration of compatibility.[175]

The strongest basis for asserting a legislative breach of the human right to property would challenge the decision in *JT International* using arguments similar to those invoked in *Anheuser-Busch Inc v Portugal* ('*Anheuser-Busch*').[176] If the European Court of Human Rights (ECtHR) had jurisdiction in relation to Australian decisions, tobacco-related trade mark owners could argue that there is a property right in the trade mark that was not appropriately recognised by the High Court in *JT International*.[177] This property right suggests a right of use by owners of

[170] Chapter 2, Section 2.3.4
[171] *Copyright Act 1968* (Cth) s 195AR provides for no infringement of right of attribution of authorship if it was not reasonable in all the circumstance to identify the author and *Copyright Act 1968* (Cth) s 195AWA(4) provides that 'consent may be given by an employee for the benefit of his or her employer in relation to all or any acts or omissions (whether occurring before or after the consent is given) and in relation to all works made or to be made by the employee in the course of his or her employment.'
[172] Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 514–515.
[173] Ibid 520.
[174] Explanatory memorandum, Exception Telecommunications Amendment (Giving the Community Rights on Phone Towers) Bill 2014 2.
[175] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3.
[176] *Anheuser-Busch Inc v Portugal (Merits)* (2007) I Eur Court HR 39, [46] ('*Anheuser-Busch*').
[177] *JT International* (2012) 250 CLR 1.

word, device and composite marks on packaging.[178] Frankel and Gervais link the object and purpose of permitting consumers to distinguish between goods to their assessment that registered owners have some rights to use trade marks.[179] Mitchell and Davison each argue that rights provided by *TRIPS* for trade mark owners should be limited to negative rights.[180] In *Australia – Plain Packaging Measures*, it was unsuccessfully asserted that *TRIPS* confers positive rights of use.[181]

How would this hypothetical ECtHR dispute be resolved? Even if the right to use constituted a relevant 'possession', states are generally given a wide margin of appreciation when the ECtHR determines whether there has been interference with property rights.[182] Other provisions of *Plain Packaging Legislation* which operate to preserve ownership of the relevant trade mark rights were considered in *JT International*.[183] Even if the legislation constituted unlawful interference, a key concern of ECtHR precedent is whether the domestic decision-making process struck a fair balance between the interests of the community and those of the applicant, or whether it imposed an individual and excessive burden on the applicant.[184] In *JT International*, French CJ found that the public purposes of the legislation outweighed the other interests engaged by *Plain Packaging Legislation*.[185] The explicit health objectives of *Plain Packaging Legislation* strongly support an argument that a fair balance had been struck. Consequently, it seems unlikely that breach of owners' right to property could be successfully argued.

8.3.4.4 Right to development

It is arguable that the restrictions imposed by *Plain Packaging Legislation* impair the economic development of countries that depend on exports of tobacco-related products to Australia for

[178] Andrew D Mitchell, 'Australia's Move to the Plain Packaging of Cigarettes and Its WTO Compatibility' (2010) 5 *Asian Journal of WTO and International Health Law and Policy* 405, 412; Daniel Gervais, 'Plain Packaging and the TRIPS Agreement: A Response to Professors Davison, Mitchell and Voon' (2013) 23 *Australian Intellectual Property Journal* 96, 103. Cf Mark Davison, 'The Legitimacy of Plain Packaging under International Intellectual Property Law' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) 81, 94–96.
[179] Susy Frankel and Daniel Gervais, 'Plain Packaging and the Interpretation of the TRIPS Agreement' (2013) 46(5) *Vanderbilt Journal of Transnational Law* 1149, 1174–1195. Johnson also supports a positive right to use argument: Phillip Johnson, 'Trade Marks without a Brand: The Proposals on "Plain Packaging" of Tobacco Products' (2012) 34(7) *European Intellectual Property Review* 461, 464.
[180] Mitchell, above n 178, 409–419; Davison, above n 178.
[181] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2260]-[7.2264], [7.2279]-[7.2292].
[182] Laurence R Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights' (2008) 49(1) *Harvard International Law Journal* 1, 10–11. Ricketson recognises potentially important differences between the question of 'acquisition' considered in *JT International* and that of taking: Ricketson, above n 3, 235–236.
[183] *JT International* (2012) 250 CLR 1, 34-5 (French CJ).
[184] *Balan v Moldova* (European Court of Human Rights, Application No 19247/03, 29 January 2008); Helfer and Austin, above n 172, 216–217.
[185] *JT International* (2012) 250 CLR 1, 34 (French CJ).

income.[186] Importantly, economic development is itself impacted by the burden of tobacco-related disease.[187] Health concerns related to tobacco consumption are also problematic for countries that are producers of tobacco.[188] The approach taken to the human right to development in this thesis is that it must advance sustainable development.

The Danish Institute of Human Rights appropriately links human rights to Sustainable Development objectives, including the human right to health.[189] This is particularly relevant to objective 3.a to '[s]trengthen the implementation of the World Health Organization Framework Convention on Tobacco Control in all countries, as appropriate.' [190] Other relevant objectives are to 'strengthen the capacity of all countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks'[191] and to 'strengthen the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol.'[192] One of Australia's goals as a signatory to the *FCTC* is improved international cooperation to address the global tobacco epidemic as a health issue.[193] Sustainable Development objectives indicate that when a human rights-based approach is taken to development, any impact of *Plain Packaging Legislation* on economic development should be balanced against the long-term health impacts of tobacco consumption on development.

8.3.5 Stakeholders, Participation and Transparency

Plain Packaging Legislation engages a number of stakeholders. A range of stakeholders was consulted in the *Taskforce Report*, in consultation preceding the introduction of *Plain Packaging Legislation* and for the *Post-Implementation Review*.[194] Relevant human rights stakeholders are considered in this section.

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[186] Toebes, above n 3, 495.
[187] Cabrera and Gostin, above n 2, 286.
[188] Cabrera and Carballo, above n 144, 236.
[189] Danish Institute for Human Rights, *The Human Rights Guide to the Sustainable Development Goals* <http://sdg.humanrights.dk/>.
[190] Ibid Objective 3.a, *Strengthen the Implementation of the World Health Organization Framework Convention on Tobacco Control in all Countries, as Appropriate* <http://sdg.humanrights.dk/en/targets2?goal[]=72&target=3.a>.
[191] Ibid Objective 3.d, *Strengthen the Capacity of all Countries, in particular Developing Countries, for Early Warning, Risk Reduction and Management of National and Global Health Risks* <http://sdg.humanrights.dk/en/targets2?goal[]=72&target=3.d>.
[192] Ibid Objective 3.5, *Strengthen the Prevention and Treatment of Substance Abuse, including Narcotic Drug Abuse and Harmful Use of Alcohol* <http://sdg.humanrights.dk/en/targets2?goal[]=72&target=3.5>. See related *ICESCR* art 12.2(b).
[193] *National Interest Analysis [2004] ATNIA 7*, above n 31.
[194] *Taskforce Report*, above n 41, 292-304; Biotext Pty Ltd, *Public Consultation on the Exposure Draft of the Tobacco Plain Packaging Bill 2011: Summary of Submissions* (18 September 2011); Siggins Miller Consultants Pty Ltd, *Consultancy Services to Inform the Development of a Post Implementation Review of the Tobacco Plain Packaging Measure: Stakeholder Consultation Report* (September 2015); *Post-Implementation Review*, above n 92, 19-23, app B.

Australia is a stakeholder to the extent that it is obliged to protect both public health[195] and the human right to health.[196] Section 4 will note other relevant international obligations in intellectual property and trade law. Section 8.3.3 has set out Australia's obligations in relation to the way in which *Plain Packaging Legislation* respects, protects and fulfils the human right to health for individuals. This protection also has a collective dimension as a reduced burden on health system leads to overall benefits, including greater resources available for the realisation of economic, social and cultural rights.[197]

Individuals could participate by making submissions to the legislative consultation.[198] Section 8.3.1.2 has also identified children and youth as affected groups but, although the measure was directed at adolescent tobacco consumption initiation, youth do not appear to have been directly consulted in the legislative development process.[199] Similarly, direct consultation of other vulnerable groups appears to be limited.[200]

The analysis in 8.3.4 considered a human rights basis for tobacco-related trade mark owners to claim a right to property. These stakeholders have been included in the consultations of the National Preventative Health Taskforce[201] and consultations related to *Plain Packaging Legislation*.[202] To the extent that unjust expropriation laws protect the human right to property in Australia, owners have also been able to assert those rights in *JT International*.[203] However, although the freedom of expression implications identified in Section 8.3.4.1 were considered in the HRCS for *Plain Packaging Legislation*, no separately justiciable right was available in *JT International* for protection of freedom of expression for this form of commercial advertising.[204] Importantly, trade mark rights are in themselves a restriction on expression, but this is balanced against public interests in permitting trade mark protection.[205]

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[195] Lawrence O Gostin and Lindsay F Wiley, *Public Health Law: Power, Duty, Restraint* (University of California Press, 3rd ed, 2016) 9.
[196] *ICESCR* art 12; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25 ('*UDHR*').
[197] Surveys on youth smoking rates were considered but youth do not appear to have been directly consulted: *Taskforce Report*, above n 41, 197, 292-304; Thomas, above n 25, 3–5.
[198] Department of Health and Ageing, *Consultation Paper: Tobacco Plain Packaging: Proposed Approach to Non-Cigarette Tobacco Products* (30 September 2011) <http://webarchive.nla.gov.au/gov/20140215002554/http://www.health.gov.au/internet/yourhealth/publishing.nsf/Content/tpp-noncig-paper>.
[199] Some submissions were made on behalf of children: Biotext Pty Ltd, above n 194, 19, 26. See also failure to directly consult more recently in Siggins Miller Consultants Pty Ltd, above n 194.
[200] Indigenous groups were consulted: *Taskforce Report*, above n 41, 292-3.
[201] Ibid.
[202] Biotext Pty Ltd, above n 194.
[203] *JT International* (2012) 250 CLR 1.
[204] Ibid.
[205] Helfer and Austin, above n 172, 285.

Tobacco-related trade mark creators could also qualify as stakeholders if their marks qualified as literary or artistic productions under Article 15(1)(c). Given current practices regarding moral rights and trade marks, these stakeholders have very limited incentives to assert any moral rights.

Transparency impacts the ability of stakeholders to participate in the process. Analysis of the effectiveness of *Plain Packaging Legislation* suggests that available data on tobacco consumption is restricted.[206] Data could also improve the effectiveness of accountability measures considered in Section 8.3.6. Transparency concerns are also relevant to concerns raised regarding the confidential negotiation of the *TPP 2016* agreement that preceded the *Trans-Pacific Partnership* (‘*TPP-11*’).[207] The *TPP-11* includes a form of investor-state dispute settlement provisions. Investor-state dispute settlement provisions were used by Philip Morris to contest *Plain Packaging Legislation*. This action highlighted the potential impact of these mechanisms on domestic regulatory autonomy to introduce measures designed to protect health. Although states can exclude investor-state dispute settlement actions involving tobacco from the proposed *TPP-11* mechanism, the lack of transparency in the negotiation of this means that interested stakeholders were not involved in the development of this mechanism.[208] The complaints about the transparency of this process are considered further in Chapters 9 and 10.

8.3.6 Accountability

As noted in section 8.3.5, the absence of justiciable rights in Australia for many of the human rights identified in this analysis impacts on the ability of stakeholders to participate and assert their human rights in relation to *Plain Packaging Legislation*.

The *FCTC* was considered by the Joint Senate Committee on Treaties and was subject to National Interest Analysis.[209] However, at the time the agreement was ratified by Australia, the guidelines for Article 11, which form the basis for *Plain Packaging Legislation*, had not been finalised or formally adopted so they could not be directly scrutinised.[210]

Chapter 5 of this thesis considered evidence of parliamentary scrutiny increasing human rights accountability for new legislative instruments. This is evident in the HRCS for the *Tobacco*

[206] Davidson and de Silva, ‘The Plain Truth about Plain Packaging’, above n 110, 31.
[207] Susan K Sell, ‘The Dynamics of International IP Policymaking’ in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 76, 77–80; Peter K Yu, ‘Six Secret (and Now Open) Fears of ACTA’ (2011) 64(3) *SMU Law Review* 975, 998–1019.
[208] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force) art 29.5. Ibid.
[209] *National Interest Analysis [2004] ATNIA 7*, above n 31.
[210] *Technical Report*, above n 21, 20.

Plain Packaging Amendment Regulation 2012, which considered *Plain Packaging Legislation* to be compatible with the human right to health and the human right to freedom of expression.[211] There was no subsequent consideration of this by the Joint Committee, indicating that the legislation was considered to raise no further human rights concerns. However, the absence of other compatibility statements for *Plain Packaging Legislation* introduced before parliamentary scrutiny legislation entered into force highlights the problematic absence of parliamentary scrutiny for existing instruments identified in Chapter 5. The subsequent implementation review for *Plain Packaging Legislation* did not directly address human rights concerns.[212] This is problematic for ongoing human rights scrutiny.

There are opportunities for further human rights-based review of the legislation by the Australian Human Rights Commission (AHRC). Although the AHRC has a limited mandate in relation to economic, social and cultural rights, section 8.3.1.2 sets out right to health obligations engaged by the *CRC*, which is part of the AHRC mandate.[213] Section 8.3.4 also notes that civil and political rights such as freedom of expression are engaged by the legislation, and these are also part of the AHRC mandate.[214]

Other international bodies are relevant to accountability. Section 8.3.1.1 shows that CESCR might consider failure to adopt the *FCTC* relevant to the realisation of right to health obligations. Tobacco control has not been noted in CESCR's most recent final recommendations regarding Australia.[215] Australia's tobacco control measures were not considered as part of its most recent Universal Periodic Review.[216] In relation to the WTO disputes, the WHO issued a statement to the *TRIPS* Council Meeting regarding the consistency of standardised plain packaging measures with the provisions of the *FCTC* and the decisions of the COP.[217] This statement also referenced the compatibility of the measures with the outcome of the United Nations High-Level Meeting of the General Assembly on the Prevention and Control of Noncommunicable Diseases, held in September 2011 in New York.[218]

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[211] Explanatory Statement, Tobacco Plain Packaging: Amendment Regulation 2012 (No 1) (Cth) 10-15.
[212] *Post-Implementation Review*, above n 92.
[213] *CRC* arts 17, 24; *Australian Human Rights Commission Act 1986* (Cth) ss 3, 11.
[214] *ICCPR* art 19; *Australian Human Rights Commission Act 1986* (Cth) ss 3, 11.
[215] Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, 61st sess, 47th mtg, UN Doc E/C.12/AUS/CO/5 (11 July 2017, adopted 23 June 2017).
[216] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016, adopted 12 November 2015).
[217] World Health Organization, *Statement of The World Health Organization in Relation to the Issue of Standardized Tobacco Product Packaging* (2014) <http://www.who.int/fctc/mediacentre/news/2014/WHOSTATEMENTWTOTRIPSOCT2014.pdf?ua=1>.
[218] Ibid referencing *Resolution 66/2: Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases. Adopted by the General*

8.3.7 Synthesis

The analysis in this section demonstrates that there are important human rights justifications for *Plain Packaging Legislation* based in the provisions of *ICESCR* and the *CRC*. There are substantial overlaps between the type of evidence relevant to understanding that *Plain Packaging Legislation* has a legitimate objective in realising Australia's obligation to fulfil the right to health and the public health evidence already identified by Australia in proposing, introducing and reviewing the legislation. There is some evidence of effective operation of the legislation in realising its health objectives. This evidence is not yet conclusive. This is understandable, given that the objectives are predicted to be realised in the longer term.[219] It is important for the government to continue to consider the effectiveness of the mechanism to ensure that it contributes to the progressive realisation of health. No negative health impacts have been identified. As the first state to introduce comprehensive tobacco plain packaging legislation, Australia has also taken a leadership role in reducing tobacco consumption. The significance of this will continue to depend on the effectiveness of *Plain Packaging Legislation*. *Plain Packaging Legislation* can also contribute to Australia's obligations of international cooperation and assistance.

A number of other rights have been engaged by *Plain Packaging Legislation*. Although *Plain Packaging Legislation* poses potential restrictions on freedom of expression, these appear to be consistent with the permissible limitations of the right. There is a very small possibility that creators of trade marks could assert that the legislation prevents recognition of their moral rights. This conflict could be resolved by applying Article 4 of *ICESCR* to determine that *Plain Packaging Legislation* is reasonable, necessary and proportionate to the purpose of promoting general welfare in a democratic society, as recognition of moral rights is not generally asserted by trade mark owners.

Australia is not a party to any enforceable instrument enshrining a right to property. To the extent that those rights are protected in other jurisdictions, the High Court decision in *JT International* suggests that *Plain Packaging Legislation* did not constitute acquisition of trade mark rights by the government and this analysis should be relevant to interpretation of right to property obligations. Australia is also not a party to any enforceable instrument enshrining a right to development. The potential negative effect of plain packaging on the right to

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Assembly, GA Res 66/2, UN GAOR, 66th sess, 3rd pln mtg, Agenda Item 117, UN Doc A/RES/66/2 (24 January 2012, adopted on 19 September 2011).

[219] Adamowitsch notes the long-term nature of tobacco control objectives in a human rights-based analysis of Styrian tobacco control: Michaela Adamowitsch, 'Tobacco Prevention Strategy in Styria, Austria: A Human Rights Analysis' in Ann Taket (ed), *Health Equity, Social Justice and Human Rights* (Routledge, 2012) 144, 144.

development appears to be outweighed by the negative impact of tobacco consumption on economic development in developing countries.

There is evidence of participation in the development of *Plain Packaging Legislation* by a range of stakeholders, although there appears to be no specific consultation with youth, who are important targets of the legislation. The involvement of relevant stakeholders is impacted by issues with transparency in data associated with *Plain Packaging Legislation* and negotiations of international agreements that may impact on the ability of Australia to implement these and similar measures.

The absence of independently judicially enforceable human rights in Australia seriously limits accountability and participation opportunities. The rights considered in this case study are relevant to rights considered in the assessment of Australia's performance in its reporting obligations to the Human Rights Council, CESCR and the Human Rights Committee. Although they have not been specifically identified in relation to those reporting obligations, the WHO has emphasised the importance of plain packaging to the prevention and control of non-communicable diseases.

This chapter identifies some important human rights justifications for *Plain Packaging Legislation*, which correspond to Australia's obligations under the *ICESCR* and the *CRC*. These justifications engage important human rights obligations for Australia. Although other rights are engaged, they should not restrict the operation of the legislation to realise its human right to health objective. *Plain Packaging Legislation* may also contribute international assistance for the realisation of the human right to health in other countries. It is not certain at this stage whether the operation of the legislation will be effective in realising its longer-term objectives. This needs to continue to be monitored to ensure progressive realisation of the right to health in Australia. This impact will be difficult to evaluate, particularly if appropriate data is not transparently available. Although there is evidence of participation and accountability in relation to the measure, there is also a need for improvement in relation to on-going human rights scrutiny of existing legislation and independently justiciable human rights to support participation and accountability.

8.4 Disputes Regarding Plain Packaging

The WTO disputes and the *Philip Morris-Australia* dispute exemplify ways in which international intellectual property laws can be used to attack legislation designed to promote health. This can impede the implementation of health-focused measures.

8.4.1 WTO Plain Packaging Disputes

This section analyses key issues in the WTO disputes. The analysis identifies the potential role for human rights in relation to *TRIPS* Article 20 in the WTO disputes, although human rights arguments were not addressed in those disputes.[220]

8.4.1.1 Nature of complaint

WTO dispute proceedings were initiated against Australia by the Ukraine, Cuba, the Dominican Republic, Honduras and Indonesia pursuant to the WTO Dispute Settlement Understanding.[221] The Ukraine suspended its dispute and joined the other disputes as a third party.[222] The primary allegations made against Australia are that *Plain Packaging Legislation* is inconsistent with provisions of both *TRIPS* and the *Agreement on Technical Barriers to Trade* (*'TBT')*.[223] Significantly, businesses with interests in the promotion and sale of tobacco have openly acknowledged that they are funding the WTO actions against Australia.[224] The impetus for defending these actions reinforces Australia's obligations to protect the right to health, and is amplified by the historic negative health impact of tobacco companies on the individual right to health.[225]

Human rights obligations can be relevant to its interpretation of *TRIPS* Article 20 in relation to plain packaging measures and this analysis focuses on Article 20.[226] The complaints asserted that, inconsistent with Article 20, *Plain Packaging Legislation* contained special requirements that unjustifiably encumbered the use of tobacco-related trade marks in the course of trade.[227] Although Australia disputed whether Article 20 applied to the plain packaging measures at all,[228] the Panel determined that the reference to special requirements on the use of a trade mark included prohibitions on the use of the trade mark.[229] Australia justified the impugned

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[220] See *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R.
[221] Ibid [1.1]-[1.8], [1.51]-[1.54].
[222] The dispute lapsed: ibid [1.51]-[1.54].
[223] Ibid [1.1]-[1.8].
[224] Stephanie Nebehay, 'Australia Says Big Tobacco Aiding WTO Challengers' *Reuters (online)*, 23 May 2012 <http://www.reuters.com/article/trade-tobacco-idUSL5E8GMHBW20120522>.
[225] The significance of the negative health impact has been identified in the dispute: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2586]-[7.2606].
[226] A significant proportion of the analysis of *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (*'WTO Agreement')* annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') (*'TRIPS'*) focused on *TRIPS* Article 20: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2131]-[7.2606].
[227] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2131]-[7.2606].
[228] Ibid [7.2173]-[7.2245].
[229] Ibid [7.2240]-[7.2245].

provisions, citing domestic public health objectives and compliance with the *FCTC*.[230] Several other complaints asserting breaches of *TRIPS* and the *TBT* were also made.[231]

TRIPS Article 20 requires that '[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements.'[232] The complainants argued that the way in which *Plain Packaging Legislation* permits the use of a trade mark on packaging only in a prescribed form - in certain locations on the packaging, in combination with health warnings, graphic photographs and a Quitline mark - constitutes special requirements that unjustifiably encumber the use of tobacco-related trade marks in the course of trade.[233] *TRIPS* Article 20 engages both owner interests and public interests, which this chapter argues can include human rights.[234]

8.4.1.2 Interpretation of Article 20

Plain Packaging Legislation is directed at restricting the use of trade marks on tobacco packaging to distinguish the goods provided from the goods of another person.[235] Word or composite marks can still be used to denote source, but device marks cannot be used.[236] Prior to considering the justifiability of plain packaging measures, the Panel made a number of findings relevant to the interpretation of Article 20. They determined that the core of the obligation is to '[disallow] special requirements that "unjustifiably encumber" the use of a trademark in the course of trade.'[237] This requires consideration of whether special requirements exist, whether such requirements 'encumber' '[t]he use of a trademark in the course of trade', and whether such requirements encumber that use unjustifiably.[238] The onus is on the complainants to establish a prima facie case of unjustifiableness, which then shifts to the respondent to disprove that case and establish that any encumbrances are not unjustifiable.[239] The interpretative approach adopted by the Panel in relation to 'special requirements' and 'unjustifiably' was to consider 'the ordinary meaning of this term, taken in its context and in light of its object and

[230] Ibid [7.2576]-[7.2581]. The Panel upheld this justification: at [7.2586]-[7.2606].
[231] Ibid [1.1]-[1.8].
[232] *TRIPS* art 20.
[233] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [2.2]-[2.5], [7.2131]-[7.2137]. See also Mitchell, above n 178, 412; Gervais, above n 178, 103. Cf Davison, above n 178, 94–96.
[234] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2257]-[7.2258].
[235] *Tobacco Plain Packaging Act 2011* (Cth) s 21; *Trade Marks Act 1995* (Cth) s 17 provides that '[a] trade mark is a sign used, [relevantly] or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with provided by any other person.'
[236] *Tobacco Plain Packaging Act 2011* (Cth) s 21.
[237] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2155].
[238] Ibid [7.2156].
[239] Ibid [7.2171].

purpose and that of the TRIPS Agreement', in accordance with *VCLT* Article 31 and other dispute settlement body decisions.[240] This analysis will use *VCLT* Article 31 to interpret *TRIPS* Article 20 to demonstrate that human rights agreements are relevant rules of international law for interpretation, which can be used to amplify Australia's public health arguments and arguments supported by *FCTC* obligations.

The Panel interpreted 'special requirements' to be conditions that must be complied with and are closely connected to the use of the trade mark in the course of trade.[241] The Panel determined that encumbrances resulting from special requirements can be limited or can include prohibitions on the use of the mark.[242] The Panel determined that 'within the meaning given by Article 20,' restrictions by *Plain Packaging Legislation* on the use of word marks to prescribed forms, and prohibitions by *Plain Packaging Legislation* on the use of fancy marks, composite marks, and device marks, constituted special requirements that encumber the use of the trade mark.[243] It determined that the relevant meaning of 'in the course of trade' included a broader scope of commercial activities than those associated with the buying and selling of goods for profit, culminating at the point of sale.[244] The relevant use is 'not limited to the use of a trademark for the specific purpose of distinguishing the goods and services of one undertaking from those of other undertakings' and includes 'a wider range of commercial, advertising and promotion activities.'[245] Consequently, the Panel determined that Australia's plain packaging measures in relation to trade marks constituted special measures that encumber the use of the trade mark in the course of trade.[246] The Panel then determined whether the identified encumbrance was unjustifiable.

The Panel interpreted that, in its use in Article 20, 'unjustifiably' 'connotes a situation where the use of a trademark is encumbered by special requirements in a manner that lacks a justification or reason that is sufficient to support the resulting encumbrance.'[247] In considering the unjustifiability of the plain packaging measures, the Panel referred to other provisions of *TRIPS*:

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[240] Ibid [7.2221], [7.2393]. The references supporting this approach only refer to the object and purpose of the agreement: at [7.1822], citing *VCLT* art 31 and Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (20 May 1996) 17 ('*US – Gasoline*'). But see argument of Frankel and Gervais that object and purpose of a provision is also relevant: Frankel and Gervais, above n 179, 1174, citing. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WTO Doc WT/DS269/AB/R, WT/DS286/AB/R, AB-2005-5 (12 September 2005) [238]-[239].
[241] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2231].
[242] Ibid [7.2231], [7.2239].
[243] Ibid [7.2245].
[244] Ibid [7.2260].
[245] Ibid [7.2286].
[246] Ibid [7.2292].
[247] Ibid [7.2395].

the Preamble and Articles 7 and 8, which are relevant to the interpretation of specific terms in context and in light of the object and purpose of the agreement.[248] It referred to the *Doha Declaration on Public Health* as supporting the view that Articles 7 and 8 guide interpretation of Article 20 as they articulate the object and purpose of *TRIPS*.[249] The Panel accorded limited interpretative relevance to provisions in other WTO agreements but considered the interpretation of other trade mark provisions in *TRIPS*.[250] Accordingly, the legitimate interests of the trade mark owner were interpreted to include legitimate interests in use of their trade marks in the marketplace.[251] This can be balanced against 'the right of WTO Members to adopt measures for the protection of certain societal interests that may adversely affect such use.'[252]

The Panel considered the nature and extent of the encumbrances posed by plain packaging measures on the use of a trade mark in the marketplace and found significant restrictions on the ability of an owner to extract economic value from the design features of its trade mark, the practical impact of which was partly mitigated by the ability to use word marks in prescribed circumstances.[253] There was also limited evidence of downtrading.[254] Australia's justifications for the restrictions on trade marks were identified as integral to measures to 'improve public health by reducing the use of, and exposure to, tobacco products.'[255] The Panel noted that Article 8.1 and paragraph 4 of the *Doha Declaration* recognise the importance of public health as a policy concern.[256] Of additional relevance was the role of plain packaging measures as part of a comprehensive range of tobacco control measures and the legislative recognition by Australia of the plain packaging measures giving effect to the *FCTC*, which notes the severity of the global tobacco epidemic.[257] Applying findings made in relation to the *TBT* claims, the Panel found that the evidence established the aptness of the 'removal of design features on packaging and cigarettes to reduce appeal and increase the effectiveness' of graphic health warnings, and that the restrictions on trade marks formed an integral part of the overall design of plain packaging measures.[258] Accordingly, the measures were supported by legitimate objectives and were not applied unjustifiably.[259] The Panel dismissed arguments that the relevant standard required consideration of whether alternative measures imposed lesser

[248] Ibid [7.2397]-[7.2411].
[249] Ibid [7.2411].
[250] Ibid [7.2413]-[7.2428].
[251] Ibid [7.2428]-[7.2429].
[252] Ibid [7.2429].
[253] Ibid [7.2564]-[7.2570].
[254] Ibid [7.2573].
[255] Ibid [7.2586]. All parties agreed on the importance of public health and effective tobacco control: at [7.2587].
[256] Ibid [7.2588].
[257] Ibid [7.2589].
[258] Ibid [7.2592]-[7.2593].
[259] Ibid [7.2592]-[7.2596].

encumbrances.[260] Instead, it affirmed that Member States should have a 'degree of latitude … to choose an intervention to address a policy objective, which may have some impact on the use of trademarks in the course of trade, as long as the reasons sufficiently support any resulting encumbrance.'[261] In any event, the alternatives proposed would not make an equivalent contribution.[262] The Panel concluded that the Article 20 claims were not established.[263]

This conclusion is significant as it interprets specific provisions of the *TRIPS* agreement to recognise that the protection and enforcement of intellectual property should be balanced by a broad range of rights and obligations. Although public health was explicitly recognised as relevant to interpretation of Article 20 in *Australia – Plain Packaging Measures*, this does not exclude recognition of other relevant rights and obligations, including human rights. Human rights support public health objectives but also introduce broader obligations that are relevant to the dispute, such as the human rights of children. The relevance of human rights obligations can be strengthened by understanding the way that they can be doctrinally relevant to interpretation of terms in *TRIPS*, pursuant to *VCLT* Article 31(3)(c), which will be considered in the following section.

8.4.1.3 What international laws are applicable to interpreting Article 20?

Human rights obligations can justify state actions. This section considers arguments that human rights obligations are relevant to interpretation of terms in Article 20, including 'unjustifiably'. Article 31(3) guides the treaty interpreter to consider 'any relevant rules of international law applicable between the parties.'[264] The relevant international laws applicable to interpreting Article 20 pursuant to Article 31 of the *VCLT* depend on the interpretation of 'parties' in Article 31(3)(c). This can refer to the parties in dispute or all of the parties to the *TRIPS* agreement.[265] McGrady has argued that the use of this restrictive approach in the WTO is not appropriate and Article 31(3)(c) sets out 'a basic procedural obligation to consider relevant rules of international law where the issues in dispute fall within the scope of those extraneous rules.'[266] If this broader

[260] Ibid [7.2597].
[261] Ibid [7.2598].
[262] Ibid [7.2600].
[263] Ibid [7.2605]. The Panel also concluded that none of the special requirements were per se unjustifiable, that Australia's compliance with its own domestic regulatory procedures was not relevant to interpretation of Article 20, that encumbrances falling within the examples provided in Article 20 should not be presumed to be unjustifiable, and that the relevant assessment should not be made on a mark-by-mark basis: at [7.2442], [7.2512], [7.2528], [7.2508].
[264] *VCLT* art 31(3).
[265] Grosse Ruse-Khan, above n 3, 143. Cf Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press, 2011) 45–78.
[266] Benn McGrady, 'Fragmentation of International Law or Systemic Integration of Treaty Regimes: EC - Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2008) 42(4) *Journal of World Trade* 589, 589; McGrady, above n 265, 45–78.

approach were taken, it is arguable that all of the *CRC*, *ICESCR*, *ICCPR* and *FCTC* rights considered in this chapter are relevant laws. Although McGrady's arguments are persuasive, the agreements that bind the parties arguably have the most weight in the interpretation of the dispute. Grosse-Ruse Khan argues that rules of international law can be relevant to interpretation of key terms like 'unjustifiably,' if the parties to the dispute will be bound by them.[267] This contributes to the systemic integration of international law, although that integration is limited to agreements between the overlapping parties.[268]

Table 1: Tobacco-related Human Rights Obligations of Parties in *Australia – Plain Packaging Measures*[269]

Party	**CRC**	**ICESCR**	**ICCPR**	**FCTC**
Australia	Ratified	Ratified	Ratified	Ratified
Honduras	Ratified	Ratified	Ratified	Ratified
Cuba	Ratified	Signed	Signed	Signed
Indonesia	Ratified	Acceded	Acceded	Not signed
Dominican Republic	Ratified	Acceded	Acceded	Not signed

This table sets out the status of each of the parties in relation to each of the agreements that have been considered in Section 8.3. The table demonstrates that the *CRC* is an agreement that binds all of the parties and can be considered in the interpretation of each of the disputes. Section 8.3 of this chapter sets out strong arguments in support of *Plain Packaging Legislation* based on the provisions of the *CRC*.

[267] Grosse Ruse-Khan, above n 3, 143.
[268] Ibid.
[269] United Nations, *WHO Framework Convention on Tobacco Control* (12 September 2018) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IX-4&chapter=9&clang=_en>; United Nations, *International Covenant on Economic, Social and Cultural Rights* (12 September 2018) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en>; United Nations, *International Covenant on Civil and Political Rights* (12 September 2018) United Nations Treaty Collection < https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en>; United Nations, *Convention on the Rights of the Child* (12 September 2018) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en>.

ICESCR and *ICCPR* can apply to the disputes between Honduras, Indonesia and the Dominican Republic. Although Cuba is not bound by *ICESCR* and *ICCPR* as a signatory, it is obliged 'to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.'[270] It is also relevant that, at the time of signing, Cuba's foreign minister stated that Cuba had always applied the principles enshrined in the agreement.[271] Provisions of *ICESCR* and *ICCPR* could constitute customary international law that would also be relevant to the dispute between Australia and Cuba, pursuant to Article 31(3).[272] This analysis suggests that the *CRC* is a relevant tool for interpretation[273] and *ICESCR* and *ICCPR* are arguably binding.[274] The *FCTC* applies only to the dispute between Australia and Honduras. Despite this, the Panel considered the binding nature of *FCTC* obligations on Australia as relevant to its interpretation of the unjustifiability of Australia's plain packaging measures for each claim.[275] This suggests that a party's international obligations may have additional significance as evidence relevant to interpretation of TRIPS complaints, which the following section will assess.

8.4.1.4 Impact of a rights-based approach to the Article 20 dispute

This section identifies the way in which the Panel's interpretation of Article 20 could support the relevance of human rights to future interpretations of Article 20.

The Panel found Australia's public health arguments to be relevant to the justification analysis in Article 20. This was extremely important for balancing trade mark owner rights. The Panel recognised owner interests that are potentially broader than the right to use trade marks to distinguish trade marked goods from other goods and services. It did not specify how broad those rights could be and did not exclude economic interests in perception advertising from the

[270] *VCLT* arts 10, 18.
[271] James C McKinley Jr, 'Cuba Signs 2 Human Rights Treaties' *The New York Times*, 29 February 2008 <https://www.nytimes.com/2008/02/29/world/americas/29iht-cuba.4.10589148.html>.
[272] Grosse Ruse-Khan, above n 3, 35.
[273] This depends on interpretation of customary international law in interpretation of the claim brought by Cuba. There is support for all of part of the *CRC* constituting customary international law: Cynthia Price Cohen, 'International Protection of the Rights of the Indigenous Child' (1995) 7 *St Thomas Law Review* 557, 565; J Marshall Beier, 'Binding Gestures: A Customary Norm Regarding the UN Convention on the Rights of the Child?' [2018] *Children's Geographies* DOI: 10.1080/14733285.2018.1495315; Gregory W Donaldson, 'How the United States' Temporary Assistance for Needy Families Program Violates Its Customary International Law Obligations Founded in the Convention on the Rights of the Child' (2016) 45 *Georgia Journal of International and Comparative Law* 315, 332–340.
[274] For a recent discussion of customary norms and *ICESCR*, see: Janelle M Diller, 'Economic, Social and Cultural Human Rights: The Journey towards Peremptory Norms in International Law' (2018) 36(1) *Nordic Journal of Human Rights* 19. In relation to recognition of freedom of expression as customary international law, see Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law' (2018) 20(1) *International Journal of Speech-Language Pathology* 12, 12, citing Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2nd ed, 2010).
[275] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2589]. See also *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [9], [12], [161].

scope of those rights.[276] However, the decision recognised that those rights should be balanced against societal interests. Interpretation of the relevant societal interests was guided by Articles 7 and 8.[277] The object and purpose of the agreement include an intention to establish and maintain a balance between societal objectives mentioned in Article 7. This interpretation can support the argument presented in Chapter 3 that implementation of intellectual property laws should broadly contribute to a balance of rights and obligations not limited to those promoting technological innovation and the transfer and dissemination of technology. This can include human rights, although this was not addressed in the decision.

Although the Panel recognised the clear relevance of public health to the balancing exercise engaged by interpretation of the Article 20 claim, it did not limit interests to 'measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development' (the objectives specifically identified in Article 8.1).[278] Article 8.1 may guide the types of societal interests that are relevant to justification, but public interests relevant to justification can be broader than the objectives identified. The Panel also rejected importation of a restrictive necessity test from other WTO agreements.[279] It recognised a 'degree of latitude' available to states to adopt policy objectives that might encumber the rights of trade mark owners to use their marks where that encumbrance is sufficiently supported by those objectives.[280] The decision suggests that, if different evidence was presented, public interests relevant to interpretation of Article 20 could overlap with human rights interests that potentially extend further than health considerations.[281] However, it is significant that Australia did not place great emphasis on human rights in its supporting materials for the legislation and did not refer to human rights in the arguments presented in the disputes.[282] For international dispute resolution processes to address fragmentation between intellectual property and human rights, these issues need to be raised by the disputants. It is important that the Panel has recognised a range of public interests relevant to the balance contemplated in Article 7, which expands beyond Article 8.

Human right to health concerns can be relevant to Article 7 and Article 8, but Section 8.4.1.3 of this chapter establishes that it may be additionally appropriate to consider Article 31(3)(c) to support the relevance of human rights obligations to interpretation of relevant terms found in *TRIPS*. The *CRC* is relevant to all of the disputes and *ICESCR* may also be relevant to all of the

[276] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2279]-[7.2286].
[277] Ibid [7.2399]-[7.2411].
[278] Ibid [7.2406].
[279] Ibid [7.2598].
[280] Ibid [7.2598].
[281] Ibid [7.2406].
[282] *Summary of Arguments*, WTO Doc WT/DS435/441/458/467.

disputes. The analysis in Section 8.3 of this chapter argues that human rights obligations, which include the human right to health, can be protected by *Plain Packaging Legislation*. These obligations can be relevant to consider as justifications for *Plain Packaging Legislation* and relevant to determining whether *Plain Packaging Legislation* unjustifiably encumbers trade mark use in breach of Article 20. Human rights obligations are relevant to the interpretation of the term 'unjustifiably', even if they are not necessary public health measures.

Considering human rights approaches to health engages a broad range of justifications for *Plain Packaging Legislation* that is not limited to public health justifications. These can be found in international law, even if they are not binding on all of the parties. The CESCR and the COMRC have explicitly noted the relevance of states' ratification of the *FCTC* to their realisation of the right to health.[283] Although this was not addressed by the Panel and not argued by any of the parties, this interpretation enhances the relevance of the *FCTC* for the parties to the dispute who have not ratified it, to the extent that the *FCTC* can be used in interpretation of their separate obligations to respect, protect and fulfil the right to health pursuant to *ICESCR*. *FCTC* guidelines were interpreted as supporting Australia's justification arguments.[284] However, the *FCTC* is not binding on Indonesia, the Dominican Republic or Cuba. The *CRC* and *ICESCR* do bind all of the complainants and Australia (if we accept Cuba to be bound by *ICESCR*, as considered above). As set out in Section 8.3 of this chapter, evidence that is relevant to public health is also relevant to the right to health.

Recognising human rights obligations as relevant to the interpretation of Article 20 introduces a broader range of justifications than the public health justifications. This includes children's human rights. These are particularly relevant to *Plain Packaging Legislation*, although relevant *CRC* obligations have not been emphasised in Australian arguments.[285] This may reflect the insufficient emphasis in international law and policy on the links between the *FCTC* and the rights enshrined in the *CRC*.[286] Yet the *CRC* is an almost universally ratified treaty. It binds each of the main parties to the WTO Dispute. As set out in Section 8.3.1.2 of this chapter, tobacco

[283] UN Committee on the Rights of the Child, *CRC General Comment No 15: The Rights of the Child to the Highest Attainable Standard of Health*, 62nd sess, UN Doc CRC/C/GC/15 (17 April 2013) [44], [66]. The CESCR used the *FCTC* as a standard to measure Brazil's compliance with its right to health obligations: Cabrera and Madrazo, above n 2, S293; Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Brazil*, 42nd sess, UN Doc E/C.12/BRA/CO/2 (12 June 2009, adopted 19 May 2009) [5], [30].
[284] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2589]. See also *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [9], [12], [161].
[285] *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [60], [64].
[286] Toebes et al, above n 82.

has a significant impact on the health of children, and there is scientific evidence to support the link between packaging and children initiating consumption.

The *CRC* and *ICESCR* have been interpreted to prohibit deliberately retrogressive measures in relation to economic, social and cultural rights.[287] This amplifies the binding nature of *ICESCR* and *CRC* to the extent that the measures that are assessed in the application of Article 20 are part of a states' progressive realisation of economic, social and cultural rights. Progressive realisation requires consideration of effectiveness, but there is also a margin of appreciation in the way that states can achieve economic, social and cultural objectives within the structure of *ICESCR* and its interpretation by CESCR.[288] This appears to be consistent with the approach taken by the Panel to the way in which a Member State can realise objectives relevant to justification consistent with Article 20.[289] An important balancing feature of progressive realisation is the emphasis on monitoring legislation to consider whether it is meeting its objectives.[290] Monitoring is evident in Australia's *Post-Implementation Review* and should be ongoing, given the long-term nature of the measures.[291] Other relevant human rights obligations include Australia's international obligations to technical assistance and cooperation in the realisation of the right to health.[292] Australia's experiences in the implementation of *Plain Packaging Legislation* are likely to be relevant to other states seeking to implement similar legislation.[293]

8.4.1.5 Synthesis

VCLT interpretations should also be in good faith. Sinclair interprets this to mean that the interpretation does not reach an absurd or unreasonable result.[294] Human rights obligations are relevant to a system of intellectual property enforcement and protection that recognises that

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[287] *CRC General Comment 16*, UN Doc CRC. C/GC/16, [31]; *General Comment 3*, UN Doc E/1991/23, [9].

[288] 'Letter from Ariranga G. Pillay (Chairperson, CESCR) to All State Parties to the International Covenant on Economic, Social and Cultural Rights', 16 May 2012 <https://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>.

[289] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2393]-[7.2431].

[290] *General Comment 3*, UN Doc E/1991/23, [11].

[291] *Post-Implementation Review*, above n 92; *Summary of Arguments*, WTO Doc WT/DS435/441/458/467, [60].

[292] Australia's leadership in plain packaging was acknowledged by the Panel and supported, in part, because of its consistency with *FCTC* guidelines: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.1554], [7.2604]. See also *CRC* art 24.4; *CRC General Comment 15*, UN Doc CRC/C/GC/15, [86].

[293] The long-term nature of the measure may mean that it is most appropriate for a developed country to adopt novel approaches to realisation of the right to health. The extensive resourcing and agenda of tobacco companies mean international cooperation is particularly relevant as they focus on economically developing countries and children.

[294] Ian Robertson Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984) 120.

there are public policy objectives underlying the national protection system.[295] Although the Panel recognised the weight of public health objectives against owner interests in the *Australia - Plain Packaging Measures*,[296] the analysis in this chapter has not attempted to undertake a further balancing exercise incorporating human rights considerations.[297] This analysis has demonstrated that a human rights approach to the relevant arguments can use interpretative tools found in the *VCLT* to support relevant human rights-based arguments.

Supporting public health justifications with human rights-based arguments expands the international legal obligations relevant to understanding whether the requirements of *Plain Packaging Legislation* unjustifiably encumber use of a trade mark in the course of trade in each of the four complaints.[298] These expanded obligations potentially support Australia's case, although this would be further supported by evidence that human rights compliance was an objective of Australia in developing the legislation.[299] Referring to human rights justifications in WTO dispute submissions could also explicitly acknowledge that states are not bound only by intellectual property obligations when they formulate domestic intellectual property policy. Article 31(3) is important for demonstrating the potential relevance of human rights instruments to the interpretation of *TRIPS*. The principle of systemic integration enshrined in Article 31(3) is a very important tool for harmonious interpretation.[300] Grosse Ruse-Khan argues that harmonious interpretation enables treaty interpreters 'to aim for a coherent and mutually consistent interpretation of the different treaty rules as much as possible to avoid norm conflicts between the two treaties.'[301] The potential for human rights obligations to reinforce public interests could be even more important, given the recognition in the decision that Article 20 could protect a broad range of owner interests.[302] The implications of this for international law will be considered further in Chapter 10.

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[295] Molly Land, 'Rebalancing TRIPS' (2011) 33(3) *Michigan Journal of International Law* 433, 471–474; Frantzeska Papadopoulou, 'TRIPS and Human Rights' in Annette Kur and Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) 262, 273–274.

[296] *Australia – Plain Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2393]-[7.2431], [7.2529]-[7.2606].

[297] Analogously, determining whether Plain Packaging Legislation contributes in the prescribed manner to the achievement of its stated objective is 'a matter for experts in the field:' Daniel J Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell, 4th ed, 2012) 350.

[298] This approach does not appear to have been taken by Australia in its *Summary of Arguments*.

[299] See weight given to objectives of the legislation in relation to *Technical Barriers to Trade* analysis and reference made to analysis of public health objectives in relation to *Technical Barriers to Trade* analysis in assessment of unjustifiability: *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.213]-[7.232], [7.2586]-[7.2604].

[300] Grosse Ruse-Khan, above n 3, 34.

[301] Ibid, citing *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objections)* [1957] ICJ Rep 125, 142.

[302] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2279]-[7.2286].

Human rights arguments were a morally persuasive feature of the access to medicines campaign that prompted amendments to *TRIPS*.[303] In that campaign, human rights were effectively employed to address the attempts by pharmaceutical companies to enforce intellectual property rights in a manner that was strongly argued to be inconsistent with access to essential medicine and the human right to health.[304] The weight of human rights arguments in WTO disputes can be increased, if states reference relevant human rights obligations when they interpret the terms of *TRIPS*. This did not occur in the WTO disputes.[305]

8.4.2 Philip Morris-Australia

The *Philip Morris-Australia* dispute is also relevant to understanding the relationship between intellectual property and human rights. Although the previous section shows how human rights can be relevant to an interpretation of *TRIPS*, the bilateral investment treaty between Australia and Hong Kong had much narrower exceptions available for the provisions invoked to challenge *Plain Packaging Legislation*.

The *Philip Morris-Australia* investor-state arbitration involved a multi-billion claim against Australia by Philip Morris seeking compensation for the impact of *Plain Packaging Legislation* on their investment in tobacco-related trade marks in Australia.[306] Philip Morris argued that changes resulting from *Plain Packaging Legislation* enacted subsequent to their acquisition of intellectual property rights to tobacco deprived them of the value of their investment, which was inconsistent with the *Australia-Hong Kong Bilateral Investment Treaty*.[307] The dispute was ultimately resolved at an interlocutory stage, on the basis that these rights had been deliberately acquired so as to exploit the investor-state dispute mechanism and the action constituted an abuse of right under international law.[308] If the jurisdictional objections had not ended the dispute, Australia would have had to address a number of claims based on violation of the protection against expropriation; failure to provide fair and equitable treatment; failure to provide full protection and security; unreasonable impairment; and the umbrella clause.[309]

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[303] *TRIPS* art 31*bis*; Noah Novogrodsky, 'After AIDS' (2013) 14(2) *Melbourne University Law Review* 643, 650.
[304] Novogrodsky, above n 303, 650.
[305] *Summary of Arguments*, WTO Doc WT/DS435/441/458/467.
[306] *Philip Morris Asia Ltd v Australia* (Notice of Arbitration, Australia/Hong Kong Investment Agreement for the Promotion and Protection of Investments) (Permanent Court of Arbitration, Case No 2012-12, 21 November 2011) [8.3].
[307] *Philip Morris Asia Ltd v Australia* (Award on Jurisdiction and Admissibility) (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015).
[308] Ibid.
[309] Tania Voon and Andrew D Mitchell, 'Implications of International Investment Law for Plain Packaging of Tobacco Products: Lessons from the Hong Kong-Australia BIT' in Tania Voon, Andrew D

Strong arguments could have been made by Philip Morris in relation to expropriation and fair and equitable treatment.[310] It is beyond the scope of this analysis to compare the *Philip Morris-Australia* dispute to the arbitration that Philip Morris brought regarding packaging requirements in Uruguay, which was ultimately unsuccessful.[311] However, the expropriation analysis in that decision suggests that Australia's public health objectives would have been relevant to a police powers defence in relation to expropriation.[312] The detailed consideration and justification of *Plain Packaging Legislation* by the Australian government would have supported Australia against fair and equitable treatment claims.[313] These matters of interpretation remain unresolved in the absence of a decision on substantive claims.

A chilling impact might remain for countries where foreign investor rights of tobacco companies are clearly established before any legislative change. If Philip Morris were able to use the dispute to obtain a significant judgment in its favour, the economic consequences of this could have compromised Australia's ability to regulate tobacco packaging with the objective of protecting and promoting the human right to health, consistent with its human rights obligations and obligations pursuant to the *FCTC*. Chapter 10 further analyses the chilling regulatory impact of investor-state disputes on tobacco regulation.

8.5 CONCLUSION

This chapter demonstrates the way in which *Plain Packaging Legislation* engages human rights. A human rights-based analysis shows the significance of progressive realisation, non-retrogression and international cooperation and assistance to *Plain Packaging Legislation*. It also demonstrates that *Plain Packaging Legislation* engages a number of interdependent rights. This justifies the use of a human rights-based approach, which can also consider relevant public health evidence.

The human rights justifications for *Plain Packaging Legislation* have been partly recognised but not emphasised by the Australian government. The emphasis on the public health objectives of the legislation in *Australia – Plain Packaging Measures* shows that this failure to explicitly

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Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) 137, 153–168.

[310] If successful, an investor is likely to be eligible for compensation even if a public purpose was established: *Agreement with Hong Kong Concerning the Promotion and Protection of Investments*, opened for signature 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993) art 6. Cf Voon and Mitchell's arguments in favour of Australia's defence: Voon and Mitchell, above n 309, 157–158.

[311] *Philip Morris Brands Sàrl v Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016).

[312] Ibid [287]-[307].

[313] Ibid [316]-[324]. See emphasis of tribunal on evidence underlying the *FCTC*: at [396].

recognise human rights implications and objectives potentially reduces the weight that can be given to human rights.[314] The legislation is clearly relevant to Australia's obligations pursuant to *ICESCR* and *CRC*. The implementation of *Plain Packaging Legislation* indicates that the legislation is largely consistent with a human rights-based approach to health. There is still abundant room for improvement in relation to recognising important human rights principles of monitoring, accountability and transparency. A human rights culture for trade marks should include explicit recognition of the relevance of human rights justifications, where relevant to intellectual property measures. In Australia, Human Rights Compatibility Statements provide an initial foundation for this recognition.

The analysis of the WTO disputes demonstrates the potential value of explicitly recognising the human rights basis of legislation that promotes health. The significance of public health evidence can be bolstered by recognition of its relevance to human rights obligations. Where human right to health obligations are relevant to identified conflict between intellectual property and health-focused legislation, as they have shown to be in this chapter, they can be considered in the interpretation of the provisions of *TRIPS*. This will be more successful if there is a domestic emphasis on human rights in policy formulation and legislative drafting.

Australia – Plain Packaging Measures shows the way in which Article 7, Article 8 and the *Doha Declaration* can be used to justify recognition of public interests that could include human rights. However, states need to recognise the relevance of these rights when they develop intellectual property legislation, as well as when they prepare evidence and arguments for WTO disputes. This is important for developing a human rights culture. If *TRIPS* Articles 7 and 8 and *VCLT* Article 31 are not used to argue that human rights obligations are relevant, there is limited opportunity for states to understand their interpretive role in the WTO dispute settlement processes. More problematically, *Philip Morris-Australia* shows how other trade agreements may restrict Australia's ability to rely on its human rights obligations in other fora. The implications of this for domestic regulatory autonomy and systemic integration of international law will be considered further in Chapter 10.

[314] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2575]-[7.2581], [7.2586]-[7.2589].

CHAPTER NINE ANTI-COUNTERFEITING CASE STUDY

9.1 INTRODUCTION

This chapter is a human rights-based analysis of the anti-counterfeiting provisions in Australian trade mark and therapeutic goods legislation. This case study considers expansion of protection for trade mark owners through enforcement measures against anti-counterfeiting. This is in contrast to plain packaging legislation, which restricts the rights of trade mark owners in order to protect health. This chapter applies a similar methodology to the plain packaging case study in the previous chapter. Anti-counterfeiting legislation is relevant to the tripartite state obligation to protect against third-parties whose actions can threaten the realisation of the right to health for individuals.[1] This chapter uses evidence of the negative health impacts of some counterfeit products to argue that counterfeiters are third-parties that produce goods that can threaten the health of individuals. It identifies evidence of the negative health impacts of the type of imported goods that have been established in case law as bearing counterfeit trade marks. The legislative analysis focuses on the operation of the provisions of the *Trade Marks Act 1995* (Cth) ('*1995 Act*'). Separate offences are found in the *Therapeutic Goods Act 1989* (Cth) ('*TGA*') in relation to counterfeit therapeutic goods that can, but do not necessarily, bear a false trade mark.[2] The chapter contributes to the existing analysis regarding counterfeiting legislation in Australia,[3] which has not previously included detailed human rights analysis.[4] The findings of this chapter are relevant to understanding the complex human rights issues that can be engaged by trade marks.

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[1] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12; Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) ('*General Comment 14*').

[2] *Therapeutic Goods Act 1989* (Cth) ss 42E, 42EA.

[3] See, eg, Jason Bosland, Kimberlee Weatherall and Paul Jensen, 'Trade Mark and Counterfeit Litigation in Australia' (2006) 4 *Intellectual Property Quarterly* 347; Min Li, 'Improving Australian Border Enforcement of IPR by Referring to the Chinese Experience' (2014) 8(2) *World Customs Journal* 39; Melanie Jose, 'Raising the Bar on Australia's Border Measures: Improvements to the Notice of Objection Scheme Resulting from the IP Laws Amendment (Raising the Bar) Act 2012' (2012) 90 *Intellectual Property Forum* 52.

[4] Rimmer considers potential human rights implications of international treaties: Matthew Rimmer, 'Trick Or Treaty?: The Australian Debate Over The Anti-Counterfeiting Trade Agreement 2011' in Pedro Roffe and Xavier Seuber (eds), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press, 2014) 169. Yu discusses broader limitations to analysis of enforcement: Peter K Yu, 'Enforcement: A Neglected Child in the Intellectual Property Family' in Susy Frankel and Daniel Gervais (eds), *The Internet and the Emerging Importance of New Forms of Intellectual Property* (Kluwer Law International, 2016) 279.

The chapter identifies key features of the legislation and the way in which this has been shaped by both international and domestic influences. In contrast to the plain packaging legislation considered in the preceding chapter, neither public health nor the human right to health is identified in legislation or policy analysis considering the provisions of the *1995 Act* that address counterfeiting. Matters of public health are addressed in the provisions that address counterfeit pharmaceutical goods in the *TGA*.[5] There is some focus on human rights in recent legislative scrutiny.[6] This chapter uses analysis of the operation of the legislation to demonstrate that there are human rights issues in relation to counterfeiting legislation that are not sufficiently considered in explanatory material or policy documents in Australia. This includes problems with the effectiveness of the relevant legislation in detecting and addressing threats to the human right to health. Unlike public health, the human right to health confers a positive obligation on states to protect individuals from third-party threats.[7] States are obligated to protect the right to health of individuals, and these protection obligations include third-party counterfeiters.[8] Implementation of those obligations should be consistent with certain human rights-based standards, including progressive realisation of rights, obligations of international cooperation and assistance, recognition of interdependent rights, participation and accountability.

The chapter applies the human rights-based methodology developed in Chapter 4 to identify human rights issues engaged by Australian anti-counterfeiting legislation that have not previously been identified in the literature. It synthesises legislation and explanatory material; Hansard and parliamentary committee records and relevant policy documents; relevant case law; academic analysis of the legislation and relevant international agreements; and data analysis about the nature of notices of objections to the importation of counterfeit goods. This permits a more detailed understanding of imported counterfeit products that are likely to threaten the health of individuals in Australia.

Importantly, other human rights issues have been raised in relation to regional agreements which Australia is presently negotiating or has negotiated that address anti-counterfeiting. This chapter identifies these human rights concerns and, with Chapter 10, explores whether the current mechanisms for identifying human rights concerns in the treaty-making process and in amendments to anti-counterfeiting legislation enable Australia to meet its obligations in international human rights law. Some literature suggests that all anti-counterfeiting measures

[5] Explanatory Memorandum, Therapeutic Goods Amendment Bill 2005 1.
[6] See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixth Report of 2013* (2013) 86–89; Explanatory Memorandum, Therapeutic Goods Amendment (2017 Measures No 1) Bill 2017 17; Explanatory Memorandum, Therapeutic Goods Amendment (2018 Measures No 1) Bill 2018 8.
[7] *General Comment 14*, UN Doc E/C.12/2000/4, [35].
[8] Ibid.

are beneficial to the extent that they benefit public health.[9] This chapter uses a human rights-based analysis of anti-counterfeiting measures to argue that health-based justifications for increased anti-counterfeiting obligations are difficult to quantify in the absence of more effective detection and data collection.

9.1.1 International Context

Importation of counterfeit goods is international in nature because at least two states are involved. Existing literature suggests broad consensus about the importance of international cooperation to address counterfeiting. [10] Changes to international obligations that strengthen the effectiveness of the system in detecting and preventing counterfeit imports can improve protection against third party threats to the right to health.[11] Increasing international coordination is demonstrated through multilateral participation in organisations such as the World Customs Organisation (WCO).[12] Australia has become a party to a number of agreements made through the WCO that impact on the regulation of anti-counterfeiting activities but do not seem to necessitate significant legislative amendment.[13] Despite increases in international cooperation, there are continued concerns about the effectiveness of the Australian system of regulating counterfeit goods.[14]

Although counterfeiting is viewed as a problem by the World Health Organization (WHO), particularly in relation to counterfeit therapeutic goods,[15] additional state obligations to regulate

[9] Michele Forzley, 'Counterfeit Goods and the Public's Health and Safety' (International Intellectual Property Institute Research Paper, July 2003) 17–21.
[10] See European Union Intellectual Property Office, *Governance Frameworks to Counter Illicit Trade* (OECD Publishing, 2018) 14–15; European Union Intellectual Property Office, *Trade in Counterfeit Goods and Free Trade Zones: Evidence from Recent Trends* (OECD Publishing, 2018) 74; Klara Dégardin, Yves Roggo and Pierre Margot, 'Understanding and Fighting the Medicine Counterfeit Market' (2014) 87 *Journal of Pharmaceutical and Biomedical Analysis* 167, 171.
[11] Maskus discusses the relationship between health impacts and international regulation of counterfeiting: Keith E Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century* (Peterson Institute for International Economics, 2012) 226–228.
[12] Takashi Matsumoto, 'WCO Regional Approach to Capacity Building' (2008) 2(2) *World Customs Journal* 79.
[13] See, eg, minor amendments required to adopt *Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures*: Joint Standing Committee on Treaties, Parliament of Australia, *Report 31: Three Treaties Tabled on 7 March 2000* (April 2000) 16. Agreements are often classified as 'minor treaty actions': see Joint Standing Committee on Treaties, Parliament of Australia, *Report 110: Treaties Tabled on 18, 25 (2) and 26 November 2009 and 2 (2) February 2010* (March 2010); Joint Standing Committee on Treaties, Parliament of Australia, *Report 95: Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008* (October 2008).
[14] Australian Government Productivity Commission, *Intellectual Property Arrangements* (Inquiry Report No 78, 23 September 2016) 555 ('*Productivity Commission Report*'); Australian Government Department of Foreign Affairs and Trade, *National Interest Analysis [2011] ATNIA 31: Anti-Counterfeiting Trade Agreement* (2011) [5]-[12].
[15] There is a Member State mechanism on substandard and falsified medical products: World Health Organization, *WHO Global Surveillance and Monitoring System for Substandard and Falsified Medical Products: Executive Summary* (2017) 6

counterfeiting are commonly found in international intellectual property law and trade law. The *Agreement on Trade Related Aspects of Intellectual Property* ('*TRIPS*') increased enforcement standards and developed in isolation from human rights institutions. The human rights implications of this have not been considered in detail in Australia.[16] This chapter contributes by analysing human rights implications of international anti-counterfeiting obligations once they are translated into domestic legislation.[17] Analysis of health implications of anti-counterfeiting internationally is often viewed from a public health perspective rather than a human rights perspective.[18]

Views on the nature of regulation required remain divergent; there is little consensus on the appropriate level of international standards.[19] The negotiation of plurilateral agreements to increase levels of protection against counterfeiting suggests a concern that the current international system regulating counterfeiting is insufficient and ineffective and there needs to be further international agreement and regulation to protect trade mark owners adequately.[20] Alternatively, there are arguments that regulation should be amended to recognise that counterfeit goods could benefit economies where they represent imitation.[21] Seuba identifies three potential impacts of cross-border enforcement of intellectual property rights that are relevant to human rights: restrictions on access to vital products; protection for individuals by ensuring consumer safety; and where regulation of rights is of bad normative quality.[22]

<http://www.who.int/medicines/regulation/ssffc/publications/GSMS_executive_Summary.pdf>.

[16] Genevieve Wilkinson, 'The Human Rights (Parliamentary Security) Act 2011 (Cth) and the Increasingly Visible Intersections between the Human Right to Health and Intellectual Property in Australia' (2016) 105 *Intellectual Property Forum* 46; Kimberlee Weatherall, 'Provocations and Challenges Concerning Enforcement and Civil Procedure in IP' in Graeme B Dinwoodie (ed), *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (Edward Elgar, 2015) 181, 192–199. For examples of more detailed analysis in a European context, see Xavier Seuba, *The Global Regime for the Enforcement of Intellectual Property Rights* (Cambridge University Press, 2017) 35–62, 353–367, 394–412; Jonathan Griffiths, 'Criminal Liability for Intellectual Property Infringement in Europe: The Role of Fundamental Rights' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012) 191.

[17] Griffiths considers domestic decisions within a regional human rights framework: Griffiths, above n 16.

[18] See, eg, Duncan Matthews, 'Counterfeiting and Public Health' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2011) 42; Jonathan Liberman, 'Combating Counterfeit Medicines and Illicit Trade in Tobacco Products: Minefields in Global Governance' (2012) 40(2) *Journal of Law, Medicine and Ethics* 326.

[19] Peter K Yu, 'TRIPS and Its Achilles Heel' (2011) 18(2) *Journal of Intellectual Property Law* 479. Yu is optimistic about the potential for future agreement: Yu, 'Enforcement: A Neglected Child in the Intellectual Property Family', above n 4, 299.

[20] Seuba, above n 16, 98–100.

[21] Li gives a detailed analysis of the potential benefits of some types of counterfeiting for development, using the case study of China: Yan Li, *Rethinking Counterfeiting in Light of The Relationship Between Intellectual Property and Development* (PhD Thesis, University of Technology Sydney, 2015).

[22] Seuba, above n 16, 354.

9.2 AUSTRALIAN ANTI-COUNTERFEITING LEGISLATION

This case study focuses on the operation of relevant provisions of the *1995 Act*. The mechanisms for the seizure of goods at the border in Part 13 of the *1995 Act* reflect the minimum standards set out in *TRIPS*, which are discussed in Chapter 6 of this thesis.[23] Part 14 of the *1995 Act* includes criminal remedies applicable to counterfeiting offences, corresponding to *TRIPS* requirements for criminal sanctions for trade mark counterfeiting activities.[24] The agency that is currently responsible for seizing goods is Border Force.[25] Separate but related offences are found in the *TGA*.[26] The definition of a counterfeit therapeutic good in this legislation includes goods bearing counterfeit marks, although other therapeutic goods that do not bear a false trade mark can also be counterfeit.[27]

9.2.1 Purpose of Anti-Counterfeiting Legislation

Australian anti-counterfeiting legislation corresponds to Australia's obligations pursuant to *TRIPS*.[28] The *1995 Act* was introduced so that Australia could comply with these obligations.[29] The *TGA* explicitly acknowledges the relevance of its provisions to public health but does not reference human rights.[30]

9.2.2 Important Features of the Trade Marks Act 1995

9.2.2.1 Amendments to the 1995 Act

The *1995* Act has been significantly amended to improve effectiveness.[31] The primary mechanism has been the *Raising the Bar* amendments discussed in Chapter 7.[32] There were limited amendments to Part 13 and Part 14 prior to 2012.[33] The *Raising the Bar* amendments

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[23] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*WTO Agreement*') annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS*') s III pt 4.
[24] Ibid s III pt 5.
[25] See *Customs and Other Legislation Amendment (Australian Border Force) Act 2015* (Cth). Legislative restructures mean that the literature often refers to various prior names for the responsible institutions including Customs and Australia Customs and Border Force Protection Services.
[26] *Therapeutic Goods Act 1989* (Cth) s 42EA.
[27] Ibid.
[28] *TRIPS* s III pt 4.
[29] Carolyn Adams, 'Australian Legislation Concerning Matters of International Law 1995' (1996) 17 *Australian Year Book of International Law* 331, 333.
[30] Explanatory Memorandum, Therapeutic Goods Amendment Bill 2005 1.
[31] Effectiveness is linked to progressive realisation of human rights: Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant)*, UN ESCOR, 5th sess, UN Doc E/1991/23 (14 December 1990) [3], [9] ('*General Comment 3*').
[32] *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) ('*Raising the Bar*').
[33] For example, the *Intellectual Property Laws Amendment (Border Interception) Act 1999* (Cth) addressed importation issues relevant to the Sydney Olympics and introduced section 133A, which vested

responded to criticisms in the Advisory Council on Intellectual Property (ACIP) policy review on trade mark enforcement.[34] It recognised seizure provisions as critical to the regulation of counterfeiting because importation was the primary means for entry of counterfeit goods into the Australian market.[35] The following discussion will identify the key amendments and relevant policy concerns.

Some changes that had been considered by ACIP and IP Australia have not been implemented. ACIP also recommended that seizure powers in relation to counterfeit goods be extended to States and local government agencies, following consultation with States.[36] This was provisionally accepted by the government but has not been further implemented in legislation.[37] It was also recommended that Customs seize goods that are similar or closely related to goods or services for which notified goods are registered.[38] This was also not implemented, so only goods for which the notified goods are registered can be seized.[39] The implications of these unimplemented recommendations will be considered further in the human right to health analysis of anti-counterfeiting.

9.2.2.2 Notice of objection

Part 13 of the *1995 Act* establishes the notice of objection scheme, which enables registered trade mark owners to register their marks as notified marks.[40] Registration occurs after written notice is provided to the Comptroller-General of Customs objecting to the importation of goods that infringe a registered trade mark.[41] It lasts for four years.[42] This permits the Comptroller-General to seize goods being imported into Australia[43] if the goods have signs applied to them

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power in the Customs CEO or an officer of Customs to determine whether a person was the owner of goods within the meaning of part (b) of the definition of a designated owner.

[34] Advisory Council on Intellectual Property, *Review of Trade Mark Enforcement* (April 2004) 22–24 <https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_final_report_review_of_trade_mark_enforcement.pdf>.

[35] Ibid 2.

[36] Ibid 23.

[37] *Government Response - Review of the Enforcement of Trade Marks* (20 April 2016) Australian Government, IP Australia <https://www.ipaustralia.gov.au/about-us/public-consultations/archive-ip-reviews/ip-reviews/Government-Response-review-of-the-enforcement-of-trade-marks/government-response>.

[38] Advisory Council on Intellectual Property, above n 34, 22.

[39] *Trade Marks Act 1995* (Cth) s 133.

[40] Government authorities have explicitly identified the notice of objection scheme as the mechanism that Australia has implemented to meet its obligations as a member of the WTO and a party to the *TRIPS* agreement in preventing and deterring trade in counterfeit goods: Australian Government, Australian Customs and Border Protection Service, *Annual Report 2011-2012* (2012) 108 <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/annual-reports/annualreport2011-12.pdf>. An authorised user of a mark can also become an objector: *Trade Marks Act 1995* (Cth) s 132.

[41] *Trade Marks Act 1995* (Cth) s 132.

[42] Ibid ss 133(4), 133(5).

[43] Ibid s 133(1).

or in relation to them that are substantially identical or deceptively similar to the notified mark.[44] The goods must be goods for which the notified mark is registered.[45]

The trade mark owner must have a valid trade mark registration. The objector provides an undertaking regarding expenses incurred through such seizures.[46] Previously, a bond was required.[47] This undertaking discourages abuses of the system where the marks in question are not in fact counterfeit.[48] Despite this indemnity, the system is largely publicly funded.[49]

9.2.2.3 Seizure of goods

The Comptroller-General must seize suspected counterfeit goods unless no reasonable grounds exist to believe the notified trade mark is infringed.[50] The goods must be stored securely.[51] The Comptroller-General sends a notice of seizure to the designated owner and the objector as soon as practicable.[52] This identifies the goods.[53] The designated owner of the imported goods can claim for the release of the goods within 10 days (the claim period), and if the objector does not institute an infringement action in respect of the goods within 10 days (the action period), the goods will be released to the designated owner.[54] The Comptroller-General can permit the objector or designated owner to inspect the seized goods and remove sample goods.[55] At any time before an infringement action commences, the designated owner can consent to forfeit the seized goods by giving notice.[56] Seized goods that are not claimed are forfeited,[57] unless a late claim is permitted.[58]

A key feature of the *Raising the Bar* amendments was the increased protection it provided for objectors where Border Force seized an import that it identified as bearing a counterfeit mark.[59] Legislative reviews criticised the heavy onus on objectors in the earlier notification system and

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[44] Ibid s 133(3).
[45] Ibid s 133(2).
[46] Ibid s 133(3). In certain cases where it is reasonable in all the circumstances, objectors must alternatively provide an amount as security: ibid s 133(3A). Costs can include transportation, storage and disposal of seized goods: Jose, above n 3, 55.
[47] *Trade Marks Act 1995 Cth* (1995) s 133, later amended by *Trade Marks Amendment Act 2006* (Cth) sch1 pt 1 cl 186.
[48] See criticisms of Australian approach in comparison to China: Li, above n 3, 42–44.
[49] See Gregor Urbas, *Public Enforcement of Intellectual Property Rights* (Australian Institute of Criminology, 2000).
[50] *Trade Marks Act 1995* (Cth) s 133(2).
[51] Ibid s 133(4).
[52] *Trade Marks Act 1995* (Cth) ss 134(1), 133A, 6.
[53] Ibid s 134(1).
[54] Ibid s 134(2), 6; *Trade Marks Regulations 1995* (Cth) reg 13.
[55] *Trade Marks Act 1995* (Cth) s 134A. If they take samples, objectors must give undertakings to return it and take reasonable care to prevent damage to the goods: at sub-ss (3), (4).
[56] Ibid s 135.
[57] Ibid s 136A, or, if claimed but possession is not taken within 90 days of the release, at s 136E.
[58] Ibid s 136B.
[59] Ibid pt 13. See Jose, above n 3.

difficulties regarding making contact with the importer of the relevant goods within the statutory time frames.[60] Several cases indicated difficulties experienced by trade mark owners regarding the technical operation of the Act, and short time frames for owners to organise court orders to prevent release of the goods.[61] Placing the onus on the importer of the goods to seek the release of their goods has resulted in the majority of goods detected by Border Force since the introduction of the Act being forfeited.[62]

9.2.2.4 Release of personal information

Trade mark owners are able to obtain more information about the parties involved in the importation of these goods following *Raising the Bar* amendments.[63] ACIP recommended that Customs give the trade mark owners any information it possessed that would help identify the source of the goods.[64] Identification was considered important to permit owners to prevent future importation of counterfeit goods more effectively.[65] At any time after the goods are seized, the Comptroller-General can give personal information relevant for the purpose of identifying and locating the designated owner and the importer of the goods respectively.[66] The Comptroller-General can also release the name and address of agents of the designated owner that made arrangements for the goods to be brought to Australia.[67]

9.2.2.5 Release of goods

During the claim period, the designated owner can make a claim for the release of the goods.[68] If the designated owner makes a claim for release of seized goods, the objector must be given notice of that claim in writing, which may include information for identifying and locating the importer and any other person who made arrangements for the goods to be brought to

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[60] Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 [2012] (Cth) 101-110. See Advisory Council on Intellectual Property, above n 34.
[61] *Disney Enterprises Inc v Australian Exim Company Pty Ltd* [2009] FCA 719; *Jemella Australia Pty Ltd v Daizli* [2009] FCA 1566; *Jemella Australia Pty Ltd v MacKinnon* (2008) 170 FCR 1; *Jemella Australia Pty Ltd v Steffensen* [2009] FCA 293.
[62] The Australian Customs and Border Protection 2013-2014 Annual Report noted that following the introduction of the *Raising the Bar* legislation amending the *Trade Marks Act 1995* (Cth) and *Copyright Act 1968* (Cth), 99.9 per cent of seized goods suspected of being counterfeit were forfeited, either as a result of court order, voluntary forfeiture or deemed forfeiture. Previously the statistic was 25 per cent: Australian Government, Australian Customs and Border Protection Service, *Annual Report 2013-2014* (2014) 38. Improvements were predicted in Jose, above n 3, 61.
[63] Jose, above n 3, 58–59.
[64] Advisory Council on Intellectual Property, above n 34, 23.
[65] Ibid. See, eg, special orders that were made for release of information so that further activities could be investigated in *British American Tobacco Australasia Ltd v The Person Identified by the Australian Customs Service as 'Gory Sabar'* [2007] FCA 1417.
[66] *Trade Marks Act 1995* (Cth) s 134(4).
[67] Ibid s 134(4)(a).
[68] Ibid s 136 consistent with *Trade Marks Regulations 1995 (Cth)* pt 13.

Australia.[69] Seized goods are released if the objector consents or if no infringement action is instituted or if, where an infringement action is commenced, that action does not result in a court order preventing release within 20 days.[70]

9.2.2.6 Infringement actions

Infringement actions can be brought by the objector and the relief granted by the court can include orders that the goods be released to the designated owner or forfeited to the Commonwealth.[71] The court can also order that the objector pay loss or damages to the designated owner or other defendants where the infringement claim is unsuccessful, and loss or damage is established.[72] Alternatively, a claim for compensation can be brought against the Commonwealth where no claim for release is made, and the goods are destroyed. [73] However, the Commonwealth is not liable for loss or damage because the Comptroller-General seized or failed to seize the goods or because of the release of any seized goods.[74]

Until 2013, it was not possible for trade mark owners to bring actions in the lowest level of court with jurisdiction in the federal system, the Federal Circuit Court.[75] They were required to use the Federal Court.[76] In contrast, copyright owners claiming infringement of counterfeit copyright products were able to obtain relief in the more cost-effective system.[77] As a number of counterfeit products breached copyright and trade mark, there had been benefits to emphasising the copyright claims so that the faster and cheaper jurisdiction could be accessed.[78]

9.2.2.7 Offences

TRIPS obligations require Australia to provide both civil and criminal remedies in Australian legislation.[79] Part 14 of the *1995 Act* provides offences for trade mark infringement that can

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[69] *Trade Marks Act 1995* (Cth) s 136C.
[70] Ibid s 136D.
[71] Ibid s 137.
[72] Ibid s 137.
[73] Ibid s 139. The owner of the goods must establish no infringement of the notified mark and circumstances providing a reasonable excuse for failing to claim for the release of the goods.
[74] Ibid s 142.
[75] *Intellectual Property Laws Amendment Act 2012* (Cth) sch 6 pt 1 cl 122 inserted *Trade Marks Act 1995* (Cth) s 191A. The Federal Magistrate's Court changed its name to the Federal Circuit Court at the time it obtained jurisdiction over certain trade mark matters.
[76] Advisory Council on Intellectual Property, *Should the Jurisdiction of the Federal Magistrates Service Be Extended to Include Patent, Trade Mark and Design Matters?* (November 2003) 3 <https://www.ipaustralia.gov.au/sites/g/files/net856/f/final_report_extending_jurisdiction_of_federal_magistrates.pdf>.
[77] Ibid.
[78] Bosland, Weatherall and Jensen, above n 3, 371–373.
[79] Between states, the nature of the requirement for the provision of criminal remedies for counterfeiting on a commercial scale remains controversial: Kimberlee Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"' (2016) 16 *Melbourne Journal of International Law* 257, 274–275.

apply to counterfeiting activities. Section 148 explicitly provides that it is an offence to import goods into Australia for the purpose of trade or manufacture in certain circumstances regarding the application, alteration, defacement or removal of a registered mark without permission or authorisation.[80] Section 148 creates indictable and summary offences, and a summary offence requires the fault element of negligence.[81]

Other offences in Part 14 that can be prosecuted as indictable or summary offences could be relevant to counterfeiting activities.[82] There is also a broad potential scope for counterfeiting activities to engage section 150, which provides an offence for aiding, abetting, counselling, procuring or being knowingly concerned in acts overseas that would constitute an offence against the *1995 Act*. Additionally, there have been criminal contempt charges issued in relation to breaches of undertakings not to continue counterfeiting activities.[83] Relevant offences will be considered in relation to civil and political rights in Section 9.3.4 and Section 9.4.

Criminal remedies for counterfeiting activities were strengthened by the *Raising the Bar* amendments[84] following the recommendations of ACIP that the penalties be strengthened for trade marks.[85] ACIP's analysis noted the differences between Australian and international penalties.[86] The government, in its response, appeared more concerned by local business concerns, which were addressed in the *Raising the Bar* amendments.[87] The objective of systemic parity also influenced amendments to the *Copyright Act 1968* (Cth).[88]

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[80] *Trade Marks Act 1995* (Cth) s 148(1)(a). The relevant circumstances are where a registered trade mark, or a mark or sign that is substantially identical to a registered trade mark, is 'applied, altered, defaced, added to, wholly or partly removed, erased or obliterated' without the permission of the owner or authorisation of the Trade Marks Registrar or Court: at s 148.

[81] In *Seiko Epson Corporation v Calidad Pty Ltd*, Burley J determined that section 148 of the *Trade Marks Act 1995* (Cth) did not confer a separate entitlement to sue for breach of statutory duty by the plaintiff in relation to the import of print cartridges which had a registered trade mark blacked out on them: *Seiko Epson Corp v Calidad Pty Ltd* [2017] FCA 1403, [396]-[418].

[82] *Trade Marks Act 1995* (Cth). Relevant offences include: falsifying or removing a registered trade mark (at s 145); falsely applying a registered trade mark (at s 146); making a die etc for use in a trade mark offence (at s 147); drawing a registered mark that is likely to be used in an offence (at s 147A); and possessing or disposing of things for use in trade marks offence (at s 147B).

[83] *Louis Vuitton Malletier SA v Design Elegance Pty Ltd* (2006) 149 FCR 494; *Rip Curl International Pty Ltd v Phone Lab Pty Ltd* (2004) 63 IPR 496.

[84] Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 [2012] (Cth) 110-111.

[85] Advisory Council on Intellectual Property, above n 34, 23–24.

[86] Ibid.

[87] *Government Response - Review of the Enforcement of Trade Marks*, above n 37.

[88] Ibid. See *Intellectual Property Laws Amendment Act 2012* (Cth) sch 5.

9.2.3 Legislative History of International Influence on Anti-Counterfeiting Protection

The *Trade Marks Act 1905* had not provided an objection system, although it prohibited the importation of counterfeit goods. [89] It emphasised source by requiring that imported goods denote country of origin. The *1955 Act* provided a registration system, which permitted a registered owner to obtain information about importers of goods making fraudulent use of their marks.[90] This was criticised by the Intellectual Property Advisory Committee (IPAC) in a 1981 report, as it was available only to registered proprietors or users of the mark who manufactured, dealt or traded in Australia.[91] Problematically, the wording of the section meant that it could sometimes be 'used to prevent trade in genuinely marked goods where no infringement [was] involved.'[92] This prompted concern about the use of the mark to preserve local Australian industry from competition from imported goods, rather than to protect rights conferred by trade mark registration.[93] IPAC was concerned that Australia might not meet its obligations to provide national treatment pursuant to the *Paris Convention*, 'insofar as it creates in favour of registered proprietors and registered users carrying on business in Australia, rights which are not available to all registered proprietors and registered users.'[94] The *1995 Act* adopted recommendations to expand protection to permit registered owners and authorised users to object, regardless of connection to Australia.[95]

The IPAC report shows recognition that Australian trade mark law should correspond to Australia's obligations under the *Paris Convention*.[96] The report identified likely amendments to Australian legislation as a result of international developments.[97] The eventual outcome of these developments was the incorporation of enforcement provisions into *TRIPS* that expressly addressed trade mark counterfeiting. This prompted significant changes to Australian legislation resulting in the system of civil and criminal protection in Parts 13 and 14.[98] The *Working Party Report* that preceded the *1995 Act* explicitly considered the consistency of its recommended

[89] *Trade Marks Act 1905* (Cth) s 90; Industrial Property Advisory Committee, *Report: The Trade Marks Act and Importation of Goods Bearing a Registered Trade Mark* (Australian Government Publishing Service, 1981) 7–8.
[90] *Trade Marks Act 1955* (Cth) ss 103-104.
[91] See Industrial Property Advisory Committee, above n 89, 11.
[92] Ibid vii.
[93] Ibid 11.
[94] Ibid.
[95] Ibid 36; *Trade Marks Act 1995* (Cth) pt 13.
[96] Industrial Property Advisory Committee, above n 89, 11.
[97] Ibid 20. Negotiations to strengthen counterfeiting procedures in the Tokyo round of GATT had resulted in agreement on an anti-counterfeiting code between the European Economic Community and the United States of America. However, IPAC determined that the likelihood of legislative change should Australia join these agreements, should not prevent the adoption of the legislative change recommended by the report as soon as possible.
[98] Jose explains how Parts 13 and 14 correspond to *TRIPS*: Jose, above n 3, 53.

changes with *TRIPS* and other international agreements being negotiated contemporaneously.[99] The *Working Party Report* also noted the frustration, apparent in submissions made by large groups of companies, that existing anti-counterfeiting legislation meant that they were unable to protect their mark properly.[100] This prompted recommendations to increase penalties to a higher level, similar to the penalties provided in the *Copyright Act 1968*.[101]

9.2.4 The Therapeutic Goods Act 1989 (Cth)

Public health is one of the overarching objectives of the *Therapeutic Goods Act 1989* (Cth) ('*TGA*').[102] The objective of the legislation, to 'provide for the establishment and maintenance of a national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods,' is directly relevant to the human right to health.[103]

The *TGA* can address the importation of counterfeit goods through provisions regulating counterfeit therapeutic goods.[104] The term 'counterfeit' includes, but does not focus on, the application of deceptively similar or substantially identical trade marks.[105] This contrasts to Parts 13 and 14 of the *1995 Act*. Counterfeit therapeutic goods are goods that have some falseness or inaccuracy regarding the nature or origin of the goods in material related to them.[106] This material includes product labelling,[107] associated documentation[108] and advertising.[109] In some cases, the relevant falseness or inaccuracy is the application of a trade mark without the consent of the registered owner.[110]

Where counterfeit therapeutic goods are imported, the provisions of Part 13 and Part 14 of the *1995 Act* can apply where notices of objection are registered. Numerous notices of objection are registered for products in classes that include therapeutic goods.[111] However, the *TGA* also

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[99] See Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* (Australian Government Publishing Service, 1992) ('*Working Party Report*').
[100] Ibid 113.
[101] Ibid.
[102] Stone J noted that 'It is evident from the objects of the TGA that the Act is an important public health and safety measure.' *Secretary, Department of Health and Ageing v Prime Nature Prize Pty Ltd (in liq)* [2010] FCA 597, [22].
[103] *Therapeutic Goods Act 1989* (Cth) s 4; *General Comment 14*, UN Doc E/C.12/2000/4, [12].
[104] *Therapeutic Goods Act 1989* (Cth) ss 42E, 42EA.
[105] Ibid ss 42E, 42EA.
[106] Ibid s 42E(3).
[107] Ibid s 42E(2)(a).
[108] Ibid s 42E(2)(b).
[109] Ibid s 42E(2)(c).
[110] Ibid ss 42E(2)(a), 42E(2)(e).
[111] See, eg, Pfizer Australia Pty Ltd, *Trade Marks and Copyright: Notices of Objection* <https://www.homeaffairs.gov.au/Customsnotices/Pages/IPDetailView.aspx?objnum=T00078-04&keyword=pfizer&searchField=All>; Eli Lilly and Co, *Trade Marks and Copyright: Notices of Objection* <https://www.homeaffairs.gov.au/Customsnotices/Pages/IPDetailView.aspx?objnum=T00210-02&keyword=lilly&searchField=All>.

addresses goods that are manufactured in Australia.[112] Litigation regarding counterfeit therapeutic goods has not focused on imported goods, although some cases involve goods produced for export.[113] Therapeutic goods may also be seized where they constitute restricted goods[114] or prohibited imports.[115]

Section 42E creates criminal offences in relation to manufacture (in Australia), supply, import and export of counterfeit therapeutic goods.[116] The maximum penalty is seven years imprisonment or 2000 penalty units, or both.[117] Executive officers can also be liable where a body corporate commits an offence contrary to 42E(1).[118] Section 42EA creates a civil offence for the conduct prohibited in section 42E and provides maximum civil penalties: 5000 penalty units for an individual and 50 000 penalty units for a body corporate. A defence exists where the offender has a reasonable excuse and ought fairly to be excused for the contravention, having regard to all of the circumstances of the case.[119] However, that section does not apply to a manufacturer of counterfeit goods.[120]

The current statutory regime for counterfeit therapeutic goods was introduced in 2000.[121] Explanatory materials noted that existing entry, search and warrant powers were being used to detect the counterfeiting of medicines.[122] In 1996, more than 20 per cent of 200 criminal charges laid in relation to therapeutic goods were laid in relation to offences of illegal export.[123] Between 1992 and 1996, 87 of the 577 offences prosecuted under the *TGA* involved counterfeiting activities.[124] The statutory regime introduced in 2000 corresponds to Australia's contemporaneous commitment to support the WHO in relation to anti-counterfeiting.[125] This was further strengthened by the introduction of extraterritorial offences.[126] This extraterritorial

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[112] *Therapeutic Goods Act 1989* (Cth) s 42E.
[113] Notably, *TRIPS* does not regulate the export of counterfeit goods.
[114] See, eg, specific restrictions for antibiotics in *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 5A.
[115] See *Customs Act 1901* (Cth) s 229; *Therapeutic Goods Act 1989* (Cth) s 42F.
[111] *Therapeutic Goods Act 1989* (Cth) s 42E(1).
[117] Ibid.
[118] Ibid s 54BA. See also s 54B.
[119] Ibid s 42EB.
[120] Ibid s 42EB(5).
[121] See *Therapeutic Goods Amendment Bill (No 2) 2000* (Cth).
[122] *Therapeutic Goods Act 1989* (Cth) pt 5A.
[123] Paul Mackey and Katrine Del Villar, 'Therapeutic Goods Amendment Bill (No 2) 2000' (2000) 139 of 1999-2000 *Bills Digest* citing KPMG, *Review of Therapeutic Goods Administration on Behalf of the Department of Health and Family Services* (January 1997) 146.
[124] Paul Mackey and Katrine Del Villar, above n 123.
[125] World Health Assembly, *Resolution of the 41st World Health Assembly: Rational Use of Drugs* (WHA41.16, 1988). The *Bills Digest* notes that the World Health Assembly passed a resolution in 1988 requesting governments and pharmaceutical manufacturers to cooperate in the detection and prevention of counterfeiting of pharmaceuticals: Paul Mackey and Katrine Del Villar, above n 123.
[126] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 August 2005, 2 (Christopher Pyne).

operation provides legislative means to address the overseas manufacturing of therapeutic goods, as such conduct 'could result in a significant impact on the health and safety of the Australian community.'[127] Addressing these threats engages Australia's human right to health obligations.[128]

9.2.5 Other Legislation

Other relevant legislation that can support the operation of the *1995 Act* includes the *Commerce (Trade Descriptions) Act 1905* (Cth), which contains offences of importing falsely marked goods and applying a false trade description to exports.[129] The *Customs (Prohibited Imports) Regulations 1956* (Cth) is also relevant to the seizure of certain goods that can then be referred to other bodies for testing, such as the Therapeutic Goods Administration.

9.2.6 Synthesis

This section sets out the legislative system that links trade mark rights to detection and seizure of counterfeit goods in Australia and considers influences on policy development. *TRIPS*, the *Paris Convention* and WHO have influenced Australian anti-counterfeiting legislation. Legislation has also responded to effectiveness concerns of trade mark owners.[130] These include overseas owners who may desire legislative change so that Australian legislation is more consistent with that of other jurisdictions.[131] The following section will consider the human rights implications of existing legislation and its operation.

9.3 THE HUMAN RIGHTS IMPLICATIONS OF COUNTERFEITING LEGISLATION

This section considers the human rights implications of counterfeiting. It focuses on the human right to health. It also identifies a number of other human rights issues engaged by anti-counterfeiting.

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[127] Ibid.
[128] *General Comment 14*, UN Doc E/C.12/2000/4, [35].
[129] *Commerce (Trade Descriptions) Act 1905* (Cth) ss 9, 12. See application in *Chief Executive Officer Customs v CHS Enterprises Pty Ltd* (2007) 70 ATR 285; *Chief Executive Officer of Customs v Hui Min Jing* [2007] NSWSC 1354; *CEO Customs v CHS Enterprises Pty Ltd (No 2)* [2008] NSWSC 47.
[130] See *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth).
[131] See, eg, Baker & McKenzie (Australia), Submission to the Advisory Council on Intellectual Property, *Review of Enforcement of Trade Marks*, 7 June 2002.

9.3.1 Human Right to Health and the Operation of Anti-Counterfeiting Legislation

States are obligated to protect the human right to health for individuals against the actions of third parties that might be detrimental to health.[132] *ICESCR* also obligates states to provide access to quality medication.[133]

9.3.1.1 Imported goods posing risks

A range of imported goods can pose health and safety risks. Case law indicates the type of counterfeit goods that are being imported. Counterfeit goods the subject of litigation include: clothing,[134] cosmetics and skincare products,[135] sunglasses,[136] cigarettes,[137] laundry detergent,[138] DVDs,[139] CD-roms, [140] and computer accessory items.[141] Although quality issues are sometimes identified,[142] the decisions cited do not specifically address the health and safety risks posed by these counterfeit goods. For example, in Australia, counterfeit apparel cases have not addressed any health and safety issues. These have involved sunglasses and accessories,[143] clothing,[144] tops,[145] scarves, [146] tracksuits,[147] t-shirts,[148] pyjamas,[149] and handbags and wallets.[150] However,

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[132] *General Comment 14*, UN Doc E/C.12/2000/4, [35].
[133] Ibid [12], [17], [43]; *ICESCR* art 12.
[134] *Disney Enterprises Inc v Australian Exim Company Pty Ltd* [2009] FCA 719; *Kabushiki Kaisha Sanrio v Impression International Pty Ltd* [2008] FCA 341.
[135] *Geneva Laboratories Ltd v Prestige Premium Deals Pty Ltd (No 4)* (2016) 120 IPR 133.
[136] *Oakley Inc v Franchise China Pty Ltd* (2003) 58 IPR 452, 458; *Chanel Limited v Donoghue* [2008] FCA 1643; *Chanel Limited v Ayad* [2005] FCA 820; *Oakley Inc v Elkofairi* [2010] FCA 188.
[137] *British American Tobacco Australasia Ltd v The Person Identified by the Australian Customs Service as 'Gory Sabar'* [2007] FCA 1417.
[138] *Unilever PLC v Bless Point Pty Ltd* [2007] FCA 551.
[139] *Dolby Laboratories Licensing Corporation & Anor v Kamil* [2013] FCCA 1326; *DPP v Ly* [2014] VCC 1514 (13 August 2014).
[140] *Sony Computer Entertainment Australia Pty Ltd v Dannoun* [2001] FCA 1235; *Sony Computer Entertainment Australia Pty Ltd v Hinson* [2000] FCA 1290; *Sony Computer Entertainment Australia Pty Ltd v Saleh* [2001] FCA 717; *Sony Computer Entertainment Australia Pty Ltd v Yansen* [2002] FCA 1000; *Sony Computer Entertainment Australia Pty Ltd v Wright* [2000] FCA 1933.
[141] *Sony Corporation v Costaneo* [2012] FCA 153.
[142] *Unilever PLC v Bless Point Pty Ltd* [2007] FCA 551.
[143] *Oakley Inc v Franchise China Pty Ltd* (2003) 58 IPR 452, 458; *Chanel Limited v Donoghue* [2008] FCA 1643; *Chanel Limited v Ayad* [2005] FCA 820; *Oakley Inc v Elkofairi* [2010] FCA 188.
[144] *TM 25 Holding BV v Ghamloush* [2016] FCCA 3064 (6 September 2016).
[145] *Disney Enterprises Inc v Sondavid Pty Ltd* [2008] FCA 1394.
[146] *Chanel Limited v Kim* [2008] FCA 477.
[147] *Disney Enterprises Inc v Australian Exim Company Pty Ltd* [2009] FCA 719. Separate copyright action was brought in *Disney Enterprises Inc v Australian Exim Company Pty Ltd (No 2)* [2009] FCA 720.
[148] *Disney Enterprises Inc v Australian Exim Company Pty Ltd* [2009] FCA 719. See also *Disney Enterprises Inc v Australian Exim Company Pty Ltd (No 2)* [2009] FCA 720.
[149] *Kabushiki Kaisha Sanrio v Impression International Pty Ltd* [2008] FCA 341. A further order restraining release of goods was made in *Kabushiki Kaisha Sanrio v Impression International Pty Ltd (No 2)* [2008] FCA 346.
[150] *Louis Vuitton Malletier SA v Knierum* [2004] FCA 1584.

health and safety risks can be inferred from international and domestic examples. Internationally, risks have been identified in relation to clothing where it is manufactured outside of supply chains that guarantee quality, and it does not perform its expected function.[151] Tested counterfeit sunglasses have not provided the expected levels of sun protection that prevent ocular harm.[152] Other health risks can result where there is substandard manufacturing, and harmful substances are found in the goods.[153]

Although Border Force does not systematically test seized goods,[154] there is some information from Border Force sources about the types of imported goods that are known to pose health and safety risks. Media articles, citing Border Force sources, report seizures of dangerous goods, including counterfeit car parts[155] and toothbrushes containing lead.[156] Quality issues that could endanger health have been reported regarding Dove soap, Nivea skincare, Gillette razors, Oral B toothbrushes, and batteries.[157] Seized goods include toys, clothing, cosmetics, electronic appliances, mobile phones and phone accessories.[158] Goods specifically identified as dangerous in the seizure period 2015-2016 included hair straighteners and mobile phones.[159] Other sources include statements and media releases from state and territory authorities conducting post-importation seizures responding to information from Border Force.[160]

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[151] Michele Forzley, *Counterfeit Hard Goods and The Public's Health and Safety: A Study of Interventions* (Widener School of Law, Health Law Institute (1 September 2012)) <http://micheleforzley.com/uploads/3/5/5/3/3553263/study_report_v5_9_1_12.pdf>.

[152] See Nooshin Bazzazi et al, 'Quality of Sunglasses Available in the Iranian Market; a Study with Emphasis on Sellers' License' (2015) 63(2) *Indian Journal of Ophthalmology* 152.

[153] There is a long history in Australia of product liability risks for individual health associated with clothing: see *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387.

[154] *Productivity Commission Report*, above n 14, 396.

[155] Liam Mannix and Mark Hawthorne, 'Huge Haul of Fake Car Parts Bound for Australia Seized in Middle East' *Sydney Morning Herald (online)*, 13 January 2017 <https://www.smh.com.au/national/huge-haul-of-fake-car-parts-bound-for-australia-seized-in-middle-east-20170113-gtr15a.html>.

[156] Connor Duffy and Nikki Tugwell, 'Global Crime Gangs Behind Surge in Counterfeiting, Customs Says: Fake Pharmaceuticals Laced with Rat Poison' *ABC News (online)*, 8 October 2014 <http://www.abc.net.au/news/2014-10-08/global-crime-gangs-behind-counterfeiting-surge-customs-says/5799660>; Jay Akbar, 'Woman Jailed for Trying to Smuggle Counterfeit Toothbrushes and Razor Blades from China' *Daily Mail (online)*, 26 February 2015 <http://www.dailymail.co.uk/news/article-2968988/Woman-jailed-trying-smuggle-3million-counterfeit-toothbrushes-razor-blades-China.html>.

[157] Esther Han, 'Customs Steps up War against Counterfeits, Seizing Record Number of Fakes' *Sydney Morning Herald (online)*, 6 October 2014 <https://www.smh.com.au/politics/federal/customs-steps-up-war-against-counterfeits-seizing-record-number-of-fakes-20141005-10pz7s.html>.

[158] Australian Border Force, *ABF Seizes Almost $17 Million of Fake and Pirated Goods* (29 July 2016) Australian Border Force Newsroom <https://newsroom.abf.gov.au/releases/media-release-abf-seizes-almost-17-million-of-fake-and-pirated-goods>; Han, above n 157; Duffy and Tugwell, above n 156.

[159] Australian Border Force, above n 158.

[160] NSW Department of Finance, Services and Innovation, *Fair Trading Raids Net Thousands of Unapproved USB Phone Chargers* (14 April 2016) <https://www.finance.nsw.gov.au/about-us/media-releases/fair-trading-raids-net-thousands-unapproved-usb-phone-chargers>.

Owners and authorised users of registered trade marks also provide information about counterfeiting activities, often when they notify consumers about potentially dangerous counterfeits in circulation.[161] There have been reported seizures of counterfeit laundry products bearing the OMO trade mark.[162] Counterfeit beer has been detected by Border Force as a result of consumer complaints.[163] 'Recycled' packaging has been used to market counterfeit wines and beers.[164] The use of recycled packaging is particularly problematic for effective detection of counterfeit goods.[165]

Information released by Border Force does not quantify the percentage of goods seized that pose these risks.[166] Even if it did, it would be difficult to determine what health and safety dangers are posed by goods that are not seized. The following sub-sections will use the examples of mobile phones and accessories and hair straighteners to demonstrate some of the types of risks that non-therapeutic counterfeit goods can pose in Australia.

9.3.1.2 Identifiable health risks from counterfeit non-therapeutic goods in Australia

Several cases regarding counterfeit mobile phones and accessories suggest that there is widespread counterfeiting of these items in Australia. These include seizures of mobile phones;[167] covers, batteries and plugs;[168] mobile phone housings;[169] cases;[170] and neck straps and

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[161] Joshua Dowling, 'Toyota Trying to Locate "thousands" of Counterfeit Airbag Parts That Could Prove Deadly in a Crash' *News.com.au*, 3 August 2015 <https://www.news.com.au/technology/innovation/motoring/toyota-trying-to-locate-thousands-of-counterfeit-airbag-parts-that-could-prove-deadly-in-a-crash/news-story/1f12a255d1093e070b1c9be616ad65ff>; Joshua Dowling, 'Police Find $1 Million Worth of Fake Car Safety Parts Destined for Australia in Chinese Factory' *News.com.au*, 29 May 2016 <https://www.news.com.au/technology/innovation/motoring/police-find-1-million-worth-of-fake-car-safety-parts-destined-for-australia-in-chinese-factory/news-story/427ccd2ce180c007caa7531c8c029a0f>; Australian Automotive Dealers Association, *Toyota Takes on Independents for Selling Fake Parts* (22 September 2015) AADA <https://www.aada.asn.au/news/toyota-takes-on-independents-for-selling-fake-parts>.

[162] Quality concerns regarding counterfeit OMO were raised in *Unilever PLC v Bless Point Pty Ltd* [2007] FCA 551. See also Unilever, *NSW Police Praised for Counterfeit OMO Seizure: Unilever Alerts Consumers* (31 July 2012) <https://www.unilever.com.au/Images/media-release_unilever-responds-to-counterfeit-omo-seizure_tcm1265-436982_en.pdf>.

[163] Jose, above n 3, 57.

[164] Ibid; Rebecca Puddy, 'Smashing Solution to China's Imitation Game' *The Australian*, 10 January 2016. See also Michael Smith, 'Chinese Police Seize 50,000 Bottles of Fake Penfolds' *Australian Financial Review (online)*, 27 March 2018 <https://www.afr.com/news/world/asia/chinese-police-seize-50000-bottles-of-fake-penfolds-20180327-h0y19c>.

[165] Jose states that this problem also exists in relation to pharmaceutical goods and luxury products: Jose, above n 3, 53.

[166] See, eg, Australian Border Force, above n 158.

[167] *Nokia Corporation v Millaras (No 3)* [2010] FCA 1396. See *Nokia Corporation v Millaras (No 2)* [2010] FCA 1217 (15 mobile phones seized).

[168] *Nokia Corporation v Henry Yu (No 2)* [2008] FCA 1088, [4] (8 phone covers, 70 phone batteries and 30 plugs, all bearing the Nokia logo). See also *Nokia Corporation v Yu* [2008] FCA 1087, [4].

cases.[171] *In Nokia Corporation v Mai*, a defendant unsuccessfully argued that counterfeit trap purchases were for spare parts.[172] Customs seizures that occurred after trap purchases were used to initiate proceedings were later included in claims[173] and considered to constitute infringement.[174] *Nokia Corporation v Liu* indicates one source of counterfeit imports is from sales on E-bay.[175] In 2010, it was reported that 10 000 mobile phones had been seized at the Australian border.[176]

Evidence demonstrates that mobile phones and accessories produced outside of traditional supply chains can pose health and safety threats to individuals.[177] Dangerous non-counterfeit phone cases suggest the potential safety risks of these products.[178] Numerous potential health risks are associated with electrical products with inferior components and circuitry. [179] Electrical products are linked to fires that can result in injuries and deaths.[180] Apple identified serious concerns with counterfeit and unbranded chargers following the electrocution death of an Apple phone user in China.[181] High proportions of non-genuine phone chargers have been assessed as being dangerous when analysed in the United Kingdom.[182]

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[169] *Playboy Enterprises International Inc v You Tao Hong* (2004) 63 IPR 533, 534, 541 (3790 mobile phone housings or face plates). The infringement claim was not pressed but the judge found he would have relied on Oakley and found infringement through the importation even though the goods had been seized.

[170] *GSM (Trademarks) Pty Ltd v Shao* [2006] FCA 1272, [2] (2965 mobile phone covers bearing Billabong trade mark).

[171] *Nokia Corporation v Cellular Line Australia Pty Ltd* [2006] FCA 726, [12]-[15]. Summary judgment following trap purchases of neck straps and phone cases. Background evidence noted forfeiture of three seized shipments associated with defendant containing 599 mobile phone batteries, 595 mobile phone cases, 295 mobile phone cases.

[172] *Nokia Corporation v Mai* (2003) 59 IPR 413, 426.

[173] Ibid 418-419.

[174] Ibid 427.

[175] *Nokia Corporation v Liu* [2009] FCA 20.

[176] Jim O'Rourke, 'Fakers Dealing in Death' *Sydney Morning Herald (online)*, 1 May 2011 <https://www.smh.com.au/national/nsw/fakers-dealing-in-death-20110430-1e20j.html>.

[177] Electrical Safety First, *Buying Chargers* <https://www.electricalsafetyfirst.org.uk/guides-and-advice/electrical-items/chargers/>.

[178] Bailee Dean, 'Serious Injuries from Faulty Phone Covers Lead to Mass Recall' *News.com.au*, 3 August 2017 <https://www.news.com.au/lifestyle/fashion/serious-injuries-from-faulty-phone-covers-lead-to-mass-recall/news-story/22eeb25f636d2dd27ddb3aa918c4c6ce>.

[179] NSW Department of Finance, Services and Innovation, above n 160.

[180] Fake mobile phone chargers have been linked to electrical fires: London Fire Brigade, *Fake iPhone Charger Danger Revealed by Brigade* (9 July 2018) <https://www.london-fire.gov.uk/news/2014-news/fake-iphone-charger-danger-revealed-by-brigade/>.

[181] 'Electrocution Death Blamed on Charging iPhone' *CBC News (online)*, 16 July 2013 <https://www.cbc.ca/news/technology/electrocution-death-blamed-on-charging-iphone-1.1313114>; Jeremy Blum, '"Fake" iPhone Charger Cited in Electrocution Death Probe' *South China Morning Post (online)*, 16 July 2013 <https://www.scmp.com/news/china/article/1283818/woman-electrocuted-while-answering-iphone-may-have-been-using-fake>; 'Apple Replacing Fake iPhone Chargers after Electric Shock Death | CBC News' *CBC News (online)*, 6 August 2013 <https://www.cbc.ca/news/technology/apple-replacing-fake-iphone-chargers-after-electric-shock-death-1.1313112>.

[182] Electrical Safety First, above n 177.

In 2014, there were allegations that the death of a young woman in Australia was a result of electrocution by a faulty USB charger.[183] It is not apparent that the charger was bearing a counterfeit trade mark or was modelled on a branded product. In investigations following the death, a number of unapproved and non-compliant USB-style chargers were seized in a raid on a mobile phone accessory shop and stall in New South Wales (NSW).[184] The relevant NSW government agency, NSW Fair Trading subsequently prosecuted those responsible for the sale of telephone chargers and an electrical travel adaptor that did not have model approval.[185] The Court accepted expert evidence that the users of the item were at risk of severe or fatal electrical shock.[186] In imposing a civil penalty, the Court noted the objective of the legislation to ensure public safety, which conferred responsibility on sellers to ensure that items have requisite regulatory approval and are therefore safe to use, as the public is entitled to expect that items offered will be safe.[187] Although there is no reference to human rights, the operation of this legislation is an example of the state fulfilling its obligation to protect the right to health. The death that was linked to these proceedings suggests that it may be necessary for stronger regulation to occur.[188] This includes border measures. Although the place of manufacture of the goods in question was not clear from the decision, the case demonstrates the potential risks associated with products from outside traditional trade channels.

In April 2016, it was reported that there had been a number of raids in NSW resulting in the seizure of 'thousands of unapproved and counterfeit products' including USB phone chargers bearing counterfeit Apple, LG, Samsung, Huawei and Motorola marks, and other products not bearing the marks but styled on branded products.[189] Some products also included a false

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[183] *Safety Alert – USB Style Chargers* (24 September 2015) Working Dog Electrical <https://www.workingdogelectrical.com.au/single-post/2015/09/24/Safety-alert-USB-style-chargers>; Saffron Howden, 'Warning over USB Chargers after Woman Dies from Apparent Electrocution' *Sydney Morning Herald (online)*, 27 June 2014 <https://www.smh.com.au/national/nsw/warning-over-usb-chargers-after-woman-dies-from-apparent-electrocution-20140626-zsngd.html>.

[184] *Safety Alert – USB Style Chargers*, above n 183. In 2015/2016 in New South Wales, 13 000 counterfeit items ranging from clothing, mobile phone and USB chargers and counterfeit mobile communications accessories were seized as part of search warrants: NSW Fair Trading, *Year in Review: 2015–2016* (July 2017) 21 <https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0019/380413/Year_in_Review_1516.pdf>.

[185] *Commissioner for Fair Trading, Office of Finance and Services v Hua Yang Australia International Trading and Investment Pty Ltd and Huadi Bi* [2016] NSWSC 1380. See also prosecution brought for selling electrical cable that failed to meet specifications: *Commissioner for NSW Fair Trading, Department of Finance and Services v Luo* [2017] NSWSC 369.

[186] *Commissioner for Fair Trading, Office of Finance and Services v Hua Yang Australia International Trading and Investment Pty Ltd and Huadi Bi* [2016] NSWSC 1380, [20], [26]. See also *McInnes v Global Imports Pty Ltd* (1993) 41 ATPR 206.

[187] *Commissioner for Fair Trading, Office of Finance and Services v Hua Yang Australia International Trading and Investment Pty Limited and Huadi Bi* [2016] NSWSC 1380, [67].

[188] No finding was made in relation to the items as the cause of death: *Commissioner for Fair Trading, Office of Finance and Services v Hua Yang Australia International Trading and Investment Pty Limited and Huadi Bi* [2016] NSWSC 1380, [34].

[189] NSW Department of Finance, Services and Innovation, above n 160.

approval number for compliance with electrical items. The NSW Fair Trading Commissioner noted that some of the products seized had inferior components and circuitry. [190] Electrical item safety regulations operate separately from laws regulating the use of counterfeit trade marks.[191] These raids were 'initiated after Australian Border Force (ABF) officers intercepted a shipment of suspected counterfeit USB phone chargers' and referred the matter to NSW Fair Trading.[192] Reliance on numerous government agencies to detect counterfeit products raises efficiency issues of fragmented expertise, institutional overlap and inconsistent practices between different states of Australia that are relevant to previous recommendations that seizure powers be extended to include States.[193]

Although it is difficult to quantify the relevant health and safety risk because of undetected imports, this example demonstrates how Border Force operations can generate information that enables products to be identified after they have entered Australia and passed through customs channels. Seizures enable Border Force to identify the source of the problem and, once they have found the supplier of counterfeit goods, they can identify the recipients of products from those suppliers.[194] This emphasises the significance of the availability of information about suppliers and importers resulting from detection of counterfeit products at the border.

Fair trading investigators can act in response to information from Border Force and make seizures.[195] For example, in relation to counterfeit mobile phone accessories, NSW Fair Trading is responsible for the *Electricity (Consumer Safety) Act 2004* (NSW). This requires the testing, approval and marking of declared electrical articles prior to sale.[196] This may mean that the main emphasis is no longer on the use of a counterfeit trade mark, and cases that involve counterfeit trade marks may generate prosecutions for separate legislative breaches.

9.3.1.2.1 Counterfeit hair straighteners

Evidence from litigation involving counterfeit hair straighteners indicates that health concerns regarding personal electrical items should not be confined to counterfeit mobile phone

[190] Ibid; Shivali Best, 'Use an iPhone? Check Your Charger NOW: Study Finds 98% of Fake Apple Power Leads Risk Causing Fatal "Electric Shocks or House Fires"' *Daily Mail (online)*, 7 December 2017 <http://www.dailymail.co.uk/sciencetech/article-5155765/98-fake-iPhone-chargers-users-risk-DEATH.html>.
[191] See *Electricity (Consumer Safety) Act 2004* (NSW).
[192] NSW Department of Finance, Services and Innovation, above n 160.
[193] See Section 9.2.2.1. Compare discussion of impact of fragmentation in relation to privacy regulation in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice - Report 108* (May 2008) <https://www.alrc.gov.au/publications/report-108>.
[194] NSW Department of Finance, Services and Innovation, above n 160.
[195] NSW Fair Trading, above n 184, 22.
[196] *Electricity (Consumer Safety) Act 2004* (NSW) ss 11 and 16 were in issue in *Commissioner for Fair Trading, Office of Finance and Services v Hua Yang Australia International Trading and Investment Pty Limited and Huadi Bi* [2016] NSWSC 1380.

accessories.[197] Although several decisions involve a small number of counterfeit items,[198] there is also evidence of widespread counterfeits in Australia, including seizure of 30 000 counterfeit hair straighteners resulting from the execution of Anton Piller orders.[199] There are numerous media reports about the risks of these products to consumers, including reports of serious burns[200] and concerns about potential risks of electrocution.[201]

9.3.1.3 Identifiable health risks from counterfeit therapeutic goods

Internationally, there have been serious concerns identified about the health risks posed by counterfeit therapeutic goods using trade marks without authorisation.[202] Risks include the negative health impacts of harmful substances found in the goods or the consequences of not receiving the therapeutic benefit of the goods.[203] The following subsections concentrate on risks identified in Australia in the context of relevant international analysis of health and safety impacts.

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[197] *Jemella Australia Pty Ltd v Bouobeid (No 2)* [2010] FCA 365; *Jemella Australia Pty Ltd v Vosiliatis* [2010] FCA 331; *Jemella Australia Pty Ltd v Bouobeid* [2009] FCA 1567; *Jemella Australia Pty Ltd v Daizli* [2009] FCA 1566; *Jemella Australia Pty Ltd v GHD Australia Direct Pty Ltd* [2009] FCA 599; *Jemella Australia Pty Ltd v Boutcher* [2009] FCA 376; *Jemella Australia Pty Ltd v Parkinson aka Matve* [2009] FCA 391; *Jemella Australia Pty Ltd v Steffensen (No 2)* [2009] FCA 296; *Jemella Australia Pty Ltd v Steffensen* [2009] FCA 293; *Jemella Australia Pty Ltd v MacKinnon* (2008) 170 FCR 1; *Jemella Australia Pty Ltd v Young (No 3)* [2008] FCA 579; *Jemella Australia Pty Ltd v Young (No 2)* [2008] FCA 396; *Jemella Australia Pty Ltd v Young* [2008] FCA 394; *Jemella Australia Pty Ltd v Internet Marketing Pty Ltd* [2008] FCA 13; *Jemella Australia Pty Ltd v M Style Plus Pty Ltd* [2007] FCA 347.

[198] *Jemella Australia Pty Ltd v Bouobeid* [2009] FCA 1567; *Jemella Australia Pty Ltd v Boutcher* [2009] FCA 376.

[199] *Jemella Australia Pty Ltd v Parkinson aka Matve* [2009] FCA 391 [6]. Anton Piller Orders are court orders that provide authorisation to search premises and seize specified categories of goods that are alleged to be related to intellectual property infringement: *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55. In Australian Commonwealth proceedings, this is regulated through *Federal Court of Australia Act 1976* (Cth) s 23; *Federal Court Rules 2011* (Cth) div 7.5.

[200] 'Leicestershire Warning after Fake Straightener Burns' *BBC News (online)*, 10 September 2010 <https://www.bbc.com/news/uk-england-leicestershire-11260351>.

[201] Anna White, 'How GHD Is Getting Ahead' *The Telegraph (online)*, 4 January 2014 <https://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/10549768/How-ghd-is-getting-ahead.html>; 'Liverpool Teams Seize Dangerous Fake GHD Straighteners' *BBC News (online)*, 15 December 2010 <https://www.bbc.com/news/uk-england-merseyside-12003150>; 'Warning of the Dangers of Counterfeit Straighteners' *The Northumberland Gazette (online)*, 20 December 2014 <https://www.northumberlandgazette.co.uk/news/business/warning-of-the-dangers-of-counterfeit-straighteners-1-7010934>.

[202] Kaho Kwok and Lynne S Taylor, 'Analysis of Counterfeit Cialis® Tablets Using Raman Microscopy and Multivariate Curve Resolution' (2012) 66 *Journal of Pharmaceutical and Biomedical Analysis* 126, 126; Dégardin, Roggo and Margot, above n 10, 169; World Health Organization and International Medical Products Anti-Counterfeiting Taskforce (IMPACT), *Counterfeit Drugs Kill!* (May 2008) <https://www.gphf.org/images/downloads/library/whoimpact2008_counterfeit_drugs_kill.pdf>.

[203] See Erwin A Blackstone, Joseph P Fuhr and Steve Pociask, 'The Health and Economic Effects of Counterfeit Drugs' (2014) 7(4) *American Health & Drug Benefits* 216, 217; Tim K Mackey et al, 'After Counterfeit Avastin - What Have We Learned and What Can Be Done?' (2015) 12(5) *Nature Reviews Clinical Oncology*; William L Hamilton et al, 'Public Health Interventions to Protect against Falsified Medicines: A Systematic Review of International, National and Local Policies' (2016) 31(10) *Health Policy and Planning* 1448, 1449.

9.3.1.3.1 Risks identified in Australia

The Therapeutic Goods Administration publishes summaries of outcomes of criminal prosecutions from August 2013.[204] Five of the nine cases listed between August 2013 and July 2017 refer to counterfeit therapeutic goods. Limited information is available about these cases. Not all of these involve the unauthorised use of registered trade marks.[205] However, at least one of them involves the unauthorised use of a registered trade mark in relation to counterfeit Viagra. [206] This entered the wholesale supply chain and was found in a Sydney children's hospital where the pharmaceutical was used to treat children with pulmonary hypertension.[207] There is no record of trade mark proceedings being instituted in relation to that offence.

A review of alerts published by the Therapeutic Goods Administration, pursuant to the *TGA*, evidences the unauthorised use of registered trade marks in relation to counterfeit therapeutic goods.[208] The alerts reference several therapeutic goods that bear marks substantially identical or deceptively similar to registered trade marks. For example, on 22 April 2015, the Therapeutic Goods Administration issued a notification of a recall undertaken by a discount purchasing website, Groupon Australia, in relation to Durex branded condoms.[209] The Therapeutic Goods Administration noted that the products 'may have defects, such as holes in the latex, and not effectively prevent pregnancy or protect against sexually transmitted infections.'[210] The notification identified counterfeiting as an issue for all major condom brands.[211] Ineffective condoms engage state human rights obligations to 'take measures to prevent, treat and control epidemic and endemic diseases' pursuant to the right to health.[212]

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[204] The Therapeutic Goods Administration publishes selected summaries dating from 1 August 2013 released pursuant to *Therapeutic Goods Act 1989* (Cth) s 61(5A): Therapeutic Goods Administration, *Court Action* <https://www.tga.gov.au/court-action>.
[205] A conviction entered on 8 November 2016 indicated that the therapeutic good was considered to be counterfeit, as the label did not disclose the presence of a prescription-only ingredient. As not all criminal cases are published, it was not possible to identify the other decisions in more detail: ibid.
[206] A conviction on 7 November 2013 in relation to provision of counterfeit Viagra was referenced in *Attia v Health Care Complaints Commission* [2017] NSWSC 1066, [7].
[207] Therapeutic Goods Administration, *Viagra (Sildenafil): Counterfeit 100mg Tablets* (21 June 2010) <https://www.tga.gov.au/alert/viagra-sildenafil-counterfeit-100mg-tablets>.
[208] Alerts dating from 2010 are currently published on the *TGA* website. All of the published alerts have been reviewed up to 4 December 2017.
[209] Therapeutic Goods Administration, *Counterfeit Durex Branded Condoms Purchased from Groupon Website* (22 April 2015) <https://www.tga.gov.au/alert/counterfeit-durex-branded-condoms-purchased-groupon-website>.
[210] Ibid.
[211] Ibid.
[212] *General Comment 14*, UN Doc E/C.12/2000/4, [44].

None of the small number of reported cases in relation to counterfeit therapeutic goods prohibited by the *TGA* dispute the unauthorised use of a registered trade mark.[213] Conversely, none of the reported cases in relation to Part 13 of the *1995 Act* involves therapeutic goods.

9.3.1.3.2 Counterfeit Viagra in Australia

This subsection considers the presence of counterfeit Viagra in Australia.[214] The detection of counterfeit Viagra in a Sydney children's hospital prompted the Therapeutic Goods Administration to issue a notification regarding the entry of counterfeit Viagra into the wholesale pharmacy supply chain. In one case in June 2010, the tested batch was not considered harmful. [215] The active ingredient, sildenafil, was present in an incorrect dose. However, in subsequent professional misconduct litigation, a medical expert identified a risk associated with incorrect dosages.[216] Sildenafil is also used in the treatment of hypertension in infants and children, and understrength dosages could place patients at significant risk.[217] The counterfeit product was estimated to be in circulation for 12 weeks before detection.[218]

A further risk identified in the alert was problems with extrapolating test results where counterfeit products have not been manufactured in controlled conditions.[219] This incident prompted professional misconduct action to be taken against the pharmacist operating as a licensed wholesaler of medicines who had been involved in the supply of the product to the hospital.[220] It resulted in two criminal convictions under the *TGA* for the prior supplier of the goods in relation to counterfeit therapeutic goods.[221] In the professional misconduct action, it was accepted that a pharmacist could not have detected the difference between the counterfeit and genuine product by 'checking the normal parameters.'[222] This sophistication of reproduction impacts on the effectiveness of Border Force in identifying counterfeit products.[223]

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[213] See, eg, *Secretary, Department of Health and Ageing v Prime Nature Prize Pty Ltd (in liq)* [2010] FCA 597; *R v Pan Pharmaceuticals Pty Ltd* [2008] NSWSC 221.
[214] See also news reports on counterfeit Viagra in Australia: Nick Dole, 'Pharmacist Fights for Licence after Fake Drugs Found at Children's Hospital' *ABC News (online)*, 22 February 2017 <http://www.abc.net.au/news/2017-02-22/pharmacist-fights-for-licence-over-fake-viagra-found-at-hospital/8292814>; 'Fake Viagra Hits Australian Black Market but Health Experts Warn It Could Be Lethal' *News.com.au*, 16 October 2015 <https://www.news.com.au/lifestyle/health/deadly-penile-potions-hit-the-black-market-in-australia/news-story/48580582a7762583753b126c1b20b860>.
[215] Therapeutic Goods Administration, *Viagra (Sildenafil)*, above n 207.
[216] *Attia v Health Care Complaints Commission* [2017] NSWSC 1066, [111].
[217] Ibid.
[218] *Health Care Complaints Commission v Attia* [2016] NSWCATOD 167, [69].
[219] Therapeutic Goods Administration, *Viagra (Sildenafil)*, above n 207.
[220] *Attia v Health Care Complaints Commission* [2017] NSWSC 1066, [7].
[221] A conviction on 7 November 2013 in relation to provision of counterfeit Viagra was referenced in ibid.
[222] Ibid; *Health Care Complaints Commission v Attia* [2016] NSWCATOD 167, [69].
[223] The Viagra mark is registered in Pfizer's Notice of Objection: Pfizer Australia Pty Ltd, above n 111.

The Viagra notification is one of a small number of *TGA* notifications that refer to both the counterfeit nature of the therapeutic good and the use of a sign that would be substantially identical to or deceptively similar to a registered trade mark.[224] The Therapeutic Goods Administration has issued five alerts that reference the use of the mark Viagra on goods that are suspected of being counterfeit.[225] The alerts do not indicate whether the amount is the correct dosage.[226] The focus of the risks posed by counterfeit Viagra in the alerts appears to be that the products contain prescription medication.[227] Lack of prescription is significant as the nature of the medication means that it is contra-indicated for use by some individuals.[228] In the first three years of prescribed use in Australia, there were reports of 14 deaths that may have been associated with ingestion of sildenafil.[229] Serious risks are also posed by additional prescription substances found in these goods.[230]

There is significant evidence of widespread counterfeiting of this product, and the counterfeit goods pose significant risks to health.[231] Representatives of Pfizer have stated that they have found a range of harmful substances in tested counterfeit products including paint, other toxins, heavy metals, chalk, rat poison, anti-freeze and ink.[232] The international scale of the counterfeiting indicates the potential health threat posed in Australia. A substantial number of studies on the health impacts of counterfeit Viagra suggest widespread counterfeiting, and they identify significant health impairments, including hypoglycaemia.[233]

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[224] Therapeutic Goods Administration, *All Alerts (Sorted by Date)* <https://www.tga.gov.au/all-alerts-sorted-date>.

[225] Therapeutic Goods Administration, *Viagra 007 Tablets* (13 January 2016) <https://www.tga.gov.au/alert/viagra-007-tablets>; Therapeutic Goods Administration, *Natural Vigra Viagra Tablets* (29 April 2011) <https://www.tga.gov.au/alert/natural-vigra-viagra-tablets>; Therapeutic Goods Administration, *Wolfish Shark Viagra Tablets* (20 September 2016) <https://www.tga.gov.au/alert/wolfish-shark-viagra-tablets>; Therapeutic Goods Administration, *Sirrori Green Viagra Tablets* (25 July 2017) <https://www.tga.gov.au/alert/sirrori-green-viagra-tablets>; Therapeutic Goods Administration, *Gold Viagra* (2 April 2015) <https://www.tga.gov.au/alert/gold-viagra-capsules>. See also Therapeutic Goods Administration, *Gold Viagra 9800mg Capsules* (17 April 2018) <https://www.tga.gov.au/alert/gold-viagra-9800mg-capsules>.

[226] Ibid.

[227] Ibid.

[228] 'Sildenafil — Three Years Experience' (2002) 21(2) *Australian Adverse Drug Reactions Bulletin* 6.

[229] Ibid.

[230] Therapeutic Goods Administration, 'Caveat Emptor "Buyer Beware" – the Risks of Purchasing Unregistered Medicines Online' (2012) 3(1) *Medicines Safety Update* 29.

[231] G Jackson et al, 'Counterfeit Phosphodiesterase Type 5 Inhibitors Pose Significant Safety Risks' (2010) 64(4) *International Journal of Clinical Practice* 497; Jason Chiang et al, 'The Dangers of Sexual Enhancement Supplements and Counterfeit Drugs to "Treat" Erectile Dysfunction' (2017) 6(1) *Translational Andrology and Urology* 12. See further, analysis of underestimated health risks of Viagra-related products in Japan: Minoru Sugita and Michiko Miyakawa, 'Economic Analysis of Use of Counterfeit Drugs: Health Impairment Risk of Counterfeit Phosphodiesterase Type 5 Inhibitor Taken as an Example' (2010) 15(4) *Environmental Health and Preventive Medicine* 244.

[232] Duffy and Tugwell, above n 156.

[233] Jackson et al, above n 231, 498–499. See also Shih Ling Kao et al, 'An Unusual Outbreak of Hypoglycemia' (2009) 360(7) *New England Journal of Medicine* 734.

There have been a number of instances that have resulted in the issue of *TGA* notifications for products bearing a mark substantially identical or deceptively similar to Viagra.[234] However, there are also recalls involving counterfeit therapeutic goods that do not reference the Viagra trade mark but contain and/or refer to the active ingredient in Viagra, sildenafil.[235] There are further recalls in relation to tablets containing tadalafil, the active ingredient in the Cialis product[236] which, as a phosphodiesterase type 5 inhibitor, performs some similar functions to Viagra.[237] The nature of these products may mean that they are more likely to be purchased outside normal supply chains. Jones suggests that it is one of a small number of prescription drugs frequently purchased on the internet.[238] However, it is very difficult to accurately estimate these matters as imported prescription drugs can be difficult to detect.[239] They can be purchased using the internet and sent in small quantities through surface mail, which may complicate accurate detection.[240]

Viagra is an example of a product where there is clear evidence of a high prevalence of counterfeiting in developed countries.[241] There may also be greater incidences of purchases of pharmaceuticals outside recognised supply chains in developed countries where the drug is not subsidised by government schemes such as the Australian Pharmaceutical Benefits Scheme.[242]

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[234] Therapeutic Goods Administration, *Viagra 007 Tablets*, above n 225; Therapeutic Goods Administration, *Natural Vigra Viagra Tablets*, above n 225; Therapeutic Goods Administration, *Wolfish Shark Viagra Tablets*, above n 225; Therapeutic Goods Administration, *Sirrori Green Viagra Tablets*, above n 225; Therapeutic Goods Administration, *Gold Viagra*, above n 225. See also Therapeutic Goods Administration, *Gold Viagra 9800mg Capsules*, above n 225.

[235] As at 20 June 2018, there have been a further 38 recalls of products containing sildenafil that do not use marks substantially identical, or deceptively similar, to Viagra as a trade mark: Therapeutic Goods Administration, *All Alerts*, above n 224.

[236] Lieel Icos Cialis has been the subject of a *TGA* alert in different forms on three separate occasions: Therapeutic Goods Administration, *Lieel Icos Cialis Tadalafil Tablets: Safety Advisory* (5 January 2015) <https://www.tga.gov.au/alert/lieel-icos-cialis-tadalafil-tablets>; Therapeutic Goods Administration, *Lieel Icos Cialis Tadalafil 80mg and 100mg Tablets: Safety Advisory* (22 January 2015) <https://www.tga.gov.au/alert/lieel-icos-cialis-tadalafil-80mg-and-100mg-tablets>; Therapeutic Goods Administration, *Lilly Icos Cialis 20mg Tablets (Lot Numbers 05668 and AD47385 - Counterfeit): Safety Advisory* (1 February 2015) <https://www.tga.gov.au/alert/lilly-icos-cialis-20mg-tablets-lot-numbers-05668-and-ad47385-counterfeit>. Maxman Cialis has also been the subject of an alert: Therapeutic Goods Administration, *Maxman Cialis Tablets (Plastic Bottle inside Cardboard Carton)* (26 February 2015) <https://www.tga.gov.au/alert/maxman-cialis-tablets-plastic-bottle-inside-cardboard-carton>.

[237] *Eli Lilly and Company v Pfizer Overseas Pharmaceuticals* (2005) 218 ALR 408.

[238] AL Jones, 'Legal "Highs" Available through the Internet–Implications and Solutions?' (2010) 103(7) *QJM: An International Journal of Medicine* 535.

[239] Jose, above n 3, 53; Australian Border Force, Therapeutic Goods Administration and Australian Pesticides and Veterinary Medicine Authority, *Global Operation Targets Dangerous Medicines* (26 September 2017) Australian Border Force Newsroom <http://newsroom.border.gov.au/releases/global-operation-targets-dangerous-medicines>.

[240] See Australian Border Force, Therapeutic Goods Administration and Australian Pesticides and Veterinary Medicine Authority, above n 239.

[241] Sugita and Miyakawa, above n 231.

[242] See Benedict Brook, 'Contradictory Rulings by Australian Border Force Staff Leaves Lifesaving Drugs In Limbo' *News.com.au*, 17 January 2016 <https://www.news.com.au/lifestyle/health/health-problems/contradictory-rulings-by-australian-border-force-staff-leaves-lifesaving-drugs-in-limbo/news-

In less economically developed countries, there is evidence of extremely high levels of other counterfeit therapeutic goods, including anti-malarial drugs and other important vaccines.[243]

The seizures by Border Force of counterfeit goods bearing the Viagra mark and the risks reported in relation to sampled counterfeit Viagra suggest that therapeutic goods bearing counterfeit marks can and do pose a significant health risk in Australia.

9.3.1.4 How does the operation of the anti-counterfeiting system engage the human right to health?

This section compiles evidence of serious potential risks to the health of individuals which engage the obligation of states to protect against third party threats to the realisation of the human right to health.[244] Pharmaceutical counterfeiting is recognised as a highly serious crime. Reviews of available data conclude that counterfeiting of pharmaceuticals has 'potentially disastrous' consequences and has already caused many fatalities.[245] Documented cases that demonstrate the potential nature of the threat include 192 000 deaths in 2002 in China, linked to diethylene glycol (DEG) contamination of paracetamol syrup,[246] and 2500 deaths, linked to counterfeit vaccinations in a meningitis epidemic, in Niger.[247] Other deaths and serious injuries have been linked to counterfeit drugs in Argentina, Myanmar, Singapore and China.[248] Analysis by WHO of 100 studies from 2007 to 2016, covering more than 48 000 samples, 'showed 10.5 per cent of drugs in low and middle-income countries to be fake or substandard,' and linked this to thousands of deaths in those countries.[249] In 2008, counterfeit heparin was identified in

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story/bbb6b093a55f9741ebad9ce0c37aebdb>. See later listing: Health Victoria, *PrEP: HIV Pre-Exposure Prophylaxis* (1 April 2018) health.vic <https://www2.health.vic.gov.au/public-health/preventive-health/sexual-health/prep>.

[243] Kao et al, above n 233; World Health Organization, 'Growing Threat from Counterfeit Medicines' (2010) 88(4) *Bulletin of the World Health Organization* 247; Paul N Newton et al, 'A Collaborative Epidemiological Investigation into the Criminal Fake Artesunate Trade in South East Asia' (2008) 5(2) *PLoS medicine* e32; AM Dondorp et al, 'Fake Antimalarials in Southeast Asia Are a Major Impediment to Malaria Control: Multinational Cross-Sectional Survey on the Prevalence of Fake Antimalarials' (2004) 9(12) *Tropical medicine & international health: TM & IH* 1241; Hanif Mohammed et al, 'Fatal Renal Failure Caused by Diethylene Glycol in Paracetamol Elixir: The Bangladesh Epidemic' (1995) 311(6997) *BMJ* 88; H Hill, 'Counterfeit Medicines – How Much of a Risk to Public Health Are They?' (2005) 275(7372) *Pharmaceutical Journal* 520; Paul N Newton et al, 'Murder by Fake Drugs: Time for International Action' (2002) 324(7341) *BMJ* 800; Amanda Chaves, 'A Growing Headache: The Prevalence of International Counterfeit Pharmaceutical Trade in Developing African Nations' (2009) 32(3) *Suffolk Transnational Law Review* 631; Erin J Walker et al, 'Are We Doing Enough to Prevent Poor-Quality Antimalarial Medicines in the Developing World?' (2018) 18(1) *BMC Public Health* 630.

[244] *General Comment 14*, UN Doc E/C.12/2000/4, [35].

[245] However, disagreement on definitions makes it difficult to compile statistics about deaths and some deaths are not clearly linked to counterfeiting: see Dégardin, Roggo and Margot, above n 10.

[246] Kwok and Taylor, above n 202, 126.

[247] Dégardin, Roggo and Margot, above n 10, 169.

[248] Ibid.

[249] See Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016) 202; Ben Hirschler, 'Tens of Thousands Dying from $30 Billion

multiple countries including Australia, Canada, China, France, Germany, Italy, Japan, The Netherlands, New Zealand and the United States. Contaminated heparin reportedly caused death and illness.[250] The example of the entry of sophisticated counterfeit Viagra tablets into Australian supply chains suggests that Australia remains susceptible to very serious threats to health.

Although there is less extensive evidence available about counterfeit non-pharmaceutical products, significant threats are apparent in Australia. The threat of counterfeit consumer products is perceived to be growing significantly in Europe.[251] This includes mobile phones and accessories.[252] Accessories manufactured outside the supply chain were identified as causing death in China and Australia in Section 9.3.1.2. The decisions cited in this section indicate clear evidence of imported counterfeit mobile phones and accessories in Australia. Counterfeit spare parts in the transport industry in the United States are well documented,[253] and evidence of counterfeit spare parts in Australia is found in the media and through owner publicity.[254] In Saudi Arabia, it is estimated that fake automobile parts account for 3000 deaths each year.[255]

This section has identified risks that consumer reliance on trade marks as a badge of origin engages right to health threats, where counterfeit products endanger consumer health and safety. Health and safety concerns surrounding counterfeit goods have been emphasised by Border

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Fake Drugs Trade, WHO Says' *Reuters (online)*, 29 November 2017 <https://www.reuters.com/article/us-pharmaceuticals-fakes/tens-of-thousands-dying-from-30-billion-fake-drugs-trade-who-says-idUSKBN1DS1XJ>.

[250] Partnership for Safe Medicines, *Counterfeit Heparin Blamed for Worldwide Deaths* (30 August 2009) Partnership for Safe Medicines <https://www.safemedicines.org/2009/08/counterfeit-he.html>; Center for Drug Evaluation and Research, *Postmarket Drug Safety Information for Patients and Providers - Information on Heparin* US Food & Drug Administration <https://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm112597.htm>.

[251] Directorate-General for Taxation and Customs Union (European Commission), *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border 2016* (European Union, 2017) 4 <https://ec.europa.eu/taxation_customs/sites/taxation/files/report_on_eu_customs_enforcement_of_ipr_at_the_border_2017.pdf>.

[252] AMTA, *Deadly Shocks and Nasty Burns from Counterfeit Mobile Devices Prompts Warning from Mobile Makers* (6 November 2013) Australian Mobile Telecommunications Association <http://www.amta.org.au/newsletters/EME.Update.November.2013?Article=41241>, citing Swiss incident of fake Samsung battery causing serious burns: Laurent Grabet, 'La batterie n'était qu'une copie' *Le Matin (online)*, 18 July 2013 <https://www.lematin.ch/faits-divers/batterie-quune-copie/story/17640250>. See also safety concerns regarding widespread counterfeit mobile phones in Africa: Matt Smith, 'Uganda Says Counterfeit Phone Purge Won't Stop Mobile Growth' *Reuters (online)*, 26 October 2012 <https://www.reuters.com/article/uganda-telecoms/uganda-says-counterfeit-phone-purge-wont-stop-mobile-growth-idUSL5E8LPJ0I20121025>.

[253] Rojek notes the prevalence of counterfeiting in transport spare parts: Chris Rojek, 'Counterfeit Commerce: Relations of Production, Distribution and Exchange' (2017) 11(1) *Cultural Sociology* 28, 34.

[254] Dowling, 'Toyota Trying to Locate "thousands" of Counterfeit Airbag Parts That Could Prove Deadly in a Crash', above n 161; Dowling, 'Police Find $1 Million Worth of Fake Car Safety Parts Destined for Australia in Chinese Factory', above n 161; Australian Automotive Dealers Association, above n 161.

[255] Forzley, above n 151, 24, citing. H Al-Muttairi and N Afit, 'Fake auto parts take 3,000 lives in Kingdom every year' *Saudia Gazette* (2010).

Force and the Therapeutic Goods Administration in their policy documents.[256] Despite this recognition, this section suggests that there is a general lack of data about the health and safety concerns regarding counterfeit goods in Australia.[257] There are no legislative mechanisms mandating systematic testing of seized goods by Border Force for health and safety risks. A significant part of the evidence about counterfeiting in Australian is anecdotal or must be inferred from recall and warning alerts.

9.3.2 Progressive Realisation

Protection against the health and safety threats identified in the previous section should be consistent with a progressive realisation approach.[258] A key legislative mechanism for the seizure of counterfeit goods is the notice of objections system.[259] There are additional relevant seizure mechanisms for counterfeit therapeutic goods.[260] The effectiveness of these systems in permitting detection and seizure of counterfeit goods should be consistent with expedient and effective progression towards the right to health.[261] This recognises restrictions on maximum available resources, as well as the need to use appropriate means to realise the right to health.[262]

9.3.2.1 Restrictions on seizure powers

The ability of the seizure provisions to be used to protect health is restricted. Seizure powers exist only when an objection in relation to a trade mark is registered for the relevant good for which seizure is sought.[263] Unregistered trade marks are not protected.[264] This can undermine the overall effectiveness of the system in protecting health and safety. If there is no notice of objection registration, Border Force would need to have another legislative basis for seizing the goods, even if it appeared that imported goods posed a threat to health and safety. Other relevant laws may be state laws such as the *Electricity (Consumer Safety) Act 2004 (NSW)*, described in section 9.3.1.2 in relation to mobile phones. In that example, Border Force intercepted a shipment and referred the matter to NSW Fair Trading, who tested the goods, pursuant to the *Electricity (Consumer Safety) Act 2004*, which requires testing, approval and marking of certain

[256] See, for examples, Australian Border Force, above n 158; Australian Border Force, Therapeutic Goods Administration and Australian Pesticides and Veterinary Medicine Authority, above n 239.
[257] Data collection has been identified as a significant problem in other jurisdictions. Michelle Forzley notes problem of data collection in United States: Forzley, above n 151, 6; Bea Perks, 'Pharmaceutical Fakes: A Dangerous Pandemic' (2015) 294(7863/4) *Pharmaceutical Journal* online DOI: 10.1211/PJ.2015.20068533.
[258] *General Comment 14*, UN Doc E/C.12/2000/4, [31].
[259] *Trade Marks Act 1995* (Cth) pt 13.
[260] *Therapeutic Goods Act 1989* (Cth) s 42F.
[261] *General Comment 3*, UN Doc E/1991/23, [9].
[262] Ibid [3], [10]-[13].
[263] *Trade Marks Act 1995* (Cth) s 133.
[264] Industrial Property Advisory Committee, above n 89, 11.

electrical articles prior to sale.[265] The mobile phones seizure provides a good example of effective coordination between Border Force and other authorities.[266] Nonetheless, the size of the seizures resulting from the April 2016 raids described in Section 9.3.1.2 suggests that sometimes thousands of potentially dangerous goods are not being intercepted at the border and subsequent seizure will depend on legislation such as the *Electricity (Consumer Safety) Act 2004* being in place.[267]

This suggests it is unlikely that the present system alone will enable the seizure of all counterfeit goods that pose threats to health and safety. Not all registered marks have corresponding objections.[268] Arguably, this is appropriate if it means that detection activities can concentrate on high-risk marks. However, it is important to understand where barriers and limitations of the notice of objection scheme limit the registration of marks that are likely to be counterfeited and may pose health and safety risks accordingly (Health Risk Marks).

Owners may choose not to register Health Risk Marks because of barriers to registration. *TRIPS* requires that costs associated with utilising the notice of objection scheme, including the potential costs owners undertake to indemnify if a seizure occurs, should not be prohibitive.[269] Unfortunately, costs are variable, so information about potential indemnification costs is not transparent, which could deter registration.[270] Perceived ineffectiveness of the legislation also poses barriers to registration. Effectiveness has been recently addressed by the *Raising the Bar* amendments to the system.[271] Goods are significantly more likely to be forfeited pursuant to the scheme, which is an incentive for owners to register objections[272] as they are less likely to need to use costly litigation to enforce rights.[273] Owners can also benefit by using the scheme to access detailed information about the source of the counterfeit goods.[274]

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[265] *Electricity (Consumer Safety) Act 2004* (NSW) s 26. The Act does not provide for border seizures
[266] NSW Department of Finance, Services and Innovation, above n 160.
[267] For example, 30 000 straighteners were seized following execution of Anton Piller orders in *Jemella Australia Pty Ltd v Parkinson aka Matve* [2009] FCA 391, [6].
[268] Whilst registrations frequently encompass more than one trade mark, the notices of objections clearly do not cover all of the registrations for goods (520 875 for classes 1-34 inclusive on 16 August 2018). Research on file with author.
[269] *TRIPS* art 53(1). Jose suggests information about costs is variable: Jose, above n 3, 55.
[270] Jose, above n 3, 55.
[271] Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 [2012] (Cth) 10.
[272] The Australian Customs and Border Protection 2013-2014 Annual Report noted that following the introduction of the *Raising the Bar* legislation amending the *Trade Marks Act 1995* and *Copyright Act 1968*, 99.9 per cent of seized goods suspected of being counterfeit were forfeited, either as a result of court order, voluntary forfeiture or deemed forfeiture. Previously the statistic was 25 per cent: Australian Government, Australian Customs and Border Protection Service, above n 62, 38.
[273] Concerns about the cost of intellectual property enforcement were identified by the Productivity Commission in 2016: *Productivity Commission Report*, above n 14, 561-562.
[274] *Trade Marks Act 1995* (Cth) ss 134, 134A.

A further limitation on the effectiveness of the system is that Border Force can seize only goods for which the potentially infringed trade mark is registered. This significantly restricts the ability of the trade mark owner to protect registered marks, particularly if a well-known brand is registered only for services. This is inconsistent with the ordinary infringement provisions of the *1995 Act*.[275] Infringement provisions apply if a substantially identical or deceptively similar mark is used on goods that are similar to specified goods or closely related to specified services.[276] This limitation incentivises owners to register marks in classes in which they are not expected to be used and thereby clutter the register.[277] ACIP recommended expanding seizure provisions to address this, but the response of the Government was cautious, referencing the resources that would be required to expand seizure power in this respect.[278] Border Force remains potentially unable to seize counterfeit goods bearing well-known marks where registration for those marks does not include specifications for the goods seized. This could permit the entry of goods that potentially threaten health into Australia.

9.3.2.2 Nature of the Notice of Objection system

In September 2016, the notice of objection scheme contained 591 objections in relation to trade marks.[279] As there is no register for well-known trade marks or an easily identifiable test for establishing a list of trade marks that the court would consider to be well-known, it is not possible to accurately assess how widely used the system is to protect well-known brands. Some well-known brands don't have registrations,[280] but many do. Even though there were only 591 notices of objection, these correspond to the identity of the objector not the number of trade marks eligible for protection. The objector can elect whether or not to register all owned trade marks.[281] Authorised users can also elect whether to seek registration.[282] This can result in an

[275] Advisory Council on Intellectual Property, above n 34, 22–23.
[276] *Trade Marks Act 1995* (Cth) s 120(2).
[277] *Productivity Commission Report*, above n 14, 377-388.
[278] Advisory Council on Intellectual Property, above n 34, 22–23; *Government Response - Review of the Enforcement of Trade Marks*, above n 37.
[279] Research on file with author.
[280] For example, in the period studied no objection was registered for pharmaceutical company GlaxoSmithKline Consumer Healthcare (UK) IP Limited, despite its registration in class 5 for Panadol (Registration Number 127289).
[281] *Trade Marks Act 1995* (Cth) s 132.
[282] Ibid.

extensive number of individual brands being covered by each objection,[283] although, in some cases, owners register only selected marks from their portfolio.[284]

For the September 2016 data collected for this thesis, registrations in relation to some of the goods that have been identified as likely to be detected as counterfeit in Australia included:

- More than 52 per cent of the notices included marks registered and notified in class 9, which includes personal electrical items.
- More than 51 per cent of the notices included marks registered and notified in class 25, which includes clothing.
- More than 39 per cent of the notices included marks registered and notified in class 3, which includes cosmetics and other personal care items.
- More than 33 per cent of the notices included marks registered and notified in class 28, which includes toys.
- More than 12 per cent of the notices included marks registered and notified in class 5, which includes pharmaceutical products.
- More than 8 per cent of the notices included marks registered and notified in class 34, which includes cigarettes.

This suggests that a large number of registrations could include Health Risk Marks. Effective inspection of goods protected through the notice of objection system is important for detection of health threats. Each notice can cover a broad range of categories of goods, which means that Border Force may need to consider a very large number of trade mark registrations for each type of good that they inspect.[285] The number of trade marks registered in each notice of objection, and the range of classes covered, influence the scale of detection activities and impact on the level of resources required to inspect imported goods for suspected trade mark infringement effectively. Cumulatively, broad registrations mean that detection is difficult because thousands of marks can be relevant to individual goods.

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[283] See, eg, Disney Enterprises Inc, *Trade Marks and Copyright - Notices of Objection* <https://www.homeaffairs.gov.au/Customsnotices/Pages/IPDetailView.aspx?objnum=T00001-03&keyword=disney&searchField=All>.

[284] On 16 August 2018, Sony Corporation had 359 registrations in class 9 but only 11 registrations in class 9 on its notice of objection. See Sony Corporation (also trading as Sony Kabushiki Kaisha), *Trade Marks and Copyright - Notices of Objection* <https://www.homeaffairs.gov.au/Customsnotices/Pages/IPDetailView.aspx?objnum=T00466-03&keyword=sony&searchField=All>.

[285] Twenty six per cent of the registrations were for one class and 38 per cent were for one or two classes; 60 per cent of registrations were for five or less classes; 82 per cent of registrations were for ten or less classes; 96 per cent were for 20 or less classes.

9.3.2.3 Maximum available resources

Resources remain a significant issue for the effectiveness of the notice of objection system. The cost of surveillance and the potential delays surveillance poses for the importation of goods[286] mean that inspection of goods is a selective exercise,[287] complicated by new approaches of sending counterfeit goods in small quantities.[288] Border Force increasingly uses intelligence to identify imports bearing counterfeit trade marks.[289] However, there is acknowledgment that it is difficult to detect counterfeit goods effectively.[290] There is no publicised systematic process for testing seized goods for health and safety dangers, although this testing does occur in certain circumstances.[291] Problematically, testing can involve damage to the relevant goods if their seizure is disputed.[292] Without that systematic testing, it is difficult to determine the extent to which these goods pose a threat to health and safety. As the nature of the threat is difficult to determine, it is difficult to determine what resources should be devoted to testing. This complicates assessment of the cost-effectiveness of the system. An initial approach is to comprehensively analyse a data set of imports,[293] testing a sample of those that are identified as potentially counterfeit.

In the 2015-2016 financial year, Border Force reported that they had seized more than 190 000 individual items with a total value of approximately $16.9 million.[294] Comparable figures were not released in the 2016-2017 annual report, which focused on the number of inspections conducted.[295] In 2013, a study of international reports estimated a global annual counterfeit trade of approximately $US461 billion.[296] Although the seized Australian items have a comparatively low value compared to the global estimates, the number of seized goods is important. The

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[286] See Andrew Hosking, 'Australian Customs Service: Working to Improve Facilitation of International Trade and Security of the Supply Chain within the APEC Region' (2007) 1(2) *World Customs Journal* 67.
[287] The ABF emphasises that this is risk-based and intelligence led: Australian Government Department of Immigration and Border Protection, Submission No 52 to the Productivity Commission, *Inquiry into Intellectual Property Arrangements*, 30 November 2015.
[288] See Jose, above n 3, 53.
[289] See ibid.
[290] NSW Fair Trading Commissioner acknowledged 'the task of protecting the public from cheap, imported, unapproved products remains a challenge for regulators': NSW Department of Finance, Services and Innovation, above n 160.
[291] See Duffy and Tugwell, above n 156.
[292] This can engage liability of the objector if infringement is not proved *Trade Marks Act 1995* (Cth) s 137.
[293] See Carsten Fink, Keith E Maskus and Yi Qian, 'The Economic Effects of Counterfeiting and Piracy: A Review and Implications for Developing Countries' (Policy Research Working Paper No 7586, World Bank Group, 29 February 2016) 34–35.
[294] Australian Border Force, above n 158.
[295] Australian Government Department of Immigration and Border Protection, *Annual Report: 2016-17* (September 2017) 90 <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/annual-reports/complete-annual-report-2016-17.pdf>.
[296] In 2016, the sum was reported as A$618 billion: Australian Border Force, above n 158.

absence of published systematic testing makes it difficult to know what percentage of the 190 000 items seized could pose a health threat. It can be inferred from the Border Force sources identified in Section 9.3.1.1 that there is a genuine threat. It can also be assumed that the resource limitations in inspecting counterfeit goods mean that some counterfeit items that pose a health threat remain undetected.[297] This is reinforced by the discussed examples of seizures of goods by NSW Fair Trading that have not been detected by Border Force.

9.3.2.4 Effectiveness of TGA mechanisms

There are additional concerns for the effective protection of the right to health through the *TGA*. This reflects the additional role of that legislation in ensuring the provision of medicine that is of good quality and availability.[298] There have been criticisms of the role of the Therapeutic Goods Administration in employing sufficient resources to ensure that high-quality detection standards are met.[299] There have also been criticisms of the effectiveness of the Therapeutic Goods Administration recall system. This was recently highlighted by a case of Valium drugs that had been substituted with other drugs.[300] Critics suggested that the Therapeutic Goods Administration alert system did not effectively notify patients of the risk.[301] Another limitation of the system in providing safe medicines relates to delays associated with Therapeutic Goods Administration approval, which ensures quality, and with Pharmaceutical Benefits Scheme approval, which subsidises expensive medicines.[302] The Personal Imports Scheme permits individuals to import therapeutic goods for themselves or an immediate family member, even if they are not approved by the Therapeutic Goods Administration, if the goods do not constitute a restricted import pursuant to *Customs (Prohibited Imports) Regulations 1956* (Cth).[303] Importers

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[297] See Fink, Maskus and Qian, above n 293, 34–35. See Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 27 February 2017, 8-9 (Michael Pezzullo) 8-9.

[298] *General Comment 14*, UN Doc E/C.12/2000/4, [12]. See, eg, emphasis on quality in Explanatory Memorandum, Therapeutic Goods Amendment (2017 Measures No 1) Bill 2017 15.

[299] Hamish Fitzsimmons, *TGA Plans to Cut Staff despite Threat from Fake Viagra, Weight Loss Pills* (7 March 2016) ABC News (online) <http://www.abc.net.au/news/2016-03-07/tga-plans-to-cut-staff-despite-fake-medicine-threat/7226986>.

[300] Therapeutic Goods Administration, *Valium Tablets Recalled Because of Suspected Tampering* (30 May 2017) <https://www.tga.gov.au/media-release/valium-tablets-recalled-because-suspected-tampering>.

[301] Naaman Zhou, 'Valium Recalled in Australia after Packets Tampered With' *The Guardian (online)*, 31 May 2017 <https://www.theguardian.com/australia-news/2017/may/31/valium-recalled-in-australia-after-packets-tampered-with>; *Valium Recall: Patients Urged to Return Roche Diazepam 5mg Packets after Evidence of Tampering* (31 May 2017) ABC News (online) <http://www.abc.net.au/news/2017-05-31/valium-recall-after-evidence-of-tampering/8574624>.

[302] See Brook, above n 242; Health Victoria, above n 242.

[303] *Therapeutic Goods Act 1989* (Cth) s 18(1); *Therapeutic Goods Regulations 1990* (Cth) reg 12(1), sch 5, pt 1. For unapproved medical devices, see *Therapeutic Goods Act 1989* (Cth) s 41HA TGA.

must not sell the imported goods.[304] This scheme poses another potential threat to health and safety as it permits the importation of untested therapeutic goods.

9.3.2.5 Synthesis

A relevant consideration in assessing whether states are realising the right to health is the use of appropriate means to realise those obligations progressively.[305] This is difficult to assess for several reasons, not all of which are within the control of Australia.

The information identified in this section cannot be used to establish a complete picture of the type of counterfeit goods being imported. One reason why this is not possible is that not all counterfeit goods are detected.[306] Another reason is that Border Force do not publish detailed information about all counterfeit goods seized.[307] The focus in annual reports is on volume of seizures and the estimated value of those seizures.[308] No information is published about health and safety testing, and there appears to be no systematic approach to testing for dangers to health and safety, although this may sometimes occur.[309]

The absence of data may reflect the fragmented approach to addressing health and safety concerns related to imported goods. Relevant bodies can include Border Force, the Therapeutic Goods Administration and various fair trading authorities in Australian States and Territories.[310] Representatives of the Australian Competition and Consumer Commission indicate that specific product safety priorities are targeted by that agency.[311] In the context of parallel imports, the Productivity Commission has explicitly stated that trade marks legislation should not play a role in preventing the importation of dangerous goods when it considered submissions that parallel imports should be monitored because they were potentially dangerous.[312] Border Force provides limited information about its testing processes, citing the sensitivity of these matters.[313]

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[304] Therapeutic Goods Administration, *Personal Import Scheme* (1 October 2004) <https://www.tga.gov.au/publication/personal-import-scheme>.
[305] *General Comment 3*, UN Doc E/1991/23, [4]-[5].
[306] Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 12 February 2013, 32, 33-34 (Michael Pezzullo).
[307] This may reflect the sensitive nature of the information being collected: ibid 34.
[308] Detailed statistics about seizures of suspected counterfeit goods were not provided in the 2016/17 annual report: Australian Government Department of Immigration and Border Protection, above n 295, 90–91.
[309] Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 12 February 2013, 33-34 (Michael Pezzullo).
[310] Ibid 35.
[311] Evidence to Economic References Committee, Senate, Parliament of Australia, Canberra, 3 October 2017, 5-6 (Timothy Grimwade).
[312] *Productivity Commission Report*, above n 14, 396.
[313] Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 12 February 2013, 34 (Michael Pezzullo).

The provision by states of maximum available resources to meet their obligations is also relevant to progressive realisation. Resource restrictions can limit the effectiveness of the system in realising its objectives and protecting health and safety. However, if the system is not able to effectively address threats to health and safety, it may not be appropriate to allocate extensive resources to counterfeiting detection.[314] This section has identified a number of potential problems with the effectiveness of the notice of objection and *TGA* systems in the detection and seizure of counterfeit goods that may pose health threats. The absence of extensive data and difficulties in detection of counterfeit goods make it difficult to understand the nature and extent of health threats posed by these goods. The need for these mechanisms to be appropriate and progress towards the realisation of the right to health suggests that careful scrutiny of the prospective and ongoing human rights impacts of anti-counterfeiting legislation is important.

9.3.3 International Cooperation and Assistance

Anti-counterfeiting can engage international cooperation and assistance concerns. States have identified the importance of international cooperation to address counterfeiting effectively and have emphasised both technical cooperation and increased enforcement obligations.[315] Many states have also sought expansion of international obligations concerning counterfeiting. The problems concerning detection and data identified in the previous section are not limited to Australia.[316] One of the justifications for expanding protection against counterfeiting in the international system is the protection of health and safety.[317] Given the difficulties identified in this chapter regarding accurately understanding the nature of the threat, the justification should be considered carefully. It will be further assessed in Chapter 10.

9.3.4 Interrelated Human Rights

9.3.4.1 Civil rights to a fair trial

The inclusion of criminal penalties in the legislation considered in this chapter raises issues regarding the protections provided pursuant to Article 14 of the *International Covenant on Civil*

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[314] *General Comment 3*, UN Doc E/1991/23, [3], [9].
[315] *Anti-Counterfeiting Trade Agreement*, opened for signature 31 March 2011, [2011] ATNIF 22 (not yet in force) Preamble ('*ACTA*').
[316] An OECD report found that in 2013 counterfeit and pirated goods accounted for as much as 2.5 per cent of world trade, a significantly higher figure than in 2008: OECD/EUIPO, *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact* (OECD Publishing, 2016) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Mapping_the_Economic_Impact_study/Mapping_the_Economic_Impact_en.pdf>. Forzley notes problem of data collection in United States: Forzley, above n 151, 6; Perks, above n 257.
[317] Fink, Maskus and Qian, above n 293, 32.

and Political Rights ('*ICCPR*'). These rights include the human right to a fair trial including the entitlement to 'a fair and public hearing by a competent, independent and impartial tribunal established by law,' in determination of criminal charges.[318] Various safeguards are enshrined in domestic law to ensure a fair hearing. For example, in *GSM (Trademarks) Pty Ltd v Shao (No 2)* the criminal penalty available in relation to the prohibition on importing goods bearing a false trade mark, pursuant to section 148 of the *1995 Act*, meant that a privilege against self-incrimination operated.[319] The judge accordingly refused to make a Norwich Pharmacal order requiring information about persons involved in the alleged infringement.[320]

9.3.4.1.1 Intellectual property counterfeits

The nature and severity of sentences issued in relation to counterfeit activities are relevant to the protection of rights conferred by Article 14 of the *ICCPR*.[321] This has been considered by Australian courts in intellectual property matters.[322] Safeguards to protect defendants, such as the totality principle that can operate to reduce sentences where there are multiple offences, can also be exercised as a matter of judicial discretion in Australia.[323]

The availability of a penalty of five years for trade mark offences and analogous offences in relation to copyright counterfeiting offences has influenced sentencing decisions.[324] Criminal penalties in the United Kingdom have also been considered in relation to sentencing.[325] This

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[318] UN Human Rights Committee, *General Comment No 32. Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [3] ('*General Comment 32*').

[319] *GSM (Trademarks) Pty Ltd v Shao (No 2)* [2006] FCA 1393, [13] (Graham J).

[320] The order sought in part required the defendant to set out:

> the names and all known current contact details, including addresses, telephone numbers, fax numbers and email addresses and domain names of all persons and entities known by him to have been in any way involved at any time in the manufacture, importation into Australia, sale, offer for sale, purchase, order, supply, distribution, promotion or provision at any time of the allegedly infringing objects:

ibid at [4].

[321] *General Comment 32*, UN Doc CCPR/C/GC/32, [15].

[322] See decision involving consideration of severity of prison sentences for offences in relation to the *Trade Marks Act 1995* (Cth) and *Copyright Act 1968* (Cth): *Ly v The Queen* (2007) 74 IPR 1. See decision discussing jail term for serious copyright counterfeiting offences: *Pontello v Ceselli* (1989) 16 IPR 645, 647. See finding of excessive penalties imposed in relation to copyright infringement: *Bell v State of Queensland* (2006) 71 IPR 139. See application of penalties where multiple charges relate to same course of conduct: *Hamm v Middleton* (1999) 44 IPR 656, 659–660. See successful appeal against severity of sentencing in relation to copyright infringement: *Van Hanh Vu v New South Wales Police Service* (2007) 73 IPR 531.

[323] Recognition of relevance of totality principle: *Kam Lai-Ha v McCusker* (2000) 49 IPR 44; *Interville Technology Pty Ltd v Commonwealth Office of the Director of Public Prosecutions* (2009) 81 IPR 115, 119–120.

[324] Severity of sentencing considerations can be influenced by the availability of five years imprisonment: *Ly v the Queen* (2014) 227 FCR 304, 331.

[325] See *Van Hanh Vu v New South Wales Police Service* (2007) 73 IPR 531, 539-540; *Ly v the Queen* (2014) 227 FCR 304, 331.

international influence may be amplified if Australia becomes a party to plurilateral agreements indicating that higher sentencing for intellectual property infringements is appropriate.[326]

9.3.4.1.2 Counterfeit therapeutic goods

It is possible to understand fair trial concerns relevant to counterfeit therapeutic goods using recent analysis of other penalty provisions in the *TGA* by the Australian Joint Parliamentary Committee on Human Rights (AJPCHR). Numerous implications for the right to a fair hearing and the right to privacy have been identified in relation to recent human rights scrutiny of amendments to the advertising provisions of the *TGA*.[327] Although equivalent amendments have not been made to the provisions concerning counterfeit therapeutic goods, some concerns raised in relation to civil penalty provisions in the Human Rights Compatibility Statement are also relevant to other civil penalty provisions in the Act, including counterfeit therapeutic goods penalty provisions. Arguably, civil penalties for advertising offences (that are similar to penalties for counterfeit therapeutic goods offences) engage right to fair hearing obligations enshrined in Article 14 of the *ICCPR*, as very high civil penalty provisions can be considered criminal.[328] The human rights compatibility statement relevant to the advertising provisions asserts that criminal procedural rights are not engaged and that there is a right to a fair hearing under Part 5A-1 of the *TGA*.[329] The statement further argues that, although the provision of civil and criminal penalties for the same offence implicates the right not to be tried or punished again for an offence for which a person has already been finally convicted or acquitted pursuant to Article 14(7) of the *ICCPR*, additional legislative provisions prevent this from occurring.[330]

Other concerns are not presently applicable to counterfeit therapeutic goods provision but could become relevant, if the counterfeit therapeutic goods provisions were amended to mirror them. The human rights compatibility statement asserted that the strict liability and reverse burden offences in the amending provisions were compatible with the right to presumption of innocence enshrined in Article 14(2) of the *ICCPR*.[331] Requirements to provide documents were asserted to be consistent with the right to be free from self-incrimination enshrined in Article 14(3) of the *ICCPR*. [332] The human rights compatibility statement recognised that the

[326] See ibid.
[327] Explanatory Memorandum, Therapeutic Goods Amendment (2017 Measures No 1) 8-17; Explanatory Memorandum, Therapeutic Goods Amendment (2013 Measures No 1) 5-6.
[328] Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence Provisions, Civil Penalties and Human Rights* (2014) 3.
[329] The 2017 Statement of Compatibility concludes that criminal process rights in Article 14 and 15 of the *ICCPR* would be unlikely to apply to civil penalty provisions: Explanatory Memorandum, Therapeutic Goods Amendment (2017 Measures No 1) 8–9.
[330] Ibid 15–16.
[331] Ibid 9–13.
[332] Ibid 13–15.

amendments support the human right to health and concluded that any incursions on other rights are 'reasonable, necessary and proportionate.'[333] The AJPCHR did not contest this assessment.[334]

Problematically, if scrutiny is incorrect and the subsequent operation of provisions of this nature negatively implicates civil rights, the limitations on human rights protection in Australia identified in Chapter 5 suggests accountability limitations. There is a concerning lack of safeguards available to individuals in Australia, whether through a justiciable bill of rights or a regional human rights tribunal.

9.3.4.2 Privacy

The right to privacy is protected in Article 17 of the *ICCPR*.[335] The right to privacy relevantly protects personal information.[336] Past and present anti-counterfeiting legislation implicates privacy concerns to the extent that it mandates collection of information about individuals involved in allegations of importation of goods bearing counterfeit trade marks.[337] The right to privacy has been raised in relation to the *Raising the Bar* amendments that introduced provisions permitting the release of information to rights holders about individuals who make a claim for release of goods seized by Border Force.[338]

The right to privacy has also been raised in relation to other customs arrangements,[339] to major sporting events,[340] and to the operation of the *TGA*, following the expansion of the definition of premises that a sponsor is permitted to enter.[341] In relation to the *Raising the Bar* amendments, the Statement of Compatibility suggested that the restrictions on privacy in the legislation pursued a legitimate aim and constituted a proportionate limitation, achieving its objective in a

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[333] Ibid 17.
[334] There had been extensive scrutiny of similar issues in 2013: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Second Report of the 44th Parliament* (2014) 79–85; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixth Report of the 44th Parliament* (2014) 42–45.
[335] See also *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 12.
[336] Griffiths, above n 16, 207–208. See also UN Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess (8 April 1988) [10]; Alberto J Cerda Silva, 'Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy' (2011) 26 *American University International Law Review* 601.
[337] See consideration in a European context: Griffiths, above n 16, 207.
[338] Explanatory Statement, Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 (No 1) (Cth).
[339] Explanatory Memorandum, Customs Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014.
[340] Explanatory Memorandum, Major Sporting Events (Indicia and Images) Protection Bill 2014.
[341] Explanatory Memorandum, Therapeutic Goods Amendment (2016 Measures No 1) Bill 2016 8-9.

'limited and reasonable manner', 'with several safeguards in place'.[342] Without the information, owners of intellectual property were prevented from being able to enforce their legal rights.[343]

The Statement of Compatibility considered previously in relation to *TGA* amendments identified that the search powers provided implicate the right to privacy and reputation pursuant to *ICCPR* Article 17.[344] This was asserted to be consistent with the powers set out in section 19 of the *Regulatory Powers (Standard Provisions) Act*, and consistent with the right not to be subjected to arbitrary or unlawful interference with privacy enshrined in Article 17 of the *ICCPR*.[345]

Privacy requires 'a sound legal regime integrated by checks and balances.'[346] Again, it is concerning that safeguards for the protection of privacy in Australia are limited so, if privacy concerns become more evident in practice, further safeguards such as justiciable rights are not available to individuals.

9.3.4.3 Human right to benefit from science and culture

The need for enforcement of intellectual property rights can be justified to some extent by using the protection provided for authors for moral and material interests in intellectual creations.[347] As noted in previous chapters, the applicability of this right to trade marks is likely to be limited in practice.[348] However, applying the arguments in Chapter 1 that support human rights protection for some trade marks, creators of a mark may be able to claim moral interests in the integrity of their mark.[349] Arguably, if a mark becomes closely associated with inferior or dangerous counterfeit goods, this could interfere with the integrity of the mark and engage moral interests.

9.3.4.4 Balancing interrelated rights

Without understanding the scale of the threat to the right to health, it is difficult to know how the human right to health concerns should be balanced against other restrictions on human rights. Analysis suggests that the right to health is being used to justify *TGA* provisions that can pose restrictions for civil rights. There is overlap between these provisions and some provisions involving counterfeit therapeutic goods. Importantly, further concerns regarding rights to a fair

[342] Explanatory Statement, Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 110. Cf Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 104.
[343] Explanatory Statement, Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 110.
[344] Explanatory Memorandum, Therapeutic Goods Amendment (2017 Measures No 1) Bill 2017 16-17.
[345] Ibid 16.
[346] Seuba, above n 16, 201.
[347] See, eg, Explanatory Memorandum, Intellectual Property Laws Amendment Bill 2014 39.
[348] See Chapter 1, Section 1.2.2
[349] See ibid.

trial and to privacy arise from international agreements containing further obligations regarding counterfeiting.[350]

Incomplete information about the nature of the health and safety threat posed by counterfeit goods also makes it difficult to assess how to allocate resources to protect against threats to the right to health appropriately. Broader implications of this for progressive realisation and international cooperation have been identified. Limitations on understanding the nature of the health and safety threat posed are partly related to the resources that would be required for a more comprehensive analysis of imported goods, to identify suspect goods and subsequent testing of those goods.[351] As the realisation of economic, social and cultural rights is progressive, it is appropriate to question whether devoting additional resources to understanding this threat is appropriate if it detracts from the resources available to realise other human rights.[352]

9.3.5 Participation

The participation of stakeholders is sought in relation to amendments to anti-counterfeiting. Issue-focused consultations occur and exposure drafts of intellectual property legislation are usually released for public comment.[353] Although they are open to the public, analysis of consultation usually focuses on specific stakeholder interests, particularly the interests of intellectual property right owners.[354] Consultations generally do not direct participants to consider human rights accountability issues in relation to intellectual property. IP Australia conducted a ten-year review of the *1995 Act*, which engaged several concerns regarding the operation of the anti-counterfeiting provisions of the legislation, but related reports did not consider human rights issues.[355] Human rights concerns regarding other intellectual property

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[350] Seuba, above n 16, 38-42.

[351] Fink, Maskus and Qian, above n 293.

[352] J Janewa Osei Tutu, 'Value Divergence in Global Intellectual Property Law' (2012) 87(4) *Indiana Law Journal* 1640, 1681. See recognition of centrality of resource assessment to a rights-based approach to health in Alicia Ely Yamin, 'Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care' (2008) 10(1) *Health and Human Rights* 45, 48–49. See also J Janewa Osei Tutu, 'Corporate "Human Rights" to Intellectual Property Protection?' (2015) 55 *Santa Clara Law Review* 1; J Janewa Osei Tutu, 'Private Rights for the Public Good?' (2013) 66(4) *SMU Law Review* 767.

[353] See discussion of consultation process for *Raising the Bar*: Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 32-33. See also IP Australia, *Exposure Draft of the Intellectual Property Laws Amendment (Raising the Bar) Bill 2010 (Cth)* (2010) <https://www.ipaustralia.gov.au/sites/g/files/net856/f/exposure_draft_bill.pdf>.

[354] Chapman identifies international limitations on consultations, noting that although business networks were involved, human rights activists were not involved in negotiations surrounding the *Doha Declaration*, Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016) 230.

[355] IP Australia, *Trade Marks Legislation Review, Paper 3* (30 September 2004) <http://www.wipo.int/wipolex/en/text.jsp?file_id=179965>; IP Australia, *Trade Marks Legislation*

laws have been raised in Australian Law Reform Commission consultations[356] and the Joint Senate Committee on Treaties.[357]

Several limitations impact on the quality of participation for the legislation discussed in this case study. ACIP, the body that conducted public consultations as part of its assessment of intellectual property policy issues, has been defunded.[358] Recent reviews of intellectual property have been conducted through the Australian Law Reform Commission, the Attorney-General's Department, the Productivity Commission and IP Australia. The last three bodies are not independent review mechanisms, and careful attention should be given to the relevant terms of inquiry.[359] The approach taken by IP Australia may be influenced by its role in the operation of the Australian intellectual property system. This can provide important insights but contrasts to previous legislative reviews, such as that of the Working Group leading to the current *1995 Act*, where other stakeholders were also represented.[360]

9.3.6 Accountability

Problems with accountability mechanisms in Australia have been identified in Chapter 5. Problematically, in Australia, the absence of a developed court enforceable mechanism for individuals to assert individual human rights means that judicial avenues for considering the human rights implications of legislation are limited, and individuals can rarely assert human rights in litigation. There is no systematic analysis of human rights compatibility for statutes that were in force prior to the operation of the *Human Rights (Parliamentary Scrutiny) Act 2011*. These Acts are often subject to scrutiny only if they are amended, and scrutiny will focus on the amending legislation. Special inquiries are rare.[361] Concerns about the effectiveness of parliamentary scrutiny - when it does occur - have been identified in Chapter 5.

Legislative evaluation of the *1995 Act* has not focused on the right to health. The Scrutiny of Bills Committee has commented on potential implications of increased trade mark penalties for

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Review, Paper 2 (March 2004) <http://www.wipo.int/wipolex/en/text.jsp?file_id=179964>; IP Australia, *Trade Marks Legislation Review, Legislation Issues, Version 6* (13 October 2003) <http://www.wipo.int/edocs/lexdocs/laws/en/au/au162en.pdf>.

[356] Australian Law Reform Commission, *Copyright and the Digital Economy* (ALRC Report No 122, November 2013) 48–49, 54, 69, 451, 454.

[357] See Matthew Rimmer, Supplementary Submission No 1.1 to Joint Senate Committee on Treaties, *Inquiry into Anti-Counterfeiting Trade Agreement 2011* (21 November 2011) 7–8. See Joint Standing Committee on Treaties, Parliament of Australia, *Report 126: Anti-Counterfeiting Trade Agreement* (2012).

[358] *Productivity Commission Report*, above n 14, 517.

[359] Ibid 517-518.

[360] See, eg, discussion of different stakeholder interests by diverse committee members: *Working Party Report*, above n 99, 70–73.

[361] For a rare example, see: Parliament of Australia, *Freedom of Speech in Australia* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia>.

civil rights, but those concerns did not effect change, as the amendments effected a separate objective of obtaining parity between the trade mark and copyright penalties.[362] Scrutiny of recent *TGA* amendments suggests recognition of quality concerns.[363] These are important to the realisation of health.[364]

JSCOT scrutiny is relevant to accountability and participation. In some cases, amendments to law resulting from international agreements are not considered by JSCOT because they are not inconsistent with existing Australian practice. JSCOT remains relevant for treaties with high visibility or those that generate significant legislative change. However, there are also treaties that are not considered sufficiently important to attract in-depth enquiries. For example, Australia has become a party to agreements under the auspices of the WCO that were classified as minor treaties and did not generate detailed assessment.[365] In some cases, the relevant agreements are consistent with existing practices. For example, the *1999 Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures* necessitated only two minor amendments as Australian Customs Practices already met or exceeded the minimum requirements set out in the agreement.[366] These types of agreements are relevant to the operational aspects of coordination of customs authorities but could contain substantive and procedural obligations that are relevant to human rights. Weatherall demonstrates that there is an unusual tendency in international intellectual property agreements to include high levels of detail about domestic legal practice, including penalty provisions.[367] Obliging Australia to continue to implement these could reduce flexibility to adopt other, more effective mechanisms.[368] Section 9.4.1 will identify ongoing problems with accountability that have been generated by problems with transparency in the negotiation of bilateral and plurilateral trade agreements.

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[362] Senate Standing Committee for the Selection of Bills, Parliament of Australia, *Selection of Bills Committee* (No 10 of 2011, 18 August 2011); *Government Response - Review of the Enforcement of Trade Marks*, above n 37. See Section 9.2.2.7 above.
[363] Explanatory Memorandum, Therapeutic Goods Amendment (2017 Measures No 1) Bill 2017 15.
[364] Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) *Health and Human Rights* 109, 115.
[365] See, eg, *Amendment to the Convention Establishing a Customs Cooperation Council, adopted at Brussels in 1952* in Joint Standing Committee on Treaties, Parliament of Australia, above n 13.
[366] Ibid.
[367] Kimberlee Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties' (2016) 32(1) *American University International Law Review* 211, 213; Seuba, above n 16, 38, 55.
[368] Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements - Productivity Commission Research Report* (November 2010) 199.

9.3.7 Synthesis

This analysis identifies important human rights concerns. It establishes that activities of third-party counterfeiters pose a significant threat to health internationally. It identifies evidence of the type of counterfeit goods that pose significant threats in Australia, including counterfeit electrical goods and therapeutic goods. It also suggests that a lack of systematic testing means that it is difficult to understand the nature of this threat to individuals. Resource constraints posed by testing could be addressed by sampling and testing all seized products.

Data limitations are important for several reasons. Without data, it is also difficult to understand whether the legislative mechanisms identified in this chapter are effective in detecting and addressing threats. Progressive realisation of economic, social and cultural rights, including the right to health, requires states to allocate maximum available resources to the realisation of the right to health and other economic, social and cultural rights. However, there is insufficient data about the nature of the threats, and the effectiveness of measures to address them, to assess whether more resources should be used to protect health rights.[369] If international obligations to implement further counterfeit mechanisms (which may not be effective) restrict states' freedom to identify more effective measures and use them in the future, uncertainty because of a lack of information should not be a reason to ignore threats but a reason to gather more data. The next chapter considers the extent to which agreements requiring other states to implement expensive anti-counterfeiting machinery also engage international assistance obligations. International cooperation and assistance could be relevant to effective protection against counterfeiting. The following section and chapter will question whether the most effective and human rights-consistent form of that cooperation is evident in prospective bilateral and plurilateral trade agreements.

9.4 Human Rights Implications of Proposed International Anti-Counterfeiting Obligations on Human Rights

The appropriate level of international regulation of anti-counterfeiting remains contested partly because of dissatisfaction with the effectiveness of *TRIPS* enforcement measures, including

[369] Although the National Interest Analysis recognised the potential benefits of *ACTA* in preventing flows of dangerous goods, JSCOT recommended a more comprehensive assessment of the economic and social benefits of the agreements: Joint Standing Committee on Treaties, Parliament of Australia, above n 357, 5, 13.

anti-counterfeiting regimes. [370] This has prompted regime shifting away from *TRIPS* to address counterfeiting in bilateral and plurilateral trade agreements.[371]

Three plurilateral agreements that are relevant to Australia are the *Anti-Counterfeiting Trade Agreement* ('*ACTA*'),[372] the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('*TPP-11*')[373] and the *Regional Comprehensive Economic Partnership* ('*RCEP*').[374] Although *ACTA* was signed, it has never been ratified by Australia and other parties and is unlikely to ever enter into force.[375] *TPP-11* was signed in March 2018 following the withdrawal of the United States from the earlier *TPP* ('*TPP 2016*').[376] *RCEP* is still being negotiated.[377]

Agreeing to these mechanisms can have a lasting impact on future agreements and domestic policy. Weatherall argues that it is an explicit part of negotiating agendas for these agreements to establish future standards for later negotiations.[378] Even if they do not enter into Australian law in their present form, they evidence what Australia may be willing to agree to in the future. For example, Weatherall discusses European demands during negotiations for *ACTA* that can be linked to the later introduction of third-party website blocking mechanisms in Australian copyright law.[379] In the following analysis, *ACTA* will be analysed as an example of potential human rights implications of future agreements.

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[370] Yu, 'Achilles Heel', above n 19; Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R (26 January 2009).
[371] Yu, 'Achilles Heel', above n 19; Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447; Susan K Sell, 'The Dynamics of International IP Policymaking' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 76, 77–80.
[372] *ACTA*.
[373] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force) ('*TPP-11*').
[374] *Regional Comprehensive Economic Partnership* Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/negotiations/rcep/Pages/regional-comprehensive-economic-partnership.aspx>.
[375] Sell, 'The Dynamics of International IP Policymaking', above n 371.
[376] *TPP-11, Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam*, signed 4 February 2016 [2016] ATNIF 2 (not yet in force).
[377] *Regional Comprehensive Economic Partnership*, above n 374.
[378] Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties', above n 367, 219.
[379] See Kimberlee Weatherall, 'Setting Global Standards for IP Enforcement: The Anti-Counterfeiting Trade Agreement' (2010) 29(2) *Communications Law Bulletin* 1, 5–6.

9.4.1 ACTA: Human Rights Implications of Increased Anti-Counterfeiting Legislation

Analysis of *ACTA* identifies potentially serious human rights implications of agreements of this nature for civil rights and obligations of international assistance and cooperation. Problematically, human rights concerns cannot always be highlighted in negotiations because these agreements are usually negotiated in secrecy.[380] This often excludes active participation by civil society actors who might otherwise articulate these concerns. The lack of transparency concerning the negotiations of *ACTA* and the *TPP 2016* has generated significant criticism.[381] Transparency is important because agreements signed by Australia are rarely amended after they open for signature.[382]

Problems with transparency are also problematic for accountability. Australia failed to acknowledge the importance of transparency when concerns about the potential impact of the *TPP 2016* on the human right to health were raised by the Special Rapporteur on Health.[383]

ACTA is particularly relevant to anticipating what Australia might agree to introduce into future anti-counterfeiting legislation, as the focus of the agreement is the prevention of counterfeiting.[384] It was agreed in 2010 between Australia and many important trade partners - Canada, the European Union, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America.[385] The Preamble suggests that the object and purpose of the agreement are to 'provide effective and appropriate means, complementing the *TRIPS Agreement*, for the enforcement of intellectual property rights, taking into account differences in [the parties'] respective legal systems and practices.' [386] This was intended to

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[380] Kimberlee Weatherall, 'Three Lessons from ACTA and Its Political Aftermath' (2012) 35 *Suffolk Transnational Law Review* 575, 591–596; Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33(2) *Sydney Law Review* 229, 230; Peter K Yu, 'Six Secret (and Now Open) Fears of ACTA' (2011) 64(3) *SMU Law Review* 975, 998–1019. See concerns identified in Joint Standing Committee on Treaties, Parliament of Australia, above n 357, 45–55.

[381] Sell, 'The Dynamics of International IP Policymaking', above n 371, 77–80; Yu, 'Six Secret (and Now Open) Fears of ACTA', above n 380, 998–1019.

[382] For example, concerns about *AUSFTA* did not change recommendation to ratify: Joint Standing Committee on Treaties, Parliament of Australia, *Report 61: The Australia – United States Free Trade Agreement* (2004) 83–95, 247–252.

[383] 'Letter from Anand Grover, United Nations Special Rapporteur on the Right to Health, to Australian Government Representative', 19 July 2011 <https://spdb.ohchr.org/hrdb/19th/AL_Australia_19.07.2011_(4.2011).pdf>; 'Letter from Peter Woolcott, Australian Permanent Representative to the United Nations in Geneva, to Anand Grover, United Nations Special Rapporteur on the Right to Health', 23 November 2011 <https://spdb.ohchr.org/hrdb/19th/Australia_23.11.11_(4.2011).pdf>.

[384] *ACTA* Preamble.

[385] *Joint Statement from All the Negotiating Parties to ACTA* (4 October 2010) European Commission - Trade <http://trade.ec.europa.eu/doclib/press/index.cfm?id=623>.

[386] *ACTA* Preamble.

address an identified proliferation of counterfeiting activities through international cooperation and more effective international enforcement.[387] The agreement contains broad *TRIPS*-plus requirements regarding enforcement of intellectual property rights and regulation of counterfeiting.[388] There had been significant controversy about earlier drafts that included even more expansive mandatory obligations that could impair the distribution and cost-effective production of generic medicines. These included the requirements that parties implement border measures for suspected patent infringements and for goods in transit.[389] These requirements were permitted but not required of parties in the final text, so could still impact negatively on human rights to access essential medicines.[390]

Other human rights concerns were identified in relation to *ACTA*. The provisions were feared to impact on the right to freedom of expression, the right to privacy and the right to a fair trial.[391] The freedom of expression concerns were particularly important in generating opposition to similar protections proposed, and ultimately rejected, in contemporaneous draft legislation in the United States.[392]

In Europe, provisions relevant to the regulation of counterfeit trade marks have raised serious concerns about the implications of *ACTA* for fundamental rights to a fair trial, which are linked to Article 14 of the *ICCPR*.[393] The extensive reach of the criminal provisions, including the reach of procedures and penalties to include 'de minimis' offences, was considered to threaten European standards regarding 'the right to freedom to obtain and disseminate information, the right to freedom from unreasonable search and arrest, the right to inviolability of the home, and the right to the peaceful enjoyment of one's possessions.'[394] *ACTA*'s emphasis on injunctions prompted concerns that this would permit seizures of property without the subject of those seizures being heard by a court.[395] These concerns were amplified by a perceived failure to

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[387] Ibid.
[388] Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 79, 280–282.
[389] Henning Grosse Ruse-Khan, 'A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit' (2011) 26(3) *American University International Law Review* 645, 660–703.
[390] Ibid 725.
[391] See Douwe Korff and Ian Brown, *Opinion on the Compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights and the EU Charter of Fundamental Rights* (Greens/European Free Alliance, European Parliament, 8 October 2011) <https://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Studies/Democracy/ACTA_fundamental_rights_assessment.pdf>; Axel Metzger and Rita Matulionyte (coordinators), *Opinion of European Academics on ACTA*, 3 December 2010, open for signatures until 7 February 2011 <https://iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf>.
[392] These concerns primarily focused on copyright provisions: Sell, 'The Dynamics of International IP Policymaking', above n 371, 77–80.
[393] Korff and Browne discuss excessive application of criminal law and the need for counter-balancing safeguards in enforcement proceedings: Korff and Brown, above n 391, 60.
[394] Ibid 53.
[395] Ibid 53–54.

provide appropriate safeguards for threatened rights.[396] Weatherall raises similar concerns about the broad range of enforcement procedures and remedies prescribed by the intellectual property chapter in the *TPP 2016*.[397] These remedies include factors that courts should consider in relation to setting damages.[398]

Concrete requirements for criminal liability, which could engage human rights concerns regarding the right to a fair trial, can be particularly important in Australia where there is extremely limited constitutional protection for certain human rights.[399] Common law protection for the right to a fair trial is less concrete than constitutional protection.[400]

A further negative consequence of prescriptive provisions regarding procedures and remedies is that a lack of flexibility could restrict future effectiveness.[401] Effectiveness is relevant to progressive realisation. A human rights approach to anti-counterfeiting legislation and policy links efficiency, effectiveness and accountability to Australia's rights and obligations pursuant to *ICESCR*.[402] The long-term impact of translating domestic legislation into binding international obligations is reduced flexibility.[403] Technological developments in counterfeiting may mean that an emphasis on requiring certain judicial mechanisms is not the most economically effective way to prevent counterfeit activities that threaten health.[404] New technologies, such as blockchain innovations, may enable a much more effective way of detecting counterfeit goods as they can create 'auditable and tamper-proof records' behind all physical products across the supply chain.[405] Examples include linking Radio Frequency Identification to blockchain at a cost of around US$1 per item, which significantly reduces the previous security costs associated with Radio Frequency Identification.[406] Blockchain can also

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[396] Ibid 60.
[397] Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 79, 281.
[398] *TPP-11* art 18.77(6)(b).
[399] See George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (Readhowyouwant.com Limited, 2017) 50–68, 78–81. See also Jonathan Griffiths, 'Enforcement of Intellectual Property Rights and the Right to a Fair Trial' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 438, 449–450.
[400] Williams and Reynolds, above n 399, 81.
[401] Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 79, 280–282.
[402] *General Comment 3*, UN Doc E/1991/23, [3] [9].
[403] Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 79, 280–282.
[404] See ibid 281.
[405] Diana Ngo, *Chronicled Completes Pilot for Blockchain-Enabled Supply Chain System* (1 August 2017) Coinjournal <https://coinjournal.net/chronicled-completes-pilot-blockchain-enabled-supply-chain-system/>. See Tim K Mackey and Gaurvika Nayyar, 'A Review of Existing and Emerging Digital Technologies to Combat the Global Trade in Fake Medicines' (2017) 16(5) *Expert Opinion on Drug Safety* 587.
[406] K Toyoda et al, 'A Novel Blockchain-Based Product Ownership Management System (POMS) for Anti-Counterfeits in the Post Supply Chain' (2017) 5 *IEEE Access* 17465. See also Michael Crosby et al, 'BlockChain Technology: Beyond Bitcoin' (2016) 2 *Applied Innovation Review* 6.

be used to protect against counterfeit pharmaceuticals.[407] Although such technologies may require infrastructure investment to implement, in the longer term investment could be cost and time effective.[408] If well-resourced countries led technological development, this might also result in future dissemination of cost-effective technology for less well-resourced countries and create a more effective mechanism for detection of counterfeit goods in a larger number of countries. This, in turn, would also make data collection more effective.

When human rights concerns are not addressed in negotiation, Australia has insufficient mechanisms for addressing human rights impacts during the ratification and legislative implementation process.[409] There is the opportunity for participation in the JSCOT process. However, the *AUSFTA* example considered in Chapter 5 suggests that government scrutiny of this nature is unlikely to prompt any changes to signed agreements.[410] Similarly, legislation that results from the agreements is subject to human rights scrutiny, but this has been criticised for not always effecting legislative change to ensure human rights compatibility.[411] Human rights scrutiny concentrates on the impact of legislation on individual rights but does not consider other relevant issues, such as the role of resources in the broader realisation of economic, social and cultural rights[412] and the importance of effectiveness in the implementation of legislation.[413] There were several concerns raised in JSCOT about *ACTA*.[414] The delay in ratification was not linked to these concerns but to international developments that resulted in the majority of other parties refusing to ratify the agreement.[415]

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[407] Thomas Bocek et al, 'Blockchains Everywhere: A Use-Case of Blockchains in the Pharma Supply-Chain' (Paper presented at *2017 IFIP/IEEE Symposium on Integrated Network and Service Management*, Lisbon, Portugal, 8-12 May 2017). See also Mackey and Nayyar, above n 405.

[408] Mackey identifies existing obstacles to investment in technology to address counterfeit pharmaceuticals as 'ongoing questions regarding utility, cost-effectiveness, and the lack of incentives (such as legal or regulatory mandates)': Mackey and Nayyar, above n 405, 597.

[409] Compare opportunities in the United States and Europe evidenced in relation to *ACTA*: Sell, 'The Dynamics of International IP Policymaking', above n 371, 77–80.

[410] Blakeney describes the failure of the government to respond to extensive criticism of *AUSFTA*: Michael Blakeney, 'The Pacific Solution: Australia and Negotiation of the Trans-Pacific Partnership Agreement (TPPA)' (2014) 37(2) *University of Western Australia Law Review* 123, 140–141.

[411] Beth Goldblatt, 'Claiming Women's Social and Economic Rights in Australia' (2017) 23(2) *Australian Journal of Human Rights* 261, 274.

[412] CESCR Rodriguez decision in Committee on Economic, Social and Cultural Rights, *Views: Communication No 1/2013*, 57th sess, UN Doc E/C.12/57/D/1/2013 (20 April 2016).

[413] Wilkinson discusses effectiveness concerns associated with the adoption of the compulsory licensing amendment on assumption that mechanism would not frequently be utilised: Wilkinson, above n 16, 48–49.

[414] Joint Standing Committee on Treaties, Parliament of Australia, above n 357.

[415] See Blakeney, above n 410, 128.

9.4.2 International Cooperation Obligations

Protection of the human right to health should be considered in the context of the obligations of all states party to *ICESCR* to cooperate to achieve economic, social and cultural human rights.[416] Osei Tutu has argued that the health and safety justification for policing counterfeit goods may not justify the resources committed by states in addressing counterfeiting activities.[417] This is particularly relevant for less developed states with greater resource constraints, yet also relevant to Australia. If the impact of regional and bilateral agreements is to use trade incentives to require poorly resourced countries to implement onerous and expensive enforcement machinery, this may be diverting resources that could be better spent on raising socio-economic standards that are essential to the realisation of the right to health in those countries, and relevant to obligations for international cooperation to realise core minimum standards of health in all states.[418] Emphasis on cooperation and intelligence sharing may be significantly more important and, where countries must choose between competing resource demands, more expeditious and effective.[419] The Committee on Economic, Social and Cultural Rights has interpreted the right to health to include a recognition of states' obligations to assist other states in realising the right to health.[420] Part of this requires states to ensure that their engagement in international agreements made subsequent to *ICESCR* is consistent with the right to health.[421] These obligations should influence trade negotiators.[422]

9.5 SYNTHESIS

This analysis of *ACTA* raises potential human rights concerns regarding transparency and participation, accountability, implications for fair trial and privacy rights, future restrictions on appropriate progressive realisation, and obligations of international assistance. The concerns about broader human rights implications of treaties that are intended to result in more effective regulation of counterfeit activities are important. They weigh against an expectation that greater

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[416] *ICESCR* art 2(1). See also *Charter of the United Nations* ss 1(1), 13(1)(b), 55, 56.
[417] Osei Tutu, 'Corporate "Human Rights" to Intellectual Property Protection?', above n 352; Osei Tutu, 'Private Rights for the Public Good', above n 352. Maskus recognises health benefits as one of the strongest incentives for poorer countries to invest in expensive machinery to implement effective anti-counterfeiting regimes, but calculates the cost to still exceed these health benefits over a twenty-year period: Maskus, above n 11, 226–228.
[418] *General Comment 14*, UN Doc E/C.12/2000/4, [38]-[42].
[419] Carlos M Correa, 'Anti-Counterfeiting: A Trojan Horse for Expanding Intellectual Property Protection in Developing Countries?' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012) 59, 74.
[420] *General Comment 14*, UN Doc E/C.12/2000/4, [38]-[42].
[421] Ibid [39].
[422] For example, Gleeson et al suggest trade negotiators should be mindful when negotiating data protection provisions that this can impact access to essential medicines: Deborah Gleeson, Kyla Tienhaara and Thomas Faunce, 'Challenges to Australia's National Health Policy from Trade and Investment Agreements' (2012) 196(5) *Medical Journal of Australia* 354, 356.

regulation of counterfeit activities will generate more effective detection of goods that pose a threat to individual health and safety. They indicate the importance of ongoing scrutiny, not only at the time that agreements are implemented into legislation but also prior to that time, during the negotiation of treaties. This will be considered further in Chapter 10. The resource dependent nature of economic, social and cultural rights and the need to appropriately allocate resources to permit progressive realisation of a broad range of rights means that developing countries should be particularly cautious about the way they allocate resources to the expansive regulation of counterfeiting.

These agreements can not only be costly to implement, but they can also reduce flexibility in finding appropriate approaches to address the threat to health effectively. The importance of flexibility is apparent from the range of potential technological approaches to anti-counterfeiting that are being aided by developing technology, such as blockchain. Resources that are used to implement prescriptive anti-counterfeiting obligations (including the cost of negotiating these agreements) might be used more appropriately to implement these technologies.[423] This may mean that resources focused on developing or maintaining anti-counterfeiting machinery consistent with international obligations are not being used effectively. It is difficult to predict whether these high levels of regulation will limit the effective use of new technology in detecting counterfeiting. International cooperation and assistance are important for addressing the health threats identified in this chapter, yet the cost of implementing anti-counterfeiting machinery raises further questions as to the most appropriate approach to addressing the problems through international agreements. Effective use of resources is a feature of a human rights approach that is particularly important in relation to the protection of economic, social and cultural rights, and it should be considered in negotiating plurilateral and bilateral trade agreements with intellectual property provisions, such as anti-counterfeiting provisions. Human rights analysis of these agreements and human rights impact assessments are necessary to permit a balancing of potential conflicts between human rights and ensure that Australia is complying with its international cooperation obligations. These mechanisms are not presently sufficient in Australia. The absence of transparency in the negotiation of these agreements has been heavily criticised and further limits the opportunity for effective human rights scrutiny prior to the signing of these agreements.

[423] See discussion of resources wasted in negotiation of *ACTA* in Yu: Peter K Yu, 'The Alphabet Soup of Transborder Intellectual Property Enforcement' (2012) 60 *Drake Law Review Discourse* 16, 23.

9.6 CONCLUSION

This chapter identifies the ways in which anti-counterfeiting legislation engages human rights. A human rights analysis shows the serious potential threats to the right to health posed by counterfeiting internationally and provides evidence of a credible threat to health and safety posed by a range of counterfeit goods, including counterfeit personal electrical goods and counterfeit therapeutic goods. However, this chapter identifies limitations on available data that reduce our ability to understand the extent of this threat to health.

A human rights-based analysis shows the significance of progressive realisation and international cooperation and assistance. However, in contrast to the plain packaging legislation studied in the previous chapter, it is not possible to understand if the legislation and its operation constitute appropriate mechanisms to progressively realise the right to health, by addressing this threat consistent with obligations to protect individuals from threats to their realisation of the right to health. There are serious difficulties in understanding the effectiveness and appropriateness of the legislation in realising Australia's obligations to protect the right to health, which partly result from a lack of data. Other problems are linked to the nature of counterfeiting and include difficulties with detection. This presents a further problem: understanding the effectiveness of the legislation could require a significant resource investment, and the evidence analysed suggests that the nature of the threat to health is serious, but its extent remains unclear. This chapter proposes that one approach to addressing this could be publicising the results of samples of seized products that are systematically tested for threats to health and safety.

The lack of available data is attributable to a range of reasons including resources limitations, the sophistication of counterfeit presentation, the sensitivity of intelligence gathering exercises and fragmentation of responsibility for testing between government authorities. Lack of data indicates a problem with effective monitoring of anti-counterfeiting legislation, suggesting that Australia may not be meeting its human rights obligations to protect individuals against threats to health that are posed by third parties who engage in counterfeiting activities. In some cases, data is collected but not made available. This suggests that operation of the legislation is not sufficiently accountable or transparent. Human rights analysis and human rights impact assessments can be useful to scrutinise Australian compliance with other human right to health obligations. Both the operation of existing counterfeiting legislation and the negotiation of additional counterfeiting obligations suggest that Australia is not meeting its obligations in a manner that is sufficiently accountable or participatory. Human rights accountability mechanisms, considering not only the right to health but other human rights obligations, should

be applied both prospectively and retrospectively to counterfeiting legislation. The current primary mechanisms for assessment considered in this chapter are not sufficient.

Although the extent of the threat cannot be quantified, the risks identified in this chapter in relation to electrical goods and therapeutic goods suggest that it is important to consider whether the existing legal framework is adequate to address the human right to health implications of anti-counterfeiting legislation. The chapter finds that there is insufficient consideration of whether intellectual property laws are consistent with human rights principles. The approach taken to regulating anti-counterfeiting suggests problems with key human rights principles of effectiveness, transparency and accountability. This may impair the ability of Australia to fulfil its human rights obligation to protect individuals against threats to health posed by counterfeiters. To the extent to which this applies to pharmaceutical imports, it can impair the ability of the government to provide infrastructure necessary for an effective essential drugs policy consistent with human rights principles of quality.

The resourcing required in order to implement effective anti-counterfeiting systems also raises questions of the appropriateness of detailed prescriptive approaches to anti-counterfeiting in proposed international agreements like *ACTA*. Another serious concern is that these additional obligations can also have negative implications for human rights other than the right to health. This chapter has already identified existing implications of anti-counterfeiting legislation for rights to a fair trial and to privacy. It has identified further serious concerns in relation to *ACTA*. These concerns will be explored further in the following chapter in relation to *RCEP* and the *TPP-11*. Agreements of this nature impact domestic regulatory autonomy and contribute to regulatory chill, which will be further explored in Chapter 10.

This chapter contributes to the understanding of counterfeiting and the right to health, and other human rights. Addressing health threats posed by counterfeiting engages more complex obligations than providing public health services and access to medicine, and collecting population data about those fulfilment exercises. Transparency, accountability and effectiveness are features of a human rights approach that are particularly relevant to assessing the human rights implications of anti-counterfeiting legislation. The human rights analysis in this chapter suggests that these obligations are not being met. This chapter provides a detailed analysis of the effectiveness of anti-counterfeiting legislation from a human rights perspective, and links problems with effectiveness to the potential dangers of agreeing to extremely prescriptive obligations in anti-counterfeiting agreements.

CHAPTER TEN NARROWING DOMESTIC REGULATORY AUTONOMY AND HUMAN RIGHTS-COMPLIANT TRADE MARK LAW

10.1 INTRODUCTION

This chapter focuses on features of international law that restrict domestic regulatory autonomy and potentially limit harmonisation between international human rights obligations and international intellectual property obligations in domestic law. It synthesises the findings from the case studies that are relevant to domestic regulatory autonomy and situates the discussion about the restrictions that trade agreements pose for domestic self-determination by framing them in a human rights context.[1] This chapter identifies present and emerging difficulties for states wishing to observe their international obligations under both human rights agreements and intellectual property agreements. Approaches to reduce potential conflict are explored.

The case studies identified limitations on the domestic regulatory autonomy of Australia to meet its human rights obligations. This chapter will consider the potential impact of agreements that have not yet entered into force on states' ability to honour their human rights obligations. It will focus on the human rights impact of these agreements on concerns posed by *TRIPS*-plus obligations and investor-state dispute mechanisms (ISDMs). It will also identify implications of the chilling impact created by the current regulatory environment. Normative justifications for international enforcement of intellectual property rights do not justify these restrictions on domestic regulatory autonomy. Potential restrictions on human rights from existing intellectual property obligations necessitate changes to present culture that will be addressed in Chapter 11. This chapter will recommend further changes surrounding negotiation of future agreements in order to prevent future restrictions. These can strengthen a culture for trade marks that is supportive of human rights.

[1] Other discussions about restrictions of domestic regulatory autonomy do not focus on a human rights approach: see, eg, Rochelle Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property' (2015) 36(4) *Michigan Journal of International Law* 557; Jennifer L Tobin, 'The Social Cost of International Investment Agreements: The Case of Cigarette Packaging' (2018) 32(2) *Ethics & International Affairs* 153.

10.2 Analysis of Domestic Regulatory Autonomy from Case Studies

The case studies demonstrate different ways in which domestic regulatory autonomy can be restricted. Restrictions include specific obligations to protect trade marks and general enforcement obligations. Enforcement mechanisms, and the threat of their use, can also deter human rights focused measures, even when they are consistent with intellectual property obligations.

The plain packaging case study shows the way that other states and third-party actors can use the existing international framework for the protection of intellectual property in order to argue against restrictions on intellectual property rights that promote health objectives consistent with the right to health. Chapter 8 uses *JT International* and *Philip-Morris Australia* to show how the mechanisms available for non-state actors to protect their property rights can restrict measures that progressively realise human rights. Non-state actors can also influence World Trade Organization (WTO) actions.[2] The absence of constitutional protection for most human rights in Australia means that they cannot be used to defend measures that support human rights against property rights in cases like *JT International*.[3] This is exacerbated by limitations on the mandate of the Australian Human Rights Commission (AHRC) in relation to economic, social and cultural rights that might prompt reflection on these constitutional deficiencies.[4] In Australia, trade agreements that introduce ISDMs that underpinned the actions in *Philip-Morris Australia,* or those that contain multilateral standards such as the WTO *Agreement on Trade Related Aspects of Intellectual Property* ('*TRIPS*') and trade agreements containing *TRIPS*-plus obligations, have not been systematically scrutinised for consistency with human rights before signing.[5] *TRIPS* obligations have not been interpreted to restrict Australian plain packaging

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[2] Christopher Thompson, 'Big Tobacco Backs Australian Law Opposers' *Financial Times (online)*, 30 April 2012 <https://www.ft.com/content/314c9446-91fb-11e1-867e-00144feab49a>; Stephanie Nebehay, 'Australia Says Big Tobacco Aiding WTO Challengers' *Reuters (online)*, 23 May 2012 <http://www.reuters.com/article/trade-tobacco-idUSL5E8GMHBW20120522>.

[3] *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v Commonwealth of Australia* (2012) 250 CLR 1, ('*JT International*'). Williams and Reynolds discuss limited protection: George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (Readhowyouwant.com Limited, 2017) 65–68.

[4] Beth Goldblatt, 'Claiming Women's Social and Economic Rights in Australia' (2017) 23(2) *Australian Journal of Human Rights* 261, 267; Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1) *UNSW Law Journal* 193.

[5] See, eg, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam and Associated Side Letters (Santiago, 8 March 2018)* [2018] ATNIF 1 ('*TPP-11*'); Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* (Australian Government Publishing Service, 1992).

legislation,[6] but *Australia – Plain Packaging Measures* will be subject to appeal.[7] *Australia – Plain Packaging Measures* is positive to the extent that it recognises the importance of public interests when it interprets terms like 'unjustifiably' that have the potential to permit states to exercise flexibility, which can support domestic regulatory autonomy. However, the decision could also permit owner interests that are relevant to all *TRIPS* trade mark protection provisions to be interpreted quite broadly.[8] This could influence inclusion of broader trade mark owner protection standards, like dilution and tarnishment, into future trade agreements. Even if they are not successful, disputes of the kind generated in relation to plain packaging legislation are expensive.[9] The cost of defending these actions and the potential cost of losing them can deter both the relevant state and other states from considering implementing similar measures to promote human rights.

Chapter 9 identified potential human rights implications of Australian legislation implementing multilateral obligations regarding the enforcement of intellectual property rights in cases of imported counterfeits.[10] There is potential for these mechanisms to further protection for the right to health. However, insufficient human rights scrutiny of trade agreements and constitutional deficiencies for protection of human rights limit consideration of the way in which these mechanisms can restrict regulatory autonomy to implement human rights obligations. The chapter used analysis of the *Anti-Counterfeiting Trade Agreement* ('*ACTA*') to demonstrate the way in which increases in enforcement measures that strengthen protection of owners' trade mark rights against counterfeiting may also restrict Australia's ability to meet its human rights obligations regarding the right to a fair trial and privacy.[11] Further measures may

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[6] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018) ('*Australia – Plain Packaging Measures*').

[7] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Notification of an Appeal by Honduras under Article 16.4 and Article 17 of the Understanding and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS435/23 (19 July 2018).

[8] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2279]-[7.2286].

[9] *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [590]; Adam Gartrell, 'Philip Morris Ordered to Pay Australia Millions in Costs for Plain Packaging Case' *Sydney Morning Herald (online)*, 9 July 2017 <https://www.smh.com.au/politics/federal/philip-morris-ordered-to-pay-australia-millions-in-costs-for-plain-packaging-case-20170709-gx7mv5.html>.

[10] The anti-counterfeiting provisions of the *Trade Marks Act 1995* (Cth) ('*1995 Act*') considered in Chapter 9 closely correspond with Australia's obligations pursuant to *TRIPS*: Melanie Jose, 'Raising the Bar on Australia's Border Measures: Improvements to the Notice of Objection Scheme Resulting from the IP Laws Amendment (Raising the Bar) Act 2012' (2012) 90 *Intellectual Property Forum* 52, 53.

[11] See Australian Government Department of Foreign Affairs and Trade, *National Interest Analysis [2011] ATNIA 31: Anti-Counterfeiting Trade Agreement* (2011). Although JSCOT concluded that the provisions of *ACTA* would not necessitate any changes to Australian law, this was disputed: Kimberlee G

also be so restrictive that they limit effective realisation of the right to health.[12] These findings show the way in which fragmentation between two fields of law means that international obligations not only restrict domestic regulatory autonomy but also potentially create conflicts with domestic human rights obligations.

10.3 Impact of Future Agreements on Australia's Domestic Regulatory Autonomy

Chapter 9 has identified two agreements that are likely to impact on Australia's intellectual property protection obligations. The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('*TPP-11*') concluded during the drafting of this thesis, and the *Regional Comprehensive Economic Partnership* ('*RCEP*') continues to be negotiated. These introduce further human rights concerns that could both reduce the flexibilities of *TRIPS* and impair human rights, although Chapter 9 has found that protection against counterfeiting could also strengthen human rights protection.

Seuba recognises potential support for human rights through a growing recognition of human rights implications of criminal enforcement.[13] National courts have traditionally recognised the relevance to intellectual property of proportionality of damages, protection of defendants' rights when granting an injunction, and protection of privacy in relation to the preservation of evidence and provision of information about individuals allegedly associated with infringing goods.[14] Increasingly, these and other issues have been recognised as implicating human rights.[15] There can be mutual reinforcement between the enforcement of intellectual property and the human rights to benefit from science and culture, as well as rights to property where

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Weatherall, Submission to the Joint Standing Committee on Treaties, *Inquiry into the Anti-Counterfeiting Trade Agreement*, 27 January 2012, 14-16 <https://works.bepress.com/kimweatherall/26/>. A similar assessment about the 2016 *Trans-Pacific Partnership Agreement* was disputed: Kimberlee G Weatherall, Submission to the Joint Standing Committee on Treaties, *Inquiry into the Trans-Pacific Partnership Agreement*, March 2016, 3 <https://works.bepress.com/kimweatherall/34/download/>.

[12] See Kimberlee Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"' (2016) 16 *Melbourne Journal of International Law* 257, 280–282.

[13] Xavier Seuba, *The Global Regime for the Enforcement of Intellectual Property Rights* (Cambridge University Press, 2017) 36–37.

[14] Ibid 36.

[15] Ibid 35–62, 353–367, 394–412; Jonathan Griffiths, 'Criminal Liability for Intellectual Property Infringement in Europe: The Role of Fundamental Rights' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012) 191. See also Jonathan Griffiths, 'Enforcement of Intellectual Property Rights and the Right to a Fair Trial' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 438, 449–450; Christophe Geiger, 'Towards A Balanced International Legal Framework For Criminal Enforcement Of Intellectual Property Rights' in Hanns Ullrich et al (eds), *TRIPS Plus 20: From Trade Rules to Market Principles* (Springer, 2016) 645, 661–673.

they are protected.[16] Seuba also identifies mutually supportive relationships between rights to a fair trial and the rights set out in *TRIPS*, as well as some local intellectual property laws.[17] However, the ability of local intellectual property laws to support human rights is likely to depend on the human rights environment in which they operate. Seuba's analysis focuses on safeguards built into European law.[18] He identifies several ways that enforcement can negatively impact on human rights as a result of poor drafting or balances favouring the rights of owners.[19] The following analysis recognises the limitations on specific protections for human rights in Australia. These limitations may mean that there are no local checking mechanisms to balance enforcement provisions that favour owner rights at the expense of human rights.

10.3.1 TPP-11

This section identifies provisions of the *TPP-11* that may restrict domestic regulatory autonomy for states to develop a human rights culture for trade marks. The *TPP-11* is a regional trade agreement that includes Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.[20] The United States has withdrawn from the earlier 2016 treaty (*TPP 2016*)[21] that has been criticised for potentially negative human rights implications.[22] This sub-section will identify human rights implications of *TPP-11* obligations, focusing on those most relevant to trade marks, and address concerns about the inclusion of ISDMs in Section 5 of this chapter.

Chapter 9 identified difficulties with effectively detecting and protecting individuals against threats posed by anti-counterfeiting to the right to health in Australia. It determined that these problems may be addressed by utilising more effective mechanisms or technology, but that highly prescriptive counterfeiting standards may restrict the ability of states to improve effectiveness and more appropriately recognise their right to health obligations. Weatherall suggests that there is evidence of unnecessary inclusion of existing standards in these

[16] Seuba, above n 13, 41.
[17] Ibid 42–46.
[18] Ibid 47, 56.
[19] Ibid 62.
[20] *TPP-11* directly references and substantially incorporates the *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam*, signed 4 February 2016 [2016] ATNIF 2 (not yet in force) ('*TPP 2016*').
[21] *TPP 2016.*
[22] See Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership' (2017) 7(1) *Victoria University Law and Justice Journal* 76, 88–93; Amy Kapczynski, 'The Trans-Pacific Partnership — Is It Bad for Your Health?' (2015) 373(3) *New England Journal of Medicine* 201. See also Desmond McNeill et al, 'Trade and Investment Agreements: Implications for Health Protection' (2017) 51(1) *Journal of World Trade* 159.

agreements that restricts flexibility in future lawmaking.[23] The following analysis identifies further human rights concerns relevant to the legislation. The analysis focuses on the provisions that are relevant to trade marks, noting that further serious human rights concerns have been identified in relation to patent protection[24] and copyright protection.[25]

Similar to the issues identified in Chapter 9 regarding the potential implications of *ACTA*, the impact of the *TPP-11* on human rights can be both beneficial and negative for human rights.[26] Recognising this through human rights scrutiny may permit more effective balancing and better realisation of all of the relevant rights involved. A *TPP-11* provision regarding remedies that might improve the realisation of the right to health is the requirement that parties provide judicial authorities with authority 'to account for the seriousness of the circumstances, which may include circumstances that involve threats to, or effects on, health or safety.'[27] The *TPP-11* indicates that this may result in a separate criminal penalty.[28] The ability of this penalty provision to improve realisation of the right to health in Australia is unclear, given the contested assertion in Australia's Treaty Impact Analysis that both the *TPP 2016* and the *TPP*-11 would require no changes in Australian intellectual property law.[29] In Australia, consideration of the

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[23] Kimberlee Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties' (2016) 32(1) *American University International Law Review* 211, 219.; Weatherall, Submission to the Joint Standing Committee on Treaties, *Inquiry into the Trans-Pacific Partnership Agreement*, above n 11, 3.

[24] Public Health Association of Australia, Submission No 34 to the Joint Senate Committee on Treaties, *Inquiry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 18 April 2018, 8-12; Matthew Rimmer, Submission No 66 to the Joint Senate Committee on Treaties, *Inquiry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, May 2018, 8. See also Kapczynski, above n 22; Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership', above n 22, 88–93; Matthew Rimmer, 'The Trans-Pacific Partnership: Intellectual Property, Public Health, and Access to Essential Medicines' (2017) 29 *Intellectual Property Journal* 277.

[25] Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 12, 264–265, 274–275, 280; Rimmer, Submission No 66 to the Joint Senate Committee on Treaties, *Inquiry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, above n 24, 4. See also Matthew Rimmer, 'Back to the Future: The Digital Millennium Copyright Act and the Trans-Pacific Partnership' (2017) 6(3) *Laws* 11; Rimmer, Submission No 66 to the Joint Senate Committee on Treaties, *Inquiry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, above n 24, 13; Matthew Rimmer, 'The Trans-Pacific Partnership and Sustainable Development: Access to Genetic Resources, Informed Consent, and Benefit-Sharing' in Charles Lawson and Kamalesh Adhikari (eds), *Biodiversity, Genetic Resources and Intellectual Property: Developments in Access and Benefit-Sharing* (Routledge, 2018) 151.

[26] Seuba identifies benefits and disadvantages in relation to border enforcement in the plurilateral environment: Seuba, above n 13, 353–367.

[27] *TPP-11* art 18.77(6)(b).

[28] Ibid art 18.77(6)(b), n 133.

[29] Australian Government Department of Foreign Affairs and Trade, *Trans-Pacific Partnership Agreement: Outcomes at a Glance* (1 February 2016) <http://www8.austlii.edu.au/au/other/dfat/ATNIA/2016/4_attach3.pdf>. This was not changed as a result in *TPP-11*: Australian Government Department of Foreign Affairs and Trade, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11): Outcomes at a Glance* (13 March 2018) <http://www8.austlii.edu.au/au/other/dfat/ATNIA/2018/1_attach2.pdf>. *TPP 2016* associated side letters and proposed Australian notification on tobacco control measures.

severity of an offence occurs where there is a range of penalties available to a decision maker and the gravity of threats to health and safety may be part of these considerations.[30] The absence of any requirements in existing intellectual property legislation for systematic testing of seized goods for health and safety may need to be reconsidered in order to ensure that threats to health and safety that might be relevant to severity can be assessed.[31]

Enforcement remedies in the *TPP-11* include factors that courts should consider in relation to setting damages.[32] However, these provisions also show the complex inter-relationship between the right to health and penalty provisions. This has been argued in Chapter 9 in relation to enforcement provisions of the *Therapeutic Goods Act 1989* (Cth) ('*TGA*').[33] A negative result of prescriptive provisions regarding procedures and remedies is that a lack of flexibility could restrict future effectiveness.[34]

The broad range of enforcement procedures and remedies prescribed by the intellectual property chapter of the *TPP 2016*, which are replicated in the *TPP-11*, raise human rights concerns.[35] This approach of using international instruments to prescribe domestic legal process in relation to private rights is unusual in international law.[36] Weatherall has criticised very broad criminalisation requirements in the *TPP 2016*.[37] She suggests that the safeguards provided by *TRIPS* are being slowly eroded,[38] which impacts on 'principle of a fair trial and due process, recognized in the common law.'[39] It is positive that the final version of the investment chapter of the agreement explicitly preserves fair and equitable treatment and that Article 18.71 of the

[30] *Commissioner for Fair Trading, Office of Finance and Services v Hua Yang Australia International Trading and Investment Pty Ltd and Huadi Bi* [2016] NSWSC 1380, [20], [26].
[31] *TPP-11* art 18.77(6)(b).
[32] Ibid.
[33] Chapter 9, Section 9.3.4.1
[34] Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 12, 280–282; Chapter 9, Section 9.4.1.
[35] See *TPP-11* ch 18; Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 12, 281.
[36] Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties', above n 23, 213.
[37] Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 12, 265, 274–275; Weatherall, Submission to the Joint Standing Committee on Treaties, *Inquiry into the Trans-Pacific Partnership Agreement*, above n 11, 4, 9.
[38] Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties', above n 23, 242. Cf Seuba, above n 13, 199.
[39] Kimberlee Weatherall, 'Provocations and Challenges Concerning Enforcement and Civil Procedure in IP' in Graeme B Dinwoodie (ed), *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (Edward Elgar, 2015) 181, 192–199. See also Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties', above n 23, 236–237, 236 n 100.

Intellectual Property chapter provides for parties to ensure that enforcement of intellectual property rights is fair and equitable.[40]

However, other civil rights concerns may be engaged in relation to the potential inequalities between the parties, access to courts and effective participation. Despite general obligations that procedures for enforcement of intellectual property rights 'not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays,'[41] it can be difficult for alleged counterfeiters to participate in a cost-effective way, which may influence a decision not to contest allegations.[42] Counterfeit action can engage human rights concerns about effective participation, access to justice and that equality of arms in any dispute can be effected by different circumstances between right owners and importers.[43]

10.3.2 RCEP

RCEP is an agreement being negotiated between the Association of Southeast Asian Nations (ASEAN), China, India, Japan, New Zealand, South Korea.[44] Yu notes that it covers half the world's population, 30 per cent of global Gross Domestic Product, and more than 25 per cent of global exports.[45] He suggests that the agreement could function as a 'viable alternative to the TPP.'[46] The negotiations are in the context of plans initiated by the Asia-Pacific Economic Cooperation (APEC) to establish a Free Trade Area of the Asia-Pacific (FTAAP)[47] and earlier negotiations within the region.[48] Intellectual property provisions are stated to be focused on deeper economic integration and cooperation and recognise differences in the economy and

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[40] See Seuba, above n 13, 199. Compare Weatherall's critique: Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties', above n 23, 242–243.
[41] *TPP-11* art 18.71(3).
[42] See Seuba, above n 13, 216. It can also impact negatively on access to medicines where it creates obstacles to distribution of generic medicines that are not counterfeit goods: Duncan Matthews, 'Counterfeiting and Public Health' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2011) 42, 45–58.
[43] Seuba analogously identifies the relevance of human rights considerations of 'equality of arms, effective access to a court and effective participation in the process' to intellectual property litigation in Europe: Seuba, above n 13, 48. *General Comment 32* provides that

> equality of arms… means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant… The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.

UN Human Rights Committee, *General Comment No 32. Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [3] ('*General Comment 32*').
[44] Yu notes that all the *RCEP* negotiating parties have agreements with ASEAN: Peter K Yu, 'The RCEP and Trans-Pacific Intellectual Property Norms' (2017) 50(3) *Vanderbilt Journal of Transnational Law* 673, 699.
[45] Ibid 676.
[46] Ibid.
[47] Ibid 679.
[48] Ibid 680.

legal environments of parties. There has been explicit recognition of 'governments' right to regulate for legitimate public policy purposes and the importance of facilitating the diffusion of information, knowledge, content, culture and the arts,' as well as the importance of appropriately balancing 'the rights of IP holders and the legitimate interests of users and the public.'[49]

Uncertainties about present negotiation suggest that it is possible that *RCEP* will introduce further concerns for human rights. Weatherall criticises a leaked draft chapter, identifying the mandatory nature of protection for intellectual property rights holders with limited or no protection for users or inclusion of flexibilities.[50] She criticises the enforcement provisions as being 'strong/unqualified,' extending beyond existing agreements and 'completely lacking in safeguards'.[51] A lack of safeguards is likely to engage the right to a fair trial.[52] Importantly, the negotiating text shows that a number of the proposals Weatherall criticises are not generally supported and do not have consensus.[53] Noting inconsistencies between the drafts, Yu suggests that it is possible that the final text will exclude intellectual property provisions, have similar provisions to the *TPP 2016*, or involve less onerous provisions than the *TPP 2016*.[54] He suggests that this third, 'TPP-lite' option is the most likely,[55] offering protection that is more limited than the *TPP 2016* but more expansive than *TRIPS* or current standards in Asian countries.[56] Yu suggests that there are less extensive provisions in *RCEP* regarding criminal procedures and penalties and border measures.[57] These analyses suggest that a lack of

[49] Australian Government Department of Foreign Affairs and Trade, *Joint Leaders' Statement on the Negotiations for the Regional Economic Comprehensive Partnership, 14 November 2017, Manila, the Philippines* (17 November 2017) <http://dfat.gov.au/trade/agreements/negotiations/rcep/news/Pages/joint-leaders-statement-on-the-rcep-negotiations-14-november-2017-manila-philippines.aspx>. See also Australian Government Department of Foreign Affairs and Trade, *Guiding Principles and Objectives for the Negotiating the Regional Comprehensive Economic Partnership* (August 2012) <http://dfat.gov.au/trade/agreements/negotiations/rcep/Documents/guiding-principles-rcep.pdf>.

[50] Kimberlee G Weatherall, 'RCEP IP Chapter Leaked 15 Oct 2015 – Weatherall Section by Section Comments in Brief' (Working Paper, from the Selected Works of Kimberlee G Weatherall, April 2016) 1 <https://works.bepress.com/kimweatherall/35/>.

[51] Ibid 2.

[52] See Weatherall, 'Provocations and Challenges Concerning Enforcement and Civil Procedure in IP', above n 39, 192–199. See also Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties', above n 23, 236–237, 236 n 100.

[53] See Weatherall, 'RCEP IP Chapter Leaked 15 Oct 2015 – Weatherall Section by Section Comments in Brief', above n 50.

[54] Yu, above n 44, 720–731.

[55] Ibid 729.

[56] Ibid.

[57] Ibid 715.

transparency during negotiation of trade agreements creates barriers to effective scrutiny, despite rhetoric about the emphasis on stakeholder participation in *RCEP*.[58]

10.3.3 Synthesis

What limitations do these agreements pose for domestic regulatory autonomy to implement human rights? Concerns identified about the impact of enforcement provisions on civil rights have also been made in relation to these agreements.[59] There is further potential for these agreements to support human rights. This is demonstrated by the specific recognition of health and safety in criminal penalty provisions, although it is not clear if this will generate any change to existing considerations. Chapter 9 of this thesis has noted that highly prescriptive provisions may also reduce flexibility to implement human rights obligations. This concern also applies to *TPP-11* and *RCEP*.[60] Problematically, there are ongoing problems with the transparency of these negotiations, which engage monitoring and accountability concerns.[61]

The analysis in this section highlights the way in which local conditions can be directly relevant to the impact of trade agreements on human rights. The difference between Seuba's analysis and analysis of the impact of these agreements on Australia is that Seuba's assessment that human rights law is sufficiently developed at local and international levels to respond to potential issues of concerns is based on analysis of European law.[62] The Australian system considered in Chapter 9 can differ significantly. This means that problems Seuba identifies may need to be addressed differently to support a human rights culture for trade marks in other states. This chapter recommends the adoption of better human rights scrutiny processes during the negotiation and drafting of bilateral, plurilateral and multilateral agreements and subsequent implementation. This means that less reliance is needed on checks and balances provided in

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[58] Australian Government Department of Foreign Affairs and Trade, *Twenty-Second Round of Negotiations: 28 April-8 May 2018, Singapore* (14 May 2018) <http://dfat.gov.au/trade/agreements/negotiations/rcep/news/Pages/twenty-second-round-of-negotiations-28-april-8-may-2018-singapore.aspx>.

[59] Weatherall, 'RCEP IP Chapter Leaked 15 Oct 2015 – Weatherall Section by Section Comments in Brief', above n 50, 2. See Weatherall, 'Provocations and Challenges Concerning Enforcement and Civil Procedure in IP', above n 39, 192–199. See also Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties', above n 23, 236–237, 236 n 100.

[60] Weatherall, 'RCEP IP Chapter Leaked 15 Oct 2015 – Weatherall Section by Section Comments in Brief', above n 50, 2; Weatherall, 'Intellectual Property in the TPP: Not "The New TRIPS"', above n 12, 280–282.

[61] Rachel Tansey and Sam Cossar-Gilbert, *RCEP A Secret Deal: Trade Talks Fail the Transparency and Public Participation Test* (Friends of the Earth International, Transnational Institute, Indonesia for Global Justice, Focus on the Global South, and Paung Ku, July 2018) <https://www.tni.org/files/publication-downloads/foe-rcep-secret-deal-2-web.pdf>. See concerns identified in Joint Standing Committee on Treaties, Parliament of Australia, *Report 126: Anti-Counterfeiting Trade Agreement* (2012) 45–55.

[62] See Seuba, above n 13, 47, 62.

some systems, such as Europe. The European system of checks and balances may itself not sufficiently protect some human rights, particularly economic, social and cultural rights.[63]

10.4 JUSTIFICATIONS FOR EXPANDED RIGHTS?

How can the increases in protection for intellectual property owners identified in the case studies and this chapter be justified? Fink, Maskus and Qian have identified three types of justifications for systematically regulating anti-counterfeiting internationally from an economic perspective.[64]

> First, infringements of intellectual property rights undermine trust in rules-based systems that are at the core of modern market-based economies.[65] Second, counterfeit products can confuse consumers and may be ineffective or even dangerous, as with adulterated medicines and foodstuffs or non-certified engine replacement parts.[66] Third, extensive counterfeiting can significantly deter the emergence of new products and firms, and piracy can block the development of creative industries, especially in poor countries where entry conditions are already weak.[67]

The first and third justifications are more likely to correspond to the expanded protection of intellectual property assets. Yet, Hilty rightly emphasises the importance of ensuring that the intellectual property rights underlying enforcement measures are justified, and Chapters 2 and 6 of this thesis have concluded that the justifications for expanded protection of trade marks should be questioned.[68] This second justification can be linked to traditional utilitarian justifications for trade mark protection but also to the right to health concerns identified in Chapter 9.[69] However, the findings in Chapter 9 suggest that caution should be exercised about relying on this threat when an absence of data makes it difficult to understand the size of the

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[63] Peggy Ducoulombier, 'Interaction between Human Rights: Are All Human Rights Equal?' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 39, 39–41; Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009) 321–324.

[64] Carsten Fink, Keith E Maskus and Yi Qian, 'The Economic Effects of Counterfeiting and Piracy: A Review and Implications for Developing Countries' (Policy Research Working Paper No 7586, World Bank Group, 29 February 2016) 33–36.

[65] Ibid 2-3.

[66] Ibid.

[67] Ibid.

[68] Reto M Hilty, 'Economic, Legal and Social Impacts of Counterfeiting' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2011) 9, 11–22.

[69] Maskus recognises health benefits as one of the strongest incentives for poorer countries to invest in expensive machinery to implement effective anti-counterfeiting regimes but calculates the cost to still exceed these health benefits over a twenty-year period: Keith E Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century* (Peterson Institute for International Economics, 2012) 226–228.

threat to the human right to health. The resource dependent nature of economic, social and cultural rights, and the need to appropriately allocate resources to permit progressive realisation of a broad range of human rights, means that developing countries should be particularly cautious about the way they allocate resources to expansive regulation of counterfeiting.[70]

Chapters 2 and 6 have criticised protection for trade marks that expands protection for owners beyond its traditional normative justifications. It appears that there may be support for expanded protection of trade mark interests in the interpretation of owner interests in *Australia – Plain Packaging Measures*. Protection for trade mark owners through prescriptive enforcement mechanisms and the availability of ISDMs can support an effective anti-counterfeiting system that enables traditional justifications, such as the reduction of consumer search costs, to be realised. However, this chapter and Chapter 9 argue that international obligations to enforce this might make it more difficult for states to simultaneously recognise their human rights obligations. Fink, Maskus and Qian recommended greater collection of data to assess the justifications that they identify for systematic international regulation of anti-counterfeiting.[71] The limitations that they identified on concrete empirical justifications for systematic international regulation of counterfeiting suggest that application of these laws at the expense of human rights concerns is not currently justified from an economic perspective.

The introduction of the interests of non-state actors into this balance through ISDMs also supports the need for careful scrutiny of these obligations because of their impact on domestic regulatory autonomy. Economically, increased protection of intellectual property through ISDMs is most likely to benefit home states of corporations, which are more likely to be net importers of intellectual property. WTO trade statistics about market share suggest that a small number of states are net exporters.[72] Although Gervais has argued that domestic calibration of interests is both important and possible within the *TRIPS* system,[73] Dreyfuss and Frankel more recently argue that the flexibilities provided by the *TRIPS* system are being constrained by the

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[70] Ibid; J Janewa Osei Tutu, 'Corporate "Human Rights" to Intellectual Property Protection?' (2015) 55 *Santa Clara Law Review* 1; J Janewa Osei Tutu, 'Private Rights for the Public Good?' (2013) 66(4) *SMU Law Review* 767. Correa warns that broad protection for counterfeiting can detract resources from other national priorities for developing countries: Carlos M Correa, 'Anti-Counterfeiting: A Trojan Horse for Expanding Intellectual Property Protection in Developing Countries?' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012) 59, 67–69, 74.

[71] Fink, Maskus and Qian, above n 64, 33–36.

[72] For recent statistics about major exporters and importers of charges for the use of intellectual property: World Trade Organization, *World Trade Statistical Review 2017* (World Trade Organization, 2017) 135 <https://www.wto.org/english/res_e/statis_e/wts2017_e/wts17_toc_e.htm>.

[73] Gervais suggests that for intellectual property 'each country is different and therefore should tailor its IP policy to its own needs': Daniel J Gervais, 'IP Calibration' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 86, 88.

increasing number of bilateral and regional trade agreements.[74] Seuba has noted a lack of balance favouring owners in trade agreements and has argued that local and international human rights protection is effective for protecting civil rights that might be impacted by these agreements.[75] This chapter argues that there is not currently enough protection for human rights in Australia to ensure effective protection of human rights, and the analysis in Chapter 5 suggests that this is unlikely to change in the short term. Additionally, Australia remains open to the inclusion of intellectual property provisions in trade agreements, which can restrict the realisation of human rights.[76] This openness remains despite extensive criticisms of the economic justifications for this practice by the Productivity Commission in 2010,[77] which were reiterated in 2016.[78]

A human rights culture for trade marks is important in Australia, but it should also be part of a broader culture that includes negotiation of trade agreements. Seuba argues that it is more effective to address imbalances between intellectual property protection and enforcement and human rights obligations through negotiation than to rely on dispute settlement mechanisms in international organisations to address fragmentation between intellectual property and human rights law.[79] Given the scope of obligations already in force and the potential impact of these discussed in the case studies, a culture for trade marks that supports human rights will need to engage principles of public international law in international organisations and to revise its approach to recognising the importance of human rights in the negotiation of trade agreements. The second approach will be addressed in Section 6 below. The next section will consider ISDMs, an important feature of many trade agreements.

10.5 INVESTOR-STATE DISPUTE MECHANISMS

The widespread inclusion of ISDMs in bilateral and regional investment and trade agreements has important implications for domestic regulatory autonomy. ISDM provisions are included in

[74] Dreyfuss and Frankel, above n 1, 565. Sell argues that agreements containing these *TRIPS*-plus provisions are ratcheting up intellectual property standards: Susan K Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play' (Program on Information Justice and Intellectual Property Research Paper Series No 15, American University Washington College of Law, October 2010) 2–4 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>.
[75] Seuba, above n 13, 62, 47, 56.
[76] See broader criticisms on impact: Australian Government Productivity Commission, *Intellectual Property Arrangements* (Inquiry Report No 78, 23 September 2016) 542-543 ('*Productivity Commission Report*').
[77] Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements - Productivity Commission Research Report* (November 2010).
[78] *Productivity Commission Report*, above n 76, 527-548.
[79] Seuba, above n 13, 52.

the *TPP-11*[80] and appear likely to be included in *RCEP*.[81] *Philip-Morris Australia* shows how ISDMs already provide standing for multinational corporations to sue host governments, consequently introducing into the international trade and intellectual property landscape additional actors that can influence domestic legislation.[82] Tobacco companies are non-state actors that have been prominent in each of the disputes regarding plain packaging legislation, either as litigants or funders of litigation. They have an extensive history of activities that are detrimental to the health of very large numbers of individuals.[83] Chapter 8 has identified tobacco companies as actors that pose threats to health that states are obligated to address in order to implement their right to health obligations.

Trade agreements usually give qualifying foreign investors the advantages of domestic investors through national treatment and most favoured nation protections.[84] They also provide additional protection for foreign investors through the provision of fair and equitable treatment and protection against expropriation of their investments by foreign states.[85] ISDMs were originally designed by developed countries to prevent the expropriation of the assets of foreign investors by developing countries.[86] The mechanism to achieve this was the provision of remedies, usually compensation for economic loss and damages, when state actions resulted in changes that were detrimental to the value of the foreign investments and there was an agreement between the home state of that foreign investor and the state where the investment occurred.[87] Dreyfuss and Frankel map changes in the emphasis on intellectual property protection in international law that privilege foreign investors.[88] They show how protection measures such as ISDMs have resulted in the 'assetization' of trade marks.[89] This means that trade marks function

[80] *TPP-11* ch 9.
[81] Australian Government Department of Foreign Affairs and Trade, *Regional Comprehensive Economic Partnership (RCEP) Negotiations: Discussion Paper on Investment* (26 May 2017) <http://dfat.gov.au/trade/agreements/negotiations/rcep/Pages/rcep-discussion-paper-on-investment-may-2017.aspx>.
[82] Tobin, above n 1, 162–163.
[83] See Melissa Crow, 'Smokescreens and State Responsibility: Using Human Rights Strategies To Promote Global Tobacco Control' (2004) 29(1) *Yale Journal of International Law* 209, 211; Carolyn Dresler and Stephen P Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28(3) *Human Rights Quarterly* 599, 633, 644.
[84] Cynthia Ho, 'A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings' (2016) 6 *UC Irvine Law Review* 395, 402–403.
[85] Ibid 403.
[86] Tania Voon and Andrew D Mitchell, 'Implications of International Investment Law for Plain Packaging of Tobacco Products: Lessons from the Hong Kong-Australia BIT' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) 137, 147.
[87] Australian Government Productivity Commission, above n 77, 265–271. See discussion of damages in Ho, above n 84, 422–424.
[88] Dreyfuss and Frankel, above n 1.
[89] Ibid.

as assets and the rights of those assets are privileged in enforcement mechanisms when they are foreign owned.[90]

Problematically, although there are increasing attempts to recognise the important relationship between business and human rights, non-state actors are not bound by the same human rights obligations.[91] ISDMs can have a potentially negative impact on both domestic regulatory autonomy and the protection of human rights.[92] Litigation of disputes in international arbitration can circumvent protection for human rights and other fundamental national interests found in domestic constitutions.[93] These claims are generally heard by ad-hoc tribunals, which are not subject to appeal.[94] The exceptions clauses associated with expropriation clauses and other conduct are not uniform.[95] There is limited opportunity for state-to-state negotiations once the action has commenced.[96] The tribunals are not bound by precedent, are usually selected with the involvement of litigants and can operate confidentially.[97] These circumstances introduce further uncertainty into domestic intellectual property law-making and can result in a chilling regulatory impact.[98]

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[90] Ibid 566–602.

[91] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 30th sess, Agenda Item 3, UN Doc A/HRC/30/44 (14 July 2015) [56]. See guidance in Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [51] ('*General Comment 14*'); Committee on Economic, Social and Cultural Rights, *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN ESCOR, 61st sess, UN Doc E/C.12/GC/24 (23 June 2017) ('*General Comment 24*').

[92] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 30th sess, Agenda Item 3, UN Doc A/HRC/30/44 (14 July 2015); Alfred-Maurice de Zayas, *Report of the Independent Expert on the Adverse Human Rights Impact of International Investment Agreements and Multilateral Free Trade Agreements, Including the Human Rights Impacts of WTO Law and Practice*, UN GAOR, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/40 (12 July 2016). Rimmer notes the importance of human rights but does not undertake detailed rights-based analysis of the problem: Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership', above n 22, 76–80. Tobin addresses social costs rather than emphasising human rights but notes the impact of regulatory chill on a 'right to health': Tobin, above n 1, 163.

[93] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 30th sess, Agenda Item 3, UN Doc A/HRC/30/44 (14 July 2015) [15]-[30].

[94] Ibid [15]; Ho, above n 84, 406–407.

[95] Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19 *Journal of International Economic Law* 27, 46–49.

[96] The state-state pre-arbitration negotiation clause in *CHAFTA* potentially provides an alternative approach: Anthea Roberts and Richard Braddock, *Protecting Public Welfare Regulation through Joint Treaty Party Control: A ChAFTA Innovation* (Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues, No 176, 20 June 2016) <https://academiccommons.columbia.edu/catalog/ac:201614>. See *General Comment 24*, UN Doc E/C.12/GC/24, [13].

[97] Tobin, above n 1, 157.

[98] Ibid.

The ISDMs contained in the investment chapter of the *TPP-11* recognise that relevant public interests include public health, safety, the environment and regulatory measures.[99] However, it seems likely that this clause could result in extensive litigation about its application.[100] More importantly, from a human rights perspective, these 'public welfare objectives' are not necessarily human rights objectives.[101] Human rights objectives are much broader than the examples given in this agreement of public health, safety, the environment and regulatory measures.

The *TPP-11* contains a further important restriction on ISDMs. This recognises states' interests in developing tobacco regulation without the threat of ISDMs. Article 29.5 enables states to deny investor claims challenging a tobacco control measure by electing that they do not proceed, either before the dispute commences or during proceedings.[102] This exception is directly relevant to the *Philip Morris-Australia* arbitration. However, it does not apply to measures involving tobacco leaf that 'is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product.'[103] Given the willingness of owners of tobacco-related trade marks to fund measures to attack plain packaging without being a party to those actions, it is foreseeable that this carve-out could be manipulated to attack future tobacco control measures.[104]

There have been widespread criticisms of the impact of ISDMs on domestic regulatory autonomy for states,[105] as exceptions for public interest-based state actions are limited and unclear.[106] In most cases, once the ISDM process initiates, there is no mechanism for

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[99] *TPP-11* arts 9.10(3)(d), 9.16, annex 9B(3)(b).
[100] Henckels notes inconsistent approach to interpretation of necessity: Henckels, above n 95, 48–49.
[101] Bartels argues that human rights protection clauses in European trade agreements could influence inclusion of human rights in references to public morals in exceptions clauses, but concludes that the terms of recently decided agreements have diminished the operative value of these general clauses: Lorand Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017) 202.
[102] *TPP-11* art 29.5.
[103] Ibid art 29.5, n 12.
[104] Thompson, above n 2; Katherine Shats, *Is the Trans-Pacific Partnership a Win for Tobacco Control? A First Look at the Tobacco Carve Out* (11 May 2015) O'Neill Institute for National and Global Health Law <http://oneill.law.georgetown.edu/is-the-trans-pacific-partnership-a-win-for-tobacco-control-a-first-look-at-the-tobacco-carve-out/>.
[105] Tobin, above n 1, 162–164. French notes its impact on the rule of law: Chief Justice Robert French, 'Trade Law and the Australian Courts' (Address delivered at the Law Council of Australia 2014 International Trade Law Symposium, National Portrait Gallery, Canberra, 18 September 2014) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frencjhcj18sep2014.pdf>; Dreyfuss and Frankel, above n 1, 565.
[106] Henckels argues that even though there have been improvements in drafting in the recent *Trans-Pacific Partnership Agreement*, there is still a lack of precision in the drafting of exceptions clauses that can preserve domestic regulatory autonomy where public interests are engaged: Henckels, above n 95. The use of the *Vienna Convention on the Law of Treaties* ('*VCLT*') 31(3)(c) to interpret customary law obligations for public health protection introduces further opportunities but also uncertainties about

involvement by the home state of the foreign investor, which may be more willing to consider public welfare objectives and competing international obligations than an economically-driven corporation accountable to shareholders. Assertions about the value of ISDMs and improvements to their form in the *TPP-11* implicitly recognise these criticisms.[107] New Zealand has moved away from ISDMs, using side letters to the *TPP-11* in some cases to exclude them or adopting a staged approach to disputes using non-binding third-party arbitrations in early stages.[108] One alternative approach that may offer some flexibility for states to protect human rights is the *China Australia Free Trade Agreement* ('*CHAFTA*').[109] *CHAFTA* exceptions to ISDMs include non-discriminatory measures 'for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order'.[110] Where a state alleges that a dispute is contrary to the exceptions provided, it can notify the non-party state and the investor claimant that this is the case, and a consultation period involving the non-party state will commence in an attempt to resolve the matter.[111] This constitutes a broader recognition that public policy matters might be critically relevant to an expropriation dispute, as the *Philip Morris-Australia* arbitration demonstrated.[112] The exception recognises the importance of measures that can be relevant to human rights protection and could circumvent lengthy arbitration that ultimately concludes that such measures constitute protected exceptions to breaches of ISDMs. It could be adapted in future agreements to recognise human rights concerns more broadly.

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whether that will be applicable in future arbitrations: *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [290]-[307]. See also Ronald Labonté, Ashley Schram and Arne Ruckert, 'The Trans-Pacific Partnership: Is It Everything We Feared for Health?' (2016) 5(8) *International Journal of Health Policy and Management* 487, 491–492.

[107] New Zealand Ministry of Foreign Affairs and Trade, *Investment and ISDS* <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/understanding-cptpp/investor-state-dispute-settlement/>; Australian Government Department of Foreign Affairs and Trade, *TPP-11 Outcomes: Investment* <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/tpp-11-outcomes-investment.aspx>.

[108] *Agreement between Australia and New Zealand Regarding Investor State Dispute Settlement, Trade Remedies and Transport Services*, 8 March 2018 (not yet in force) <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/official-documents/Documents/sl15-australia-new-zealand-isds.pdf>.

[109] *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) ('*CHAFTA*').

[110] Ibid art 9.11.4.

[111] Ibid art 9.11.5–9.11.8.

[112] Weihuan Zhou, 'Chinese Investment in Australia: A Critical Analysis of the China-Australia Free Trade Agreement' (2017) 18(2) *Melbourne Journal of International Law* 407, 427.

10.6 CHILLING REGULATORY ENVIRONMENTS, TRADE AGREEMENTS AND HUMAN RIGHTS

The potential for ISDMS to create a chilling regulatory environment is important to human rights. In a chilling regulatory environment, states are unwilling to implement policies or delay policy implementation, often because they fear that this will place them in breach of international law, particularly trade and investment laws, and they will be held accountable for that.[113] Activities of tobacco companies attacking plain packaging exemplify strategies of non-state actors to effect regulatory chill that restricts realisation of the right to health.[114] These activities include the *Philip Morris-Australia* litigation discussed in this chapter and Chapter 8. The WTO disputes provide a less palpable threat to the extent that they implement remedies differently, so that it is possible to avoid paying compensation by withdrawing a non-compliant measure.[115]

10.6.1 Tobacco and Chilling Regulatory Environments

The economic significance of ISDMs, which can involve billion-dollar claims, can heighten a chilling regulatory environment and greatly limit the ability of states to develop their own intellectual property policies.[116] The *Philip Morris-Australia* dispute is a particularly chilling example of this as it was eventually found to be an abuse of process.[117] Although a significant adverse costs order followed the finding, this was unlikely to compensate the Australian government for the resources utilised in defending the claim.[118] Costs orders are also not sufficient to address the potential chilling impact of the threat of costly litigation on states that have insufficient resources to defend them.[119] The lengthy nature of many disputes potentially amplifies chilling regulatory impact.[120]

Chilling regulatory impact has also been linked to another arbitration brought by Philip Morris against Uruguay.[121] Arbitration proceedings brought against Uruguay contested requirements of

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[113] Lukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigation and Regulatory Chilling Effect' (2014) 5(2) *European Journal of Risk Regulation* 242, 244.
[114] Eric Crosbie, *Constraining Government Regulatory Authority: Tobacco Industry Trade Threats and Challenges to Cigarette Package Health Warning Labels* (PhD Thesis, University of California, 2016) 284–289 <https://escholarship.org/uc/item/7tr077rr#main>. See Gruszczynski, above n 113.
[115] Gruszczynski, above n 113, 244–245.
[116] Dreyfuss and Frankel, above n 1, 565.
[117] *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015).
[118] *Philip Morris Asia Ltd v Australia (Final Award regarding Costs)* (Permanent Court of Arbitration, Case No 2012-12, 8 March 2017).
[119] Tobin, above n 1, 163.
[120] Gruszczynski describes a strategy of delay by corporations in Gruszczynski, above n 113, 247.
[121] Tobin, above n 1, 160–163.

the Uruguay government that 80 per cent of tobacco packaging be covered in health warnings and brands meet single presentation requirements.[122] Arbitration was commenced under a bilateral investment treaty between Switzerland and Uruguay. The treaty provides for '… each other's right not to allow economic activities for reasons of public security and order, public health or morality …'.[123] The dispute commenced in 2010 in the Permanent Court of Arbitration and was finally resolved in 2016 in favour of Uruguay.[124] Yet even where these exclusion provisions are upheld, the disputes are lengthy and expensive.[125]

Although Australia and Uruguay successfully defended their policies in arbitration, New Zealand acknowledged that disputes regarding plain packaging legislation in other countries delayed the introduction and implementation of plain packaging legislation in New Zealand.[126] Crosbie has conducted a comprehensive analysis of attempts to prevent tobacco regulation in Uruguay, Australia and New Zealand, and has identified significant evidence of regulatory chill in New Zealand and several other countries, corresponding to activities of tobacco companies in these countries.[127] Tobin provides evidence that the impact of tobacco company campaigns against plain packaging in Australia and Uruguay restricted the implementation of similar policies in Mexico, Guatemala, Honduras and Chile.[128] In arbitration, Uruguay submitted that New Zealand, Costa Rica and Paraguay had been deterred from introducing similar packaging legislation by the threat of litigation.[129]

A number of aspects of the Uruguay arbitration contribute to its chilling effect. The fact of the arbitration reinforced threats made by tobacco companies to other states that they would contest tobacco packaging measures. The length of the arbitration (over five years) reinforced uncertainty.[130] The financial and resource cost of the arbitration deterred other states from introducing legislation that they might have been able to defend only after costly and lengthy

[122] *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [9]-[11].
[123] *Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments*, 7 October 1988, 1976 UNTS 389 (entered into force 22 April 1991) art 2(1).
[124] Ibid [590], [273].
[125] *Philip Morris Asia Ltd v Australia (Final Award regarding Costs)* (Permanent Court of Arbitration, Case No 2012-12, 8 March 2017); Gartrell, above n 9.
[126] Gruszczynski, above n 113, 245.
[127] Crosbie, above n 114, 284–289.
[128] Tobin, above n 1, 161–162.
[129] *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [367]; William New, 'Australia Accuses Tobacco Industry Of "Regulatory Chill" In WTO Plain Packaging Case' *Intellectual Property Watch (online)*, 20 November 2014 <http://www.ip-watch.org/2014/11/20/australia-accuses-tobacco-industry-of-regulatory-chill-in-wto-plain-packaging-case/>.
[130] The request for arbitration was received in February 2010: *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [15].

arbitration proceedings.[131] Despite Uruguay's overall success, it was only awarded part of its legal fees.[132] The final aspect was the scrutiny of the processes of the Uruguay government in relation to the implementation of the single presentation requirement. The dissenting judgment found these processes to be inconsistent standards of fair and equitable treatment as they were arbitrary and disproportionate.[133] Inconsistencies between administrative and judicial decisions about the Uruguay packaging requirements and the failure to provide a judicial means to address these directly was determined to be a further breach of fair and equitable treatment protections.[134] The dissenting judgement is important because it recognises some of the justifications for introducing ISDMs into trade agreements based on concerns about the legal processes of investment states. They also introduce complex human rights considerations. The rule of law considerations raised in relation to inconsistent decisions on packaging requirements are directly relevant to human rights protections for civil rights.[135] In the dissenting judgment, the standard applied in assessing whether the measures were arbitrary suggests limited latitude available to states when formulating policies of this nature.[136] The dissenting judgment rejected the use of a 'margin of appreciation' test, which can be found in relation to regional protection for the human right to property in *Article 1, Protocol No 1 of the European Court of Human Rights*.[137] This margin of appreciation test could address some of the concerns about the democratic impact of foreign investors using ISDMs to influence government policy in investment states. The test could also support the integration of human rights laws and investment laws. It is beyond the scope of this thesis to provide a detailed analysis of the human rights implications of the judgment. However, it remains important that the Uruguay disputes were a relevant influence on the chilling impact of the WTO disputes and the *Philip Morris-Australia* disputes. Ho notes that the decision was not unanimously in favour of Uruguay and the dissenting decision could be preferred in a subsequent arbitration.[138]

The initiation of lengthy investor-state dispute proceedings in Australia and Uruguay increased the palpable risk of disputes occurring in other countries and influenced the introduction of plain packaging legislation in those countries.[139] Chapter 8 has identified the importance of tobacco control measures to health protections found in *ICESCR* and the *CRC*. The *FCTC* has

[131] Tobin, above n 1, 161–162; Crosbie, above n 114, 284–289.
[132] *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [590].
[133] Ibid [146]-[196] (Mr Born).
[134] Ibid [81] (Mr Born).
[135] Ibid [42] (Mr Born).
[136] Ibid (Mr Born).
[137] Ibid [85]-[87], [181-191] (Mr Born). Cf *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [398]-[401], [409].
[138] Ho, above n 84, 452–453.
[139] Crosbie, above n 114, 286–287.

weight as a binding international agreement but also as an interpretation of right to health obligations in relation to tobacco control.[140] Plain packaging measures engage core obligations and core minimum obligations. Crosbie's findings support regulatory chill concerns previously identified by Gruszczynski.[141] This provides evidence of the strong influence of third-party actors on states, which can restrict the implementation of human rights obligations.

10.6.2 TRIPS Flexibilities

In a chilling regulatory environment, states may be unwilling to test whether policy can be shaped to use the flexibility mechanisms of *TRIPS* to privilege justifiable domestic interests.[142] Ho has linked the use of ISDMs to restricted use of *TRIPS* flexibility mechanisms.[143] She finds that ISDMs are often interpreted in favour of investors, but they are also interpreted inconsistently, which contributes to their chilling impact.[144] She argues that the public-private nature of the disputes lacks democratic accountability in most cases, and that there is only limited recognition of the potential overlap between ISDMs and *TRIPS* flexibilities.[145] These arguments reinforce earlier observations by Taubman that the absence of disputes engaging Articles 7 and 8 is problematic for states seeking guidance in exercising flexibility.[146] The explicit recognition of the relevance of Articles 7 and 8 to the interpretation of Article 20 in *Australia – Plain Packaging Measures* may improve this situation.

Judd contends that many of the concerns that have prompted forum shifting away from *TRIPS* to intellectual property provisions and chapters in bilateral and regional trade agreements result from a failure to recognise that *TRIPS* is no longer unnecessarily broad.[147] Arguably, the broad-reaching nature of *TRIPS* is appropriate, given trade expansion and massive changes in technology and globalisation since the formulation of the agreement.[148] These concerns about the reach of *TRIPS* can be partially addressed if states concentrate on making *TRIPS* an effective framework for calibrating domestic intellectual property legislation, where necessary

[140] Oscar A Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52(Suppl 2) *Salud Publica De Mexico* S288, S293.
[141] Crosbie, above n 114, 284–289; Gruszczynski, above n 113.
[142] Gruszczynski, above n 113, 244.
[143] Ho, above n 84, 425–426.
[144] Ibid 408–411.
[145] Ibid 421.
[146] Antony Taubman, 'Australia's Interests Under TRIPS Dispute Settlement: Trade Negotiations by Other Means, Multilateral Defense of Domestic Policy Choice, or Safeguarding Market Access' (2008) 9(1) *Melbourne Journal of International Law* 217, 234.
[147] Patricia L Judd, 'The TRIPS Balloon Effect' (2014) 46(2) *New York University Journal of International Law & Politics* 471.
[148] Ibid 497–508.

emphasising the flexibilities that are present in the *TRIPS* agreement.[149] Judd's emphasis on calibration is an extremely important consideration to assessing whether the WTO is an appropriate forum for reducing fragmentation between intellectual property and human rights. Calibration influences whether the WTO dispute resolution mechanisms are suitable for conflict-rule integration.[150]

Although many argue that these flexibilities have been little considered by the dispute settlement bodies of the WTO,[151] there has been an increased emphasis on context in the *China Enforcement* decision[152] and the *Geographical Indications* decision.[153] *Australia – Plain Packaging* shows that flexibility mechanisms can support the incorporation of appropriate national interests, and this recognition can support the legitimacy and centrality of *TRIPS*.[154]

Other suggestions that could improve the impact of bilateral and regional trade agreements on domestic regulatory autonomy and protection of human rights include establishing *TRIPS* provisions as a ceiling and then permitting non-violation complaints for *TRIPS* where other agreements overreach this ceiling.[155] These are unlikely to be appealing to net exporters of intellectual property.[156] If it is not possible to prevent regime shifting from reducing the operation of *TRIPS* flexibilities, it is necessary to consider what other approaches are required to promote a human rights-based approach to negotiating trade agreements that contain intellectual property provisions.

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[149] Ibid 539–540; Patricia L Judd, 'Retooling TRIPS' (2014) 55(1) *Virginia Journal of International Law* 117, 141–144; Patricia L Judd, 'Toward a TRIPS Truce' (2011) 32(4) *Michigan Journal of International Law* 613, 661–662.

[150] Henning Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health' (2013) 9(2) *Journal of Private International Law* 308, 331.

[151] See, eg, Judd, 'Retooling TRIPS', above n 149, 123, 144; Taubman, above n 146, 234–235.

[152] Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R (26 January 2009); Dreyfuss and Frankel, above n 1, 565–566.

[153] Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs. Complaint by United States*, WTO Doc WT/DS174/R (15 March 2005); Dreyfuss and Frankel, above n 1, 565.

[154] *Australia – Plain Packaging Measures*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2598], [7.2604]. Taubman argues that 'enlightened domestic policymaking within the treaty framework' will enhance *TRIPS*: Antony Taubman, 'TRIPS Jurisprudence in the Balance: Between the Realist Defense of Policy Space and a Shared Utilitarian Ethic' in Christian Lenk, Nils Hoppe and Roberto Andorno (eds), *Ethics and Law of Intellectual Property: Current Problems in Politics, Science and Technology* (Ashgate, 2007) 113, 120.

[155] Annette Kur and Henning Grosse Ruse-Khan, 'Enough Is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection' in Annette Kur and Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) 359, 366; Susy Frankel, 'Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes' (2009) 12(4) *Journal of International Economic Law* 1023. Judd notes advantages but ultimately argues against non-violation complaints: Judd, 'Toward a TRIPS Truce', above n 149.

[156] Judd describes ways that non-violation complaints might be used against 'IPR maximalists': Judd, 'Retooling TRIPS', above n 149, 144–149.

10.6.3 Recommendations for Improvement

ISDMs should be subject to greater human rights scrutiny as protections provided within governing agreements are often limited to narrower exceptions clauses.[157] Greater scrutiny can encourage businesses to bring actions that do not circumvent human rights standards.[158] This is consistent with recent recommendations by the Committee on Economic, Social and Cultural Rights regarding businesses and economic, social and cultural rights.[159]

The United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order lists numerous cases of disputes impacting negatively on human rights, including the *Philip Morris-Australia* investor-state arbitration.[160] He recommends the abolition of the investor-state dispute settlement system and its replacement with potential alternatives, including an international investment court, state-to-state settlement before the International Court of Justice, and adjudication by domestic courts bound by the protections for civil rights contained in the International Covenant on Civil and Political Rights.[161] These recommendations are aimed at enhancing uniformity and reducing the ability of investor businesses to use these actions, or the threat of them, to directly change policies made by democratic governments in accordance with their international obligations.[162] Proposals for a European Investment Court could assist.[163] Mechanisms in the *TPP-11* that address popular criticisms of ISDMs include mechanisms for addressing frivolous claims, waiver of rights to bring other legal proceedings, shorter limitation periods for claims, requirements for greater transparency and a code of conduct for arbitrators. [164]

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[157] See Henckels, above n 95, 46–50.
[158] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 70th sess, Agenda Item 73(b), UN Doc A/70/285 (5 August 2015) [9]. See also Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/40 (12 July 2016). *General Comment 24* sets out a number of instances where states are obliged to perform human rights scrutiny of corporate entities operating in their territory: *General Comment 24*, UN Doc E/C.12/GC/24, [7]-[24].
[159] *General Comment 24*, UN Doc E/C.12/GC/24.
[160] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 70th sess, Agenda Item 73(b), UN Doc A/70/285 (5 August 2015) [27]-[37].
[161] Ibid [55]. But see later concerns about an investment court: Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/40 (12 July 2016) [2], [43]-[54].
[162] Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, UN GAOR, 70th sess, Agenda Item 73(b), UN Doc A/70/285 (5 August 2015) [23]-[24].
[163] However, Ho identifies concerns that this might create inconsistencies with WTO decisions: Ho, above n 84, 430.
[164] New Zealand Ministry of Foreign Affairs and Trade, above n 107; Australian Government Department of Foreign Affairs and Trade, above n 107.

Unwillingness to implement *TRIPS* flexibilities could be addressed by modifying provisions in future trade agreements. Ho argues that limiting the scope of investments covered by future agreements to exclude intellectual property could be effective but recognises that this is unlikely.[165] Alternatively, where there are intellectual property claims, the operation of expropriation and fair and equitable treatment claims could be modified to exclude indirect appropriation in circumstances of no abuse of process or narrowing the scope of fair and equitable treatment claims.[166] Another approach would be amending the dispute settlement process for claims that engage *TRIPS* so that they were limited to state-to-state actions or required state consent for investor-state claims to proceed.[167] This is similar to the *ChAFTA* model described above. Alternatively, claims that engage adjudication of *TRIPS* rights could be disallowed.[168] Finally, a hybrid dispute settlement mechanism could include the WTO in relevant arbitrations.[169] All of these suggestions are thoughtful and useful for prospective agreements. However, although only two prospective agreements with ISDMs and *TRIPS*-plus provisions have been identified in this chapter, there are already over 3000 trade agreements in operation.[170] States need to consider how to address potential claims in those agreements, even though new agreements might modify old ones. More problematically, the focus of these suggestions is to return emphasis to *TRIPS* flexibilities. The findings in Chapter 8 are that the current approach to both arguing and interpreting these provisions does not focus on human rights, so important human rights obligations may continue to be excluded, even if other trade agreements were interpreted consistently with *TRIPS*.[171]

Domestic regulatory autonomy to develop intellectual property policy that is nationally appropriate and consistent with other international obligations, such as human rights obligations, is likely to be further restricted by the inclusion of ISDMs in the *TPP-11*.[172] This has broader consequences for systemic integration. There is great potential for different outcomes between WTO disputes and analogous disputes conducted in arbitration, which can

[165] Ho, above n 84, 460–462.
[166] Ibid 461–462.
[167] Ibid.
[168] Ibid 462–463.
[169] Ibid 461–465.
[170] Ibid 407.
[171] This approach can be seen in the failure to rely on human rights arguments supported by *TRIPS* Article 7 and 8 in Australia's arguments in the WTO Dispute, despite the relevance demonstrated in analysis in Chapter 8 of this thesis. See *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging. Integrated Executive Summary of Australia's Submissions*, WTO Doc WT/DS435/441/458/467 (23 March 2016) ('*Summary of Arguments*').
[172] See Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership', above n 22, 78.

contribute to further fragmentation and uncertainty in international law.[173] Chapter 3 has considered the potential for *TRIPS* dispute resolution mechanisms to integrate human rights concerns, using a range of interpretive tools linked to the flexibility provisions of *TRIPS*. If states are unwilling to exercise these flexibility mechanisms, it is unlikely that human rights obligations can be effectively integrated into WTO dispute processes.

Increasing transparency and broader participation in ISDMs could improve surrounding human rights culture. This could increase the inclusion of amicus curiae briefs that would engage human rights concerns.[174] Transparency concerns are broadly relevant to the negotiation of trade agreements and will be discussed below. They are also specifically important to human rights and the human right to health.[175] Transparent negotiations can influence effective participation by a broad range of actors. Ho notes that public consultation has influenced consideration of A European Investment Court in recent trade negotiations.[176] This can generate further transparency and participation.[177]

10.7 HUMAN RIGHTS-BASED APPROACH TO TRADE AGREEMENTS

This section considers a range of measures that could promote a stronger human rights culture in the negotiation of trade marks. It builds on existing recommendations for a human rights-based approach to trade agreements using the analysis in this chapter and the findings of the case studies to provide an Australian perspective.

10.7.1 Transparency, Participation and Human Rights Impact Assessments

A key concern that has been identified is transparency and participation in the negotiation of trade agreements. This inclusiveness is critical for democracy.[178] Academic and civil society responses to *ACTA* show that transparency can also be critically important for understanding

[173] Ho and Dreyfuss and Frankel identify problems with the integrity of the investor state dispute system and suggest that this may result in inconsistencies between arbitrations and *TRIPS*: Ho, above n 84, 398; Dreyfuss and Frankel, above n 1, 565.
[174] Ho, above n 84, 466–467.
[175] Ho cites an example of Colombia removing approval for a generic drug following an investment claim filed by an American pharmaceutical, which received little publicity: ibid 468.
[176] Ibid 465. However, there are also concerns within Europe about the appropriateness of the arbitration mechanism that are currently being considered by the Court of Justice of the European Union (CJEU): Belgian Federal Public Service Foreign Affairs, *CETA – Belgian Request for an Opinion from the European Court of Justice* (13 March 2018) 2 <https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf>.
[177] Ho, above n 84, 465.
[178] Thomas Cottier, Dannie Jost and Michelle Schupp, 'The Prospects of TRIPS-Plus Protection in Future Mega-Regionals' in Thilo Rensmann (ed), *Mega-Regional Trade Agreements* (Springer, 2017) 191.

TRIPS-plus provisions once agreements are formed.[179] Further, transparency in the process is necessary to preserve the utility of trade agreements so that, unlike *ACTA*, they enter into force.[180] This is particularly important for human rights concerns that engage the rights of vulnerable peoples, as they often depend on civil society organisations to advocate on their behalf.[181] Van Ham and Chappell note that deficiencies in democratic protection of human rights in Australia restrict protection for vulnerable groups.[182] Ongoing assessment of human rights during negotiation, using a broader approach to relevant human rights, requires both comprehensive human rights impact analysis and the political will to engage with that analysis and be accountable to the human rights obligations engaged. The sustainability impact assessment approach taken by the European Union has included human rights assessments in combination with economic, social and environmental assessments since 2012.[183] It provides important guidance for developing assessments in this context, but it is difficult to assess how much influence this process has on negotiations.[184]

The interrelated nature of human rights implications of intellectual property is evident from the case study analysis. This suggests the importance of detailed human rights impact studies with recognition that human rights are interdependent.[185] The case studies show that a rights-based approach to health engages more complex assessments than focusing only on the relationship between trade marks and the right to health. The way in which this type of human rights-based approach to health can be adapted beyond health-based analysis will be considered in Chapter 11. The Welfare Preservation Questions[186] suggested by Helfer and Austin to best preserve existing international intellectual property obligations are applied to the case studies. The considerations in these questions are relevant to enhancing systemic integration between the two

[179] Carolien van Ham and Louise Chappell, 'Democracy and Human Rights: A Tripartite Conceptual Framework' (2017) 23(2) *Australian Journal of Human Rights* 143, 157–160.
[180] Susan K Sell, 'The Dynamics of International IP Policymaking' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2nd ed, 2014) 76.
[181] For example, Goldblatt, above n 4, 269.
[182] van Ham and Chappell, above n 179, 154.
[183] European Commission - Trade, *Handbook for Trade Sustainability Impact Assessment* (Publications Office of the European Union (April 2016), 2nd ed) 4–5. <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF>.
[184] Ibid 21-22.
[185] Lisa Forman, 'From TRIPS-Plus to Rights-Plus? Exploring Right to Health Impact Assessment of Trade-Related Intellectual Property Rights through the Thai Experience' (2012) 7(2) *Asian Journal of WTO and International Health Law and Policy* 347, 347.
[186] Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 516–521; Chapter 1, Section 1.3.3.3.

fields, although they may be less useful in the absence of sufficient data in prospective trade agreements.[187]

Transparency and human rights assessments during negotiations are important. However, human rights scrutiny needs to continue once agreements are concluded. It needs to be recognised in the implementation phase, as it was in Europe following broad human rights criticisms and public protest regarding *ACTA*.[188] Increased transparency and participation has been evident in two recent trade negotiations by the European Union with Canada and the United States, and Ho argues that participation has influenced the intended development of a regional investment court.[189]

The criticisms identified in Chapter 5 of the recognition of the human rights concerns in scrutiny processes are problematic for transparency, participation and accountability.[190] They need to be improved in ongoing and future negotiations. In Australia, the depth of the human rights scrutiny conducted by JSCOT and the AJPCHR also needs to be addressed.[191] JSCOT could benefit from working with the AJPCHR or AHRC (if the mandate of the AHRC were to be expanded to include *ICESCR*), but there needs to be greater accountability for negative findings.[192] Finally, the mechanisms for participation and accountability for human rights concerns need to be ongoing features of the agreements. Ho suggests that greater inclusion of amicus curiae briefs in investment arbitration is also important.[193] Continued recognition of due process and transparency in determining certain claims, such as fair and equitable treatment claims, is also important.[194] Ongoing transparency at multiple levels remains relevant for effective human rights scrutiny of the operation of investment agreements and associated disputes.

10.7.2 International Cooperation and Assistance

Human rights obligations of international cooperation and assistance should also be considered in the negotiation of trade agreements. Chapter 8 recognised Australian leadership in

[187] The importance of broad participation and data collection to human rights impact assessment has been emphasised in Forman's analysis of the *Thai-US Trade Agreement* considered in Chapter 4: ibid 361–362, 365–366, 369.
[188] Sell, above n 180, 79–80.
[189] Ho, above n 84, 465.
[190] Goldblatt, above n 4, 274–275; 'Letter from Anand Grover, United Nations Special Rapporteur on the Right to Health, to Australian Government Representative', 19 July 2011 <https://spdb.ohchr.org/hrdb/19th/AL_Australia_19.07.2011_(4.2011).pdf>.
[191] Williams and Reynolds, above n 3, 130–137.
[192] Goldblatt has raised related concerns about the effectiveness of the AJPCHR: Goldblatt, above n 4, 274–275.
[193] Ho, above n 84, 465–467.
[194] Henckels, above n 95, 39–40.

implementing the *Framework Convention on Tobacco Control*. The anti-counterfeiting case study and other prospective agreements with anti-counterfeiting provisions demonstrate the complexity of obligations of international cooperation and assistance for the right to health. There is international evidence of the health threat posed by counterfeit operations. Chapter 9 links this evidence to counterfeit activities in Australia. International cooperation is important in addressing the activities of counterfeiters. However, the agreed mechanisms for international cooperation to address counterfeiting, which are increasingly found in trade agreements, need to be scrutinised to ensure that they are consistent with human rights.

Some of the factors contributing to detecting counterfeiting in Australia are common internationally. Counterfeiting is difficult to detect worldwide as digital technology permits increasingly sophisticated counterfeits to be produced.[195] Time and economic resource constraints mean that existing measures for detection are used selectively and are unlikely to detect all threats.[196] Where resources are extremely limited, this may be even more problematic.[197] Obtaining data and effectively detecting counterfeit goods are also resource-intensive exercises and complaints about data collection are relevant to many jurisdictions,[198] particularly in relation to health-related data.[199] Chapter 9 has identified concerns about the effectiveness of the anti-counterfeiting mechanisms used in Australian legislation. This engages questions as to the appropriateness of these approaches to progressive realisation of the right to health. Detailed and restrictive requirements for addressing counterfeiting may require resources that could be more usefully employed implementing more effective approaches to detecting counterfeiting. These may be possible with the use of emerging technology, such as blockchain.[200] International leadership in implementing the approaches could benefit other states that also experience problems effectively detecting counterfeiting.[201]

However, despite international cooperation obligations to consider human rights in international agreements and obligations, fragmentation persists. Analysis of the appropriate balance between international legal obligations in relation to the use of trade marks on tobacco packaging

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[195] Jose, above n 10, 52–53, 55–57; Tim K Mackey and Gaurvika Nayyar, 'A Review of Existing and Emerging Digital Technologies to Combat the Global Trade in Fake Medicines' (2017) 16(5) *Expert Opinion on Drug Safety* 587, 597.
[196] See Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 27 February 2017, 8–9 (Michael Pezzullo); Fink, Maskus and Qian, above n 64, 34–35.
[197] Maskus, above n 69, 226–228; Correa, above n 70, 67–69, 74.
[198] Michele Forzley, *Counterfeit Hard Goods and The Public's Health and Safety: A Study of Interventions* (Widener School of Law, Health Law Institute, 1 September 2012) 6 <http://micheleforzley.com/uploads/3/5/5/3/3553263/study_report_v5_9_1_12.pdf>.
[199] Gunilla Backman et al, 'Health Systems and the Right to Health: An Assessment of 194 Countries' (2008) 372(9655) *The Lancet* 2047, 2049–2053.
[200] See Mackey and Nayyar, above n 195.
[201] *ACTA* Preamble.

identifies many competing interests. A number of these interests, such as public health, human rights and development, are protected by other agreements overseen by institutions that are clearly distinct from the WTO, and are not always clearly protected by bilateral and regional trade agreements.[202] Even though there are strong arguments as to the relevance of other bodies of law to dispute settlement procedures, they are rarely given weight.[203] The engagement of the WTO with other institutions in relation to intellectual property is relatively limited.[204] Further consideration needs to be given as to how these potentially conflicting bodies of international regulation can engage.

Increased human rights scrutiny should identify the interrelated human rights issues engaged by recent trade agreements that Australia has negotiated. The *TPP-11* and further negotiations for *RCEP* raise concerns that have been identified in this chapter. These concerns suggest that states should be cautious in negotiating agreements of this nature, which formalise procedural approaches to addressing counterfeit activity that require expensive judicial machinery. This may reduce the resources available to effectively detect the threat and deter it in a manner that is appropriate to the progressive realisation of the right to health. This is relevant to obligations of international cooperation as it may negatively impact on the ability of other states to realise health obligations progressively.[205] These effectiveness considerations are also important in assessing whether the existing mechanisms provided in *TRIPS* might be used more effectively. Where obligations are not effective, a precedent exists for amendment of *TRIPS*.[206] It is much harder to unravel a 'noodle bowl' of trade agreements.[207]

10.8 CONCLUSION

This chapter has highlighted important structural features surrounding the protection of trade mark law in the bilateral and regional environment which demonstrate that intellectual property

[202] See Valentina S Vadi, 'Trade Mark Protection, Public Health and International Investment Law: Strains and Paradoxes' (2009) 20(3) *European Journal of International Law* 773, 776–781.
[203] Klaus D Beiter, 'Establishing Conformity Between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights' in Hanns Ullrich et al (eds), *TRIPS Plus 20: From Trade Rules to Market Principles* (Springer, 2016) 445, 497–498.
[204] Ibid 496–498.
[205] Activities designed to use regime shifting to influence developing states to adopt these agreements potentially engage concerns about conduct in developing international agreements: *General Comment 14*, UN Doc E/C.12/2000/4, [39].
[206] *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (2 September 2003) (Decision of 30 August 2003); *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540/Corr.1 (29 July 2005) (Decision of 30 August 2003: Corrigendum); *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (8 December 2005) (Decision of 6 December 2005).
[207] The difficulties of this were discussed in relation to Trans-Pacific Partnership negotiations in Deborah Elms, 'The Trans-Pacific Partnership: The Challenges of Unraveling the Noodle Bowl' (2013) 18(1) *International Negotiation* 25.

protection is often preferred over human rights protection. Although this thesis has recommended a cautious approach to using normative or doctrinal claims to assert the primacy of human rights, it has identified no normative or doctrinal support for the primacy of intellectual property law. The type of protection privileged by these agreements is usually expanded trade mark protection, for which there is limited theoretical justification. These restrictions on the realisation of trade marks reinforce the justification for developing a positive human rights culture for trade marks.

Protection of human rights values in disputes about trade mark protection is not uniform. In *JT International*, all of the relevant human rights issues were not able to be addressed, and Australia would need to introduce broad justiciable protection for human rights for this to change.[208] The investment agreement governing the dispute in *Philip Morris-Australia* severely limited the potential for recognition of human rights objectives.[209] The analysis in Chapter 8 suggests that human rights could have been integrated into the WTO disputes, but these arguments were not made, possibly because there was insufficient recognition of human rights in the earlier policy development of plain packaging measures. This suggests that change is possible, but states need to emphasise the importance of human rights for more effective recognition of human rights to occur.

A broader analysis of non-WTO trade agreements, particularly where they contain ISDMs, suggests more pervasive problems. This chapter has used findings from the case studies to argue that certain features could be emphasised as part of a human rights-based approach to future trade agreements. These would foster a human rights culture for trade marks. Although there is some evidence of improvement, significant work needs to be done on this, including political recognition of the ongoing relationship and potential conflicts between intellectual property and human rights in trade agreements.

Justifying intellectual property by adopting a traditional utilitarian approach requiring a balance between users and creators is meaningful only if it recognises that this balance has been significantly impacted by the way in which intellectual property has increasingly become part of multilateral, plurilateral and bilateral agreements. This is most evident where intellectual property obligations are directly addressed, such as in *TRIPS* and intellectual property chapters of trade agreements. However, there are other important agreements that impact on intellectual property. The potential chilling impact of bilateral agreements on the autonomy of states to

[208] *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v Commonwealth of Australia* (2012) 250 CLR 1.
[209] *Agreement with Hong Kong Concerning the Promotion and Protection of Investments*, opened for signature 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

make changes to intellectual property rights in the public interest has been reinforced by the *Phillip Morris-Australia* arbitration. The inclusion of investor-state dispute settlement provisions in the *TPP-11* indicates that this may be an increasingly relevant consideration, as the interpretation of exception provisions is likely to vary between agreements and arbitration systems.

This chapter has considered how approaches to transparency, participation and accountability and recognition of international cooperation and assistance could improve future agreements. The following chapter will consider links between regional and bilateral trade agreements and the models conceptualising the relationship between human rights and intellectual property.

CHAPTER ELEVEN MODELLING A HUMAN RIGHTS CULTURE FOR TRADE MARKS: AUSTRALIA AND BEYOND

11.1 INTRODUCTION

A culture for trade marks that fosters and protects human rights can have many dimensions. This chapter reconsiders the relationship between trade marks and human rights and identifies appropriate tools and approaches for building a human rights culture for trade marks that can be modified to be domestically appropriate. It integrates the analysis from all previous chapters and the findings of each case study. It uses the findings of conflict and potential conflict between human rights law and intellectual property law in each case study to reassess the models introduced in Chapter 1. Using domestic case studies to reassess the models recognises that human rights obligations are primarily owed by states to individuals, and intellectual property laws continue to operate within national systems, as demonstrated in Chapters 5 and 7. Chapters 3, 4 and 6 have identified the international legal obligations that govern these domestic laws.

The application of the models to the case studies in Section 11.2 of this chapter also engages some of the broader international law issues that can impede the development of a regulatory environment for trade marks that would promote and foster human rights. The regime shift towards bilateral and regional trade agreements analysed in Chapter 10 can restrict the effectiveness of the analytical tools prescribed by each of the models. Despite these limitations, the analytical approaches provided permit us to address considerations relevant to the relationship between human rights law and intellectual property law. In addition to this positivist framework, the analysis in this chapter considers normative aspects of the relationship identified in Chapter 2 that are important to doctrinal legitimacy. Normative considerations can justify the primacy of human rights obligations, particularly where those obligations conflict with expanded intellectual property obligations.

Section 11.3 uses the case study analysis to develop a further analytical approach to assess the relationship between human rights and intellectual property. The human rights-based assessment tool used in each of the case studies to focus on human right to health considerations can be more broadly developed as a rights-based approach to intellectual property. The analytical approach developed in this chapter contributes to the field as it permits states to more completely recognise their economic, social and cultural rights obligations, including those related to progressive realisation and international cooperation and assistance.

Section 11.4 uses the case study analysis to explain the way in which the features of each model can be integrated as part of a human rights culture for trade marks, both domestically and internationally. It recognises that each state will use analytical tools differently to correspond to local conditions.[1] Recognition of national differences permits beneficial aspects of earlier proposals to be integrated using a plurality of analytical approaches. This proposal for a pluralistic approach contributes towards addressing conflicts and potential conflicts between intellectual property and human rights, and to understanding the relationship between trade marks and human rights.

11.2 How Do the Models Apply to Case Studies of Domestic Law?

Chapter 1 introduced models that are relevant to understanding the relationship between human rights and intellectual property. This provided a conceptual framework for the analysis of the relationship between human rights and intellectual property that was developed in Chapters 2 and 3 by considering normative and doctrinal dimensions of the relationship. This section considers the conflict, coexistence and prescriptive approaches introduced in Chapter 1. It synthesises findings from earlier chapters to test and confirm the conclusion from Chapter 1 that the best approach to addressing the relationship between intellectual property and human rights is a prescriptive model. It considers the application of each of the three key prescriptive models identified in Chapter 1 to the examples of domestic law analysed in each of the case studies. This is an important contribution to the literature as it helps to understand the practical utility of the human rights framework for intellectual property proposed for each model.

11.2.1 Conflict Models

A central tenet of the conflict models is that conflicts between human rights and intellectual property can be resolved by applying the principle of human rights primacy.[2] This principle is also relevant to the prescriptive models.[3] The normative justifications for human rights primacy were considered in Chapter 2. Although there is a normative basis in natural law for arguing for

[1] This can have greater significance. Petersmann recognises the importance of constitutional pluralism to theories of justice: Ernst-Ulrich Petersmann, 'Human Rights and International Economic Law' (2012) 4(2) *Trade Law and Development* 283, 301.

[2] Laurence R Helfer, 'Towards a Human Rights Framework for Intellectual Property' (2006) 40 *University of California Davis Law Review* 971, 985–987.

[3] Yu applies primacy: Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40(3) *University of California Davis Law Review* 1039, 1092–1093. Geiger modifies this slightly by focusing on fundamental rights: Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 661.

human rights primacy, the chapter recognised that the theoretical justifications for the primacy of human rights law are also grounded in a positivist approach.[4] Positivist and normative approaches to human rights can both be considered using a spectrum that recognises both what the relevant law is and what it ought to be.[5] This spectrum is applied to areas of potential conflict between different fields by analysing the extent of relative detriment that the relevant norms engage.[6]

Interpretative tools in international law could be used to address conflicts between intellectual property and human rights, but the structure of the international legal framework means that this is difficult in practice. Chapter 3 has identified fragmentation between human rights law and intellectual property law. This means that, although interpretive tools can be used to address conflicts between international laws, this is complex where the fields of law are separate.[7] Dispute resolution mechanisms could address fragmentation of this nature, yet Chapter 3 concluded that there are no institutional mechanisms that currently operate to effectively adjudicate considerations of human rights law and intellectual property law.[8]

Even if a dispute resolution forum could adjudicate between the two fields, application of the conflict model is limited, as the doctrinal basis for human rights primacy, applying interpretative rules of hierarchy, is arguable but not definitive. A large body of obligations in intellectual property agreements and trade agreements bind Australia. It is not doctrinally sound to ignore those obligations in the absence of a clear doctrinal justification for human rights primacy.[9] There is limited state practice of straightforward applications of human rights primacy

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[4] Samuel Murumba, 'Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property' (2012) 38(1) *Monash University Law Review* 119.

[5] Murumba argues that command sanction theory is also relevant to the way in which states recognise global intellectual property law: ibid 134, 136–137. This contrasts to the primarily consensus-based approach to enforcement of human rights law, which has been described as 'toothless': Rhona KM Smith, 'Human Rights in International Law' in Michael Goodhart (ed), *Human Rights: Politics and Practice* (Oxford University Press, 3rd ed, 2016) 60, 72.

[6] Murumba, above n 4, 144–147.

[7] Henning Grosse Ruse-Khan, *Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 15–17. See generally International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by the Chairman, Martti Koskenniemi*, UN GAOR, 58th sess, UN Doc A/CN.4/L.682, A/CN.4/L.682/Add.1, A/CN.4/L.682/Corr.1 (13 April 2006).

[8] See Henning Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health' (2013) 9(2) *Journal of Private International Law* 308. Although the International Court of Justice has jurisdiction over human rights agreements and the *Paris Convention*, it has never been used to adjudicate disputes pursuant to the *Paris Convention*: Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press, 2015) 323.

[9] *Pacta sunt servanda* is codified in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

where conflicts of intellectual property law and human rights law occur.[10] Cases in which fundamental constitutional rights are asserted to restrict intellectual property involve complex considerations.[11] Accordingly, the applicability of the conflict model is problematic.

Nonetheless, the findings in Chapters 6 and 10 that the existing international legal framework appears to favour the primacy of international intellectual property law, without normative or doctrinal justification, should be analysed and addressed. The complex nature of the relationship between intellectual property and human rights is apparent from the case studies. To understand how intellectual property primacy impacts human rights obligations, detailed scrutiny of human rights implications of existing and prospective legislation, and of prospective international agreements relevant to intellectual property protection, is critically important.

11.2.2 Coexistence Models

An alternative approach to a conflict model is a coexistence model for resolving the relationships between intellectual property and human rights. One tenet of this model is the similarity of the underlying objectives for each of the fields.[12] Chapter 2 disputed the extent of similarity between the underlying objectives of human rights law and the two dominant justifications for trade mark law: utilitarian economic theory and natural rights theory, which commonly uses Lockean labour theory to justify property rights.[13] The dominant utilitarian approach to social welfare focuses on net population benefit.[14] This inappropriately reduces emphasis on the inherent dignity of the individual, which is fundamental to human rights law.[15]

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[10] See *Novartis AG v Union of India* (2013) 6 SCC 1.

[11] For example, the final decision in *Laugh It Off* differed significantly from earlier judgments: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV* (2006) 1 SA 144 (Constitutional Court) [1] (Moseneke J).

[12] Estelle Derclaye, 'Intellectual Property and Human Rights: Coinciding and Cooperating' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008) 133. See Abbe EL Brown, 'Socially Responsible Intellectual Property: A Solution?' (2005) 2(4) *SCRIPT-ed* 485, 505; Hans Morten Haugen, 'Human Rights and TRIPS Exclusion and Exception Provisions' (2008) 11(5–6) *Journal of World Intellectual Property* 345, 364–366; Philippe Cullet, 'Human Rights and Intellectual Property Protection in the TRIPS Era' (2007) 29(2) *Human Rights Quarterly* 403, 406–407, 411–412; Geertrui Van Overwalle, 'Human Rights' Limitations in Patent Law' in Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 236, 237–238.

[13] Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011). Fisher criticises some uses of Locke: William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168, 170, 184–189.

[14] Fisher, above n 13, 169; William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) 173.

[15] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) Preamble, arts 1, 22, 23 ('*UDHR*'). See also *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) Preamble, art 13 ('*ICESCR*'); *Vienna Declaration and Programme of Action:*

Human rights law has origins in natural law and natural rights, which influenced the primary human rights instruments that form the positivist basis for human rights.[16] Although Lockean justifications for intellectual property law have similar natural rights justifications, the two fields have developed separately, and Chapter 2 has identified different justifications for trade mark law and human rights law.

Chapter 6 identifies trends of expanded protection for trade mark owners in certain jurisdictions. These have influenced the inclusion of *TRIPS*-plus provisions in trade mark provisions in regional and bilateral agreements, and the use of protection mechanisms, like investor-state dispute mechanisms, to protect strong owner rights.[17] This expanded protection for trade mark owners is not consistent with economic theory, which is the dominant utilitarian theory justifying the protection of human rights, or with property-based justifications, which apply Lockean principles to support the grant of intellectual property rights for individuals.[18] It further moves away from the focus on the rights of the individual towards the protection of assets and investments primarily owned by corporations.[19] This highlights differences in the objectives of the two fields that suggests that coexistence between them should not be uncritically accepted on the grounds of normative similarity. The theoretical justification for expanded protection of trade marks is particularly flawed from a human rights perspective that recognises considerations of justice.

Analysis of the case studies suggests that the coexistence model is not working in practice. The potential for conflicts between the two fields of law is evident from the case studies. The disputes considered in the plain packaging case study demonstrate conflicts between intellectual property and human rights in practice. Chapter 10 determined that both case studies raise concerns about the way in which features of bilateral and regional trade agreements and, to some extent, the operation of the World Trade Organization (WTO) can have a chilling impact on domestic regulatory autonomy to introduce policy and legislation that support human rights.[20]

Adopted by the World Conference on Human Rights, UN GAOR, UN Doc A/CONF.157/23 (25 June 1993).

[16] Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford University Press, 2011) 32–33.

[17] Rochelle C Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property' (2015) 36(4) *Michigan Journal of International Law* 557, 566–575.

[18] See Fisher, above n 13, 169–173.

[19] Geiger, above n 3, 662–664; Dreyfuss and Frankel, above n 17, 566–575.

[20] Council for TRIPS, *Minutes of Meeting*, WTO Doc IP/C/M/77/Add.1 (28-29 October 2014) 81, [605]-[608]. William New, 'Australia Accuses Tobacco Industry Of "Regulatory Chill" In WTO Plain Packaging Case' *Intellectual Property Watch (online)*, 20 November 2014 <http://www.ip-watch.org/2014/11/20/australia-accuses-tobacco-industry-of-regulatory-chill-in-wto-plain-packaging-case/>.

International intellectual property structures at bilateral, regional and multilateral levels can restrict domestic regulatory autonomy to recognise obligations to implement policies that support the realisation of human rights, including the right to health. This does not mean that a goal of coexistence is not important. It is a significant consideration where there are fragmented fields of international law. Chapter 3 has identified that, where possible, there should be harmonious interpretation of international law.[21] Although coexistence is an important objective, it needs to occur with the recognition that there are structural features in international law, including different enforcement approaches, which mean that intellectual property obligations are more likely to be observed, despite no normatively-based claims for the primacy of those obligations. As a checking mechanism of this structural bias, appropriate analytical tools should be in place to consider whether intellectual property is consistent with human rights. Consistent with a coexistence objective, approaches for analysing human rights implications of intellectual property legislation should also recognise the instrumental objectives of socially beneficial intellectual property.

11.2.3 Prescriptive Models and their Potential to Operate Together

This section considers how prescriptive models apply to the case studies, noting the conclusion in Chapter 1 that prescriptive models appear to provide the most appropriate vehicle for conceptualising the relationship between intellectual property and human rights. The analysis suggests that there may be benefits to integration of the individual models considered. The models can also be used to address some of the other problems with the international system that were analysed in Chapter 10, such as chilling regulatory impact.

11.2.3.1 Links between the models

It is possible to identify links between the approaches taken by the three prescriptive models identified in Chapter 1. This commonality is important for understanding how the models could potentially work together. Coexistence is a goal of the prescriptive models, which is addressed in different ways by each model. The prescriptive models recognise both the importance of human rights and the objectives of intellectual property law, although they do this in different ways.

Yu's model of protection emphasises human rights primacy and values the objectives of intellectual property law by asserting that resolving conflicts between intellectual property and human rights involves recognising human rights protection for some patent rights and some

[21] Grosse Ruse-Khan, above n 7, 31.

copyrights.[22] It differs from conflict models by proposing a tool to guide analysis of the eligibility of certain forms of intellectual property (that can also be protected by international intellectual property law) for human rights protection. It then proposes an approach to addressing conflicts between human rights protected intellectual property and other human rights.[23] The approach to resolving conflicts draws partly on mechanisms already adopted in intellectual property legislation to manage conflicts (just compensation), and on human rights mechanisms that respectively emphasise progressive realisation and core minimum protection.[24]

Geiger integrates protection for intellectual property rights, which is primarily justified by Article 27 of the *Universal Declaration on Human Rights* ('*UDHR*'), into a domestic or regional human rights framework.[25] Yu and Geiger both emphasise protecting the objectives of intellectual property law that are consistent with Article 15 of the *International Covenant of Economic, Social and Cultural Rights* ('*ICESCR*') and Article 27 of the *UDHR*.[26] However, because Geiger integrates this within constitutional frameworks, the mechanisms for resolving disputes are likely to be guided by the approach taken to resolve conflicts by the relevant domestic or regional constitutional framework.[27] The constitutional framework can also influence what other rights are protected. This may not be consistent with the protections provided in the key international human rights agreements and the interpretation of these protections by the relevant treaty-making body.[28] For example, Ricolfi's analysis of the relationship between trade marks and human rights emphasises freedom to conduct business, which is not a feature of key human rights agreements.[29] It is also more likely that constitutional frameworks will not give sufficient weight to economic, social and cultural rights.[30] Ducoulombier has also criticised the limited protection of economic, social and cultural rights in the European Court of Human Rights framework, although additional protection is available in

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[22] Peter K Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property' (2016) 69(1) *SMU Law Review* 37, 54–55.
[23] Ibid 66; Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 3, 1094–1123.
[24] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 3, 1094–1123.
[25] Geiger does not exclude right to property justified protection: Geiger, above n 3, 661–689.
[26] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22, 66; Geiger, above n 3, 662–664.
[27] Geiger, above n 3, 678–689.
[28] Peggy Ducoulombier, 'Interaction between Human Rights: Are All Human Rights Equal?' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 39, 39–41.
[29] Marco Ricolfi, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015) 453, 458–459.
[30] Hunt identifies problems with the weight given to economic, social and cultural rights in human rights-based assessments for health: Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) *Health and Human Rights* 109, 111; Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62(4) *American Journal of Comparative Law* 1043, 1057.

the *European Social Charter*.[31] Direct protection for economic, social and cultural rights in legislation and common law is very limited in Australia.[32]

The extent to which a human right to property is protected has been considered throughout this thesis. Given the existence of limited human rights protection for the right to property in some regional systems, the analysis has not excluded considerations of a right to property consistent with these protections.[33] However, the status of even this limited right to property remains contested.[34] This controversy has been explored but not resolved by this thesis.

Helfer and Austin recognise that human rights obligations can both protect and restrict intellectual property rights.[35] Restriction of intellectual property rights in order to recognise human rights obligations requires careful assessment of perceived conflicts, using Welfare Preservation Questions.[36] This recognises protection for the right to benefit from science and culture, which could include trade mark protection.[37] To the extent that they recognise protection of trade marks based on the right to property, the models of Geiger and Helfer and Austin both recognise some human rights protection against state interference with property rights, which could include expansive trade marks rights.[38] However, the rights protected by a right to property in Helfer and Austin's models are quite narrow rights, which have been applied with a wide margin of appreciation for states.[39] The additional considerations that they suggest for the assessment of the human rights implications of intellectual property permit greater emphasis on the broader objectives of intellectual property law.

11.2.3.2 Geiger's model

Geiger's model attempts to promote coexistence between intellectual property and human rights law by suggesting three different approaches to protecting certain elements of intellectual property as fundamental rights. Geiger acknowledges that some protection for the right to property is presently available in both the *First Protocol to the European Convention on Human*

[31] Ducoulombier, above n 28, 39–41.
[32] Beth Goldblatt, 'Claiming Women's Social and Economic Rights in Australia' (2017) 23(2) *Australian Journal of Human Rights* 261, 266–268.
[33] This is consistent with a deliberative approach: Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) 32(1) *Human Rights Quarterly* 1, 1.
[34] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22; Laurence R Helfer and Graeme Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011).
[35] Helfer and Austin, above n 34, 512–522.
[36] Ibid 516–521. See Chapter 1, Section 1.3.3.3.
[37] Ibid 513–516.
[38] Ibid.
[39] Ibid 212–220; Ricolfi, above n 29.

Rights and the *European Charter of Fundamental Rights*.[40] He argues that criticisms of the protection of intellectual property in these systems, and criticisms more broadly, can be addressed through greater emphasis on the objectives of intellectual property protection that are highlighted in Article 27 of the *UDHR*.[41]

Chapter 5 explains the limitations in constitutional protection for human rights in Australia. Protection for human rights in State Charters in Australia appears to be a potential growth area for the protection of human rights.[42] Nonetheless, Chapter 5 has identified significant limitations to the effectiveness of these State Charters.[43] The absence of Australian constitutional protection for human rights limits the immediate application of Geiger's model.[44] In contrast to Europe, there is no strong regional protection for human rights that might influence Australia to change its constitutional model so that it can comply with relevant regional agreements. Chapter 5 has also identified serious limitations to protection for economic, social and cultural rights in Australia. These rights are the source for human rights protections for intellectual property and, accordingly, an important component of any human rights culture for trade marks that integrates intellectual property and human rights.[45] Concerns with the extent to which economic, social and cultural rights are appropriately protected in the European fundamental rights protection system also limit the application of Geiger's model.[46]

It is useful to consider how Geiger's approach can apply to examples of conflict in each case study. Chapter 1 concluded that the model proposed by Geiger has advantages for integrating the broader objectives of Article 27 into justiciable human rights protection.[47] These advantages mean that it can be more broadly relevant to a human rights culture for trade marks. Geiger's approach could constitute a longer-term objective for countries like Australia that do not yet provide sufficient constitutional protection for human rights.

Geiger's approach of integrating Article 27 rights into the *European Charter of Fundamental Rights* would expand the range of relevant rights available to be considered in a European Court of Justice dispute with facts analogous to *JT International*. The analysis in Chapter 8 suggests

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[40] Geiger, above n 3, 667–672, 678–685. See *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389 (entered into force 1 December 2009) art 17; *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954) art 1 ('*First Protocol*').
[41] Geiger, above n 3, 662–664, 672–673.
[42] Gillian Triggs, 'Creating a Human Rights Culture' (2014) 17 *Southern Cross University Law Review* 59, 69.
[43] Williams and Reynolds note success within the context of each act: George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (Readhowyouwant.com Limited, 2017) 170–181.
[44] See ibid 65–68.
[45] *ICESCR* art 15.
[46] Ducoulombier, above n 28, 39–41.
[47] See Geiger, above n 3.

that a constitutional protection model that incorporated rights to benefit from science and culture enshrined in Article 15 is unlikely to have changed the outcome in *JT International*. Any moral rights or material rights to remuneration in the trade marks resulting from creative activity that might be protected by Geiger's model are unlikely to be directly restricted by *Plain Packaging Legislation*.[48] In the unlikely event that a restriction was identified, these rights would probably be balanced against the right to health benefits.[49] Freedom of expression and right to health arguments considered in Chapter 8 would also have been relevant to a case decided under an expanded *European Charter of Justice* incorporating Article 27 rights.[50]

Geiger is critical of expanded protection for intellectual property using the right to property, but does not exclude right to property protection for intellectual property from his other approaches for integrating Article 27 into rights for freedom of arts and science or freedom of expression. There are differences between the protection from unjust appropriation found in the *Australian Constitution* and the human right to property that can be identified from European and other regional protection models for 'peaceful enjoyment of possessions', which prohibits deprivation of those possessions 'except in the public interest and subject to the conditions provided by law and by the general principles of international law.'[51] However, the analysis in Chapter 8 finds that, if *JT International* had been argued in the European Court of Human Rights, pursuant to the *First Protocol to the European Convention on Human Rights*, the trade mark owners were unlikely to succeed.[52] Ricolfi suggests that the property protection in the *European Charter* is coextensive with *European Convention* protection.[53] The dynamic nature of human rights means that the broader wording of the *European Charter* provision might be interpreted more broadly to support expanded protection of property rights in the future, but Geiger's approach is

[48] Ibid 686. See *Tobacco Plain Packaging Act 2011* (Cth), the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth), the *Tobacco Plain Packaging Regulations 2011* (Cth) and the *Tobacco Plain Packaging Amendment Regulation (No 1) 2012* (Cth) ('*Plain Packaging Legislation*').
[49] Geiger, above n 3, 681; *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389 (entered into force 1 December 2009) art 35. See Ducoulombier, above n 28, 40–42; Lorenzo Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008) 19, 27–28.
[50] *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389 (entered into force 1 December 2009) arts 11, 35.
[51] *First Protocol* art 1.
[52] Ricolfi agrees that the outcome would have been the same: Ricolfi, above n 29, 472–473. Ricketson notes differences between the actions: Sam Ricketson, 'Plain Packaging Legislation for Tobacco Products and Trade Marks in the High Court of Australia' (2013) 3(3) *Queen Mary Journal of Intellectual Property* 224, 235–236.
[53] Ricolfi, above n 29, 469–470.

intended to be a reminder of the purpose of intellectual property rights, which limits expansion of this nature.[54]

Geiger's approach is directed towards changing perceptions of intellectual property that he views as negative for human rights.[55] Greater acknowledgement of human rights to benefit from science and culture could encourage human rights recognition in the interpretation of *TRIPS* in the WTO. Chapter 3 has identified stronger recognition as doctrinally possible but not currently in existence. This would be relevant to the likelihood that states in positions similar to those of Australia would consider and use *TRIPS* Article 7 arguments, applying *VCLT* Article 31(3)(c), to engage human rights-based arguments similar to the argument proposed in Chapter 8 of this thesis. However, the anti-counterfeiting case study and the analysis in Chapter 10 of the implications of both case studies for domestic regulatory autonomy suggest limitations to Geiger's approach. Unless human rights considerations could be effectively integrated into regional trade agreements and the processes of negotiating them, using the approaches suggested in Chapter 10 or alternative approaches, the constitutional protections advocated by Geiger may not be useful.[56]

What changes could the adoption of Geiger's model mean for the *Philip Morris-Australia* dispute? Although European trade agreements have exceptions clauses, these do not directly incorporate human rights obligations.[57] Interpretation of human rights may change with the expansion of a regional investment court, which is a new feature of European trade agreements.[58] Given established fundamental rights jurisprudence in Europe, this court may be more open to recognising the relevance of fundamental rights to general principles of international law that can be relevant to international arbitration. The protection proposed by Geiger could be recognised by utilising Article 31(3)(c) in a manner similar to that considered in the analysis of the WTO disputes in Chapter 8 of this thesis.[59]

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[54] Geiger, above n 3, 662–664, 677–680; John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012) 92–94. See Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 607; Hunt, above n 30, 121.
[55] Geiger, above n 3, 663–664.
[56] Helfer asserts that gaps between international, regional and national protection may permit flexibility: Laurence R Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' in Rochelle C Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, 2018) 117, 134.
[57] Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19 *Journal of International Economic Law* 27, 46–49.
[58] Cynthia Ho, 'A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings' (2016) 6 *UC Irvine Law Review* 395, 465.
[59] The provision was also used to protect public health in *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [291]-[307].

Constitutional protections can provide useful, domestically relevant benchmarks. Chapter 9 demonstrated that fundamental rights provided useful standards to criticise the *Anti-Counterfeiting Trade Agreement* ('*ACTA*').[60] However, a preventative approach that can be utilised before trade agreements are finalised is also important.[61] In a transparent negotiating environment, an assessment tool that is more directly focused on human rights-based analysis could be effective for addressing these problems.

11.2.3.3 Yu's model

Applying Yu's approach to the case studies recognises principles about the relationship between intellectual property and human rights, using a systematic assessment of whether certain forms of protection for intangible property can also be protected using a human rights framework. This analyses the nature of scientific, literary or artistic productions; the human rights available for their creators; the nature of protection; and exogenous limits on that protection.[62] In Australia, the tool could be relevant to parliamentary scrutiny of Article 15 implications of legislation and treaties. The absence of justiciable human rights limits the likelihood of Yu's model being applicable to domestic judicial considerations.

How would Yu's model apply to disputes regarding *Plain Packaging Legislation*? Yu does not permit human rights protection to be afforded to corporations and does not recognise protection for intellectual property based on the right to property.[63] The focus of analysis using his model would be on any rights that might be relevant to individuals who are authors of scientific, literary or artistic productions. For example, Yu's model could be used to consider whether *Plain Packaging Legislation* restricts the moral and material rights of authors of device marks that are registered in relation to tobacco-related products and constitute artistic productions, in whole or in part. In the case of plain packaging, Chapter 8 has concluded that it is arguable that tobacco-related trade marks could constitute literary and artistic productions.[64] In relation to the plain packaging disputes, little is known about the trade mark authors. They have not brought

[60] Roberto D'Erme et al, 'Opinion of European Academics on Anti-Counterfeiting Trade Agreement' (2011) 2 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 65; Douwe Korff and Ian Brown, *Opinion on the Compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights and the EU Charter of Fundamental Rights* (Greens/European Free Alliance, European Parliament, 8 October 2011) <https://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Studies/Democracy/ACTA_fundamental_rights_assessment.pdf >.

[61] Lisa Forman, 'From TRIPS-Plus to Rights-Plus? Exploring Right to Health Impact Assessment of Trade-Related Intellectual Property Rights through the Thai Experience' (2012) 7(2) *Asian Journal of WTO and International Health Law and Policy* 347.

[62] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22, 64–66.

[63] Ibid 85–95.

[64] The cultural significance of tobacco trade marks is recognised in Michael E Starr, 'The Marlboro Man: Cigarette Smoking and Masculinity in America' (1984) 17(4) *Journal of Popular Culture* 45.

the relevant actions. *Plain Packaging Legislation* does not remove any moral attribution rights as there is no practice of attribution of trade mark creators in Australia.[65] As the analysis of *Laugh It Off* in Chapter 2 analogously concluded, the absence of information about the creators makes it difficult to understand if the relevant individuals might consider *Plain Packaging Legislation* to interfere with the integrity of their production. [66]

Material interests protected by Article 15 do not correlate with the rights against restriction of use asserted by trade mark owners in *JT International*.[67] There is no evidence in *JT International* that *Plain Packaging Legislation* will impact on the remuneration for the creators of the relevant trade marks which the Committee on Economic, Social and Cultural Rights (CESCR) recognises can be satisfied by a one-time payment.[68] There is no evidence that the rights claimed in the disputes regarding *Plain Packaging Legislation* engage human rights interests that would engage the third protection layer in Yu's model. [69] Even if claims were to be brought on behalf of the creators, it is not clear that the protection that might be relevant is restricted by *Plain Packaging Legislation*. It is possible that the protection layer could recognise attribution or integrity rights of creators of trade marks or remuneration rights. However, Yu's final limitation layer recognises exogenous restrictions like international human rights treaties.[70] The right to health justifications for *Plain Packaging Legislation* identified in Chapter 8 are relevant limitations on any rights of authors of tobacco-related trade marks that might be protected by applying Yu's approach. Consequently, it appears unnecessary to apply Yu's conflict model, as Article 15(1)(c) rights are not engaged.[71] This conclusion is consistent with the objectives of Article 15 recognised in *General Comment 17*.[72] Even if the marks have historically attained cultural significance, it would be difficult to argue that it is important to stimulate the creation of further tobacco-related marks 'to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole.'[73] In the absence of human rights protection for tobacco-related trade marks, the human right to health-based

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[65] Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15, Para 1(c) of the Covenant)*, UN ESCOR, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [3] ('*General Comment 17*'). See Chapter 2, Section 2.3.4.
[66] *General Comment 17*, UN Doc E/C.12/GC/17, [3]. See Chapter 2, Section 2.4.2.
[67] *General Comment 17*, UN Doc E/C.12/GC/17, [2]-[4], [15]-[16]; *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Ltd v Commonwealth of Australia* (2012) 250 CLR 1, ('*JT International*').
[68] *General Comment 17*, UN Doc E/C.12/GC/17, [2]-[4], [15]-[16]; *JT International* (2012) 250 CLR 1.
[69] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22, 65.
[70] Ibid 65–66.
[71] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 3, 1075–1123.
[72] *General Comment 17*, UN Doc E/C.12/GC/17, [4].
[73] Ibid.

justifications for *Plain Packaging Legislation* trump non-human rights-protected trade mark rights in each of the plain packaging disputes. [74]

Considering the relevance of Yu's model to anti-counterfeiting engages a much broader range of artistic, literary and scientific productions that might be relevant. The majority of trade mark owners may be corporations, but there appear to be numerous examples on the Trade Marks Register of individual trade mark owners who may also be creators of scientific, literary and artistic productions.[75] Adopting Yu's approach means that the focus of the enquiry would be more likely to be on the third protection layer. Is the use of trade marks as a type of protection necessary to preserve the moral and material interests of the creators of artistic, scientific and literary productions?[76] There is a much stronger case for this in relation to material interests if it can be established that counterfeit products are interfering with the limited exclusive exploitation rights of creators of artistic, scientific or literary productions.[77] Chapter 9 found that trade marks maintain an important instrumental role in aiding detection of counterfeiting and preventing this negative impact on exploitation rights.[78] Consequently, it would be necessary to look at the limitation level and consider whether the concerns about civil rights and effective protection of the right to health identified in Chapter 9 limit relevant available human rights protection provided for creators by anti-counterfeiting legislation.

Yu's model reminds us that there might be a range of mechanisms that are relevant in his protection layer. [79] Consequently, if a more effective mechanism develops, the relevance of trade marks at the protection level may decrease. This indicates that Yu's approach might favour a regulatory approach that is more flexible than very prescriptive requirements for trade mark protection identified in Chapter 10 in prospective international agreements. It is also important to recognise that trade marks could be used to expand protection well beyond the one-off payment or limited monopoly recognised by CESCR.[80] Chapter 7 considered a potential example of this where a trade mark that is close to an INN stem restricts activities of generic

[74] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 3, 1095.
[75] See Chapter 8, Section 8.3.4.2 discussion of individuals registered for ATMOSS search on 28 August 2018.
[76] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22, 65.
[77] *General Comment 17*, UN Doc E/C.12/GC/17, [16].
[78] See Melanie Jose, 'Raising the Bar on Australia's Border Measures – Improvements to the Notice of Objection Scheme Resulting from the IP Laws Amendment (Raising the Bar) Act 2012' (September 2012) 90 *Intellectual Property Forum* 52.
[79] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22, 70–84.
[80] *General Comment 17*, UN Doc E/C.12/GC/17, [16].

competitors and potentially permits a pharmaceutical corporation to maintain a strong price monopoly after patent rights have expired. [81]

How could Yu's model be useful to the domestic regulatory autonomy issues identified in the case studies and Chapter 10. Yu's model appears to be less regionally specific than Geiger's, but his analytical tools would be more relevant if there were a cultural change towards a human rights-based approach to trade agreements. Recognition of the importance of protecting rights to benefit from science and culture by the relevant states negotiating the bilateral or regional trade agreements could be enhanced by constitutional incorporation of rights to the benefits of science and culture in the manner prescribed by Geiger. Such recognition would make Yu's tool more likely to be used in the scrutiny of trade agreements and resulting legislation. Yu's model can also be extremely useful as a tool for excluding broad claims to protection for intellectual property as a human right by corporations that have been identified as being likely to claim any human rights protection for their intellectual property.[82]

Although he considers what might be done in circumstances of conflict between Article 15(1)(c) rights and other human rights, Yu does not prescribe one approach to the way that other human rights should be protected in conflicts between them.[83] He raises the possibility of core minimum protection for Article 15(1)(c) and other human rights, but also considers the possibility of a progressive realisation approach that focuses on asking what should be protected and on states undertaking their best efforts, based on the availability of resources, to comply with all of their obligations under human rights standards.[84] Yu suggests that his methods could be used together, but explaining how these mechanisms would be combined will depend on the circumstances.[85] Yu also recognises a just remuneration approach using compulsory licensing methods, which is already used to balance rights for copyright, patents and designs in some jurisdictions[86] but is not a feature of trade mark protection domestically or internationally.[87]

Yu's principles, model and approaches to resolving conflicts are important for integrating human rights considerations into intellectual property. The model could potentially afford human rights protection to the instrumental use of trade marks, for example where trade marks constitute a mechanism for preventing counterfeiting activities that restrict the material interest

[81] Kappoori M Gopakumar and Nirmalya Syam, 'International Nonproprietary Names and Trademarks: A Public Health Perspective' (2008) 11(2) *Journal of World Intellectual Property* 63, 96.
[82] Peter K Yu, 'Ten Common Questions about Intellectual Property and Human Rights' (2007) 23(4) *Georgia State University Law Review* 709, 738–740.
[83] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 3, 1093.
[84] Ibid 1105–1123.
[85] Ibid 1095.
[86] Ibid 1095–1105.
[87] For example, there is no provision for compulsory licensing in the *Trade Marks Act 1995* (Cth).

rights of authors. The next section will investigate the way in which Helfer and Austin's approach can permit greater inclusion of trade marks in a human rights framework for intellectual property.

11.2.3.4 Helfer and Austin

How does Helfer and Austin's model apply to the case studies? As with other models, its applicability is limited by the absence of constitutional human rights protection in Australia and present limitations in the recognition and use of human rights in international arbitration in the WTO. Importantly, Helfer and Austin encourage the broader use of human rights assessment tools.[88] These assessment tools should acknowledge the potential relevance of all of the human rights protected in key international human rights agreements. Geiger's model depends on whether the relevant constitutional framework includes broad human rights protection of this nature.[89] Yu asserts the primacy of human rights in external conflicts, proposing different approaches to internal conflicts.[90] More recently, his analytical approach focuses on identifying protection for the narrow class of intellectual property that can be protected as human rights, using detailed examples of scientific productions that might be protected by rights to benefit from science and culture.[91]

How can this model be applied to the plain packaging case study, utilising the human rights-based analysis adopted in Chapter 8? Helfer and Austin argue that, if the unrestricted use of tobacco trade marks on cigarette packaging is characterised as in conflict with Australia's human rights obligations to protect the right to health, the following Welfare Protection Questions should be addressed before those rights are restricted:

1. Is intellectual property actually restrictive of the relevant human right or freedom or are other factors such as structural limitations causing the restriction?
2. What is the positive impact of intellectual property?
3. What is the negative impact of intellectual property?
4. What is the relative causal contribution of intellectual property in comparison to other factors?
5. What legal and policy measures can facilitate human rights outcomes?[92]

[88] Helfer and Austin, above n 34, 518–520.
[89] Geiger, above n 3.
[90] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 3, 1095.
[91] Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22, 70–80.
[92] Helfer and Austin, above n 34, 520.

Interpretation of the right to health by the CESCR and the Committee on the Rights of the Child (COMRC) identifies state obligations to protect individuals from the harmful impact of tobacco.[93] Owners of tobacco-related trade marks have demonstrated systematic disregard for the health and safety of individuals and obstructed access to information about the harmful and addictive impact of smoking.[94] There is evidence of direct links between packet advertising that includes the use of trade marks to create positive brand perceptions and initiation of tobacco consumption.[95] This is the negative causative impact of the trade mark. Tobacco advertising is extensively restricted in Australia. Tobacco packaging has been identified as the last available vehicle for advertising in Australia.[96] In a highly influential study in 2000, Saffer and Chaloupka emphasised the importance of comprehensive tobacco advertising bans, as a more limited approach would have minimal effect.[97] This indicates a significant causal contribution between package advertising using trade marks and tobacco consumption where there are no other mechanisms for advertising.[98] Consequently, the use by an owner of a tobacco-related trade mark on product packaging to induce individuals to consume tobacco can directly engage states' obligations to protect individuals in realisation of the right to health.[99]

However, this does not consider the question of what threshold of realisation of the right to health should be protected. The protection threshold prescribed by Helfer and Austin for non-interference with civil and political rights is reasonably comprehensive, but the protection guarantee of 'minimum levels of economic and social well-being in areas such as health, food and education' does not seem to engage with different standards of progressive realisation of economic, social and cultural rights between different states.[100] Retrogression from these standards is not permitted without careful consideration and excellent justification.[101] This is important. Chapter 1 has explained that Helfer and Austin are not completely clear about the nature of the minimum standards they advocate protecting. A more recent consideration of

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[93] *Charter of the United Nations* arts 55, 56; UN Committee on the Rights of the Child, *CRC General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33rd sess, UN Doc CRC/GC/2003/4 (1 July 2003) [6], [21]-[22] ('*CRC General Comment 4*').
[94] Brigit Toebes et al, 'A Missing Voice: The Human Rights of Children to a Tobacco-Free Environment' (2018) 27(1) *Tobacco Control* 3, 4.
[95] National Preventative Health Taskforce, *Australia: Healthiest Country by 2020. Technical Report 2 - Tobacco Control in Australia: Making Smoking History, Including Addendum for October 2008 to June 2009* (2009) 20.
[96] Matthew Thomas, 'Tobacco Plain Packaging Bill 2011' (2011) 35 of 2011–2012 *Bills Digest* 5.
[97] Henry Saffer and Frank Chaloupka, 'The Effect of Tobacco Advertising Bans on Tobacco Consumption' (2000) 19(6) *Journal of Health Economics* 1117.
[98] Thomas, above n 96, 5; Richard Edwards et al, 'Impact of Removing Point-of-Sale Tobacco Displays: Data from a New Zealand Youth Survey' (2017) 26(4) *Tobacco Control* 392.
[99] *General Comment 14*, UN Doc E/C.12/2000/4, [51].
[100] Helfer and Austin, above n 34, 517.
[101] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant)*, UN ESCOR, 5th sess, UN Doc E/1991/23 (14 December 1990) [9] ('*General Comment 3*').

standards by Helfer refers to 'the minimum entitlements relating to health, food, education and so forth that international human right law requires.' [102] By prohibiting retrogression, international human rights law requires a range of standards that may differ significantly between states.[103] This interpretation of progressive realisation is likely to protect higher standards than the minimum entitlements envisaged by Helfer, but this would vary between states, which may problematically further entrench inequality.[104] This needs to be addressed through international cooperation and assistance.[105]

The Welfare Preservation Questions emphasise the potential benefits of intellectual property. This is useful because it can permit realisation of some of the normative justifications for trade mark protection that were identified in Chapter 2, as well as the benefits of human rights protection of intellectual property advocated by Geiger. Dominant theoretical justifications for trade mark protection suggest that the primary positive impact of the trade mark rights is that it reduces consumer search costs in distinguishing between the relevant goods.[106] *Plain Packaging Legislation* continues to permit identification of the source of origin by allowing the brand name to be printed on packaging in standardised font.[107] Brand names appear to be strongly associated with brand recognition for cigarettes, so restrictions on the use of device marks seem to be a less relevant consideration.[108] Characterising the positive impacts of intellectual property as recognising the investment in advertising and branding made by tobacco companies, and using this as a basis for protecting the trade mark as a vehicle for that brand, moves beyond traditional normative justifications for trade marks, which are more likely to be consistent with justice.[109]

More recently, Helfer has considered whether 'more numerous, nuanced and sometimes contradictory' international rules regulating intellectual property and human rights permit greater leeway for states to further national interests in implementation without challenges from other countries.[110] The chilling regulatory impact considered in Chapter 10 in relation to plain packaging suggests that Helfer's suggestion may not have universal application.[111] Crosbie and

[102] Laurence R Helfer, 'Mapping the Interface between Human Rights and Intellectual Property' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 6, 14.
[103] *General Comment 3*, UN Doc E/1991/23, [3].
[104] Hunt, above n 30, 119.
[105] Jonathan Wolff, *The Human Right to Health* (WW Norton & Co, 1st ed, 2012) 11–12.
[106] Landes and Posner, above n 14, 173.
[107] *Tobacco Plain Packaging Act 2011* (Cth) s 21.
[108] *JT International* (2012) 250 CLR 1, 103 (Crennan J).
[109] Emphasising investment recognition arguably corresponds to a 'habitual maximalist inflation of global intellectual property norms': Murumba, above n 4, 125–126.
[110] Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship', above n 56, 134.
[111] Uruguay's reluctance to contest Philip Morris because of cost of arbitration is important: Eric Crosbie, Particia Sosa and Stanton A Glantz, 'Defending Strong Tobacco Packaging and Labelling Regulations in

Gruszczynski's conclusions about the chilling regulatory impact of plain packaging litigation in New Zealand suggest that these concerns are also relevant to countries that do have constitutional protection for human rights.[112] Europe is a good example of a system where protection of human rights is highly valued, and many features of the European human rights system considered throughout this thesis can be useful to building a human rights culture. However, there are still features that can limit an effective culture for trade marks. Unequal protection of economic, social and cultural rights in the European system is relevant to effectively protecting the right to health and, absent Geiger's proposed model, the right to benefit from science and culture.[113] Further, human rights are not sufficiently protected in exceptions clauses for ISDMs, so these clauses might still be used by corporations to restrict realisation of human rights in arbitrations.[114]

In the case of the anti-counterfeiting case study, Helfer and Austin's approach initially appears likely to support broader protection for counterfeiting than the other models. One reason is that the main human rights concerns regarding restrictions on civil rights have been identified as potential conflicts rather than certainties.[115] Other causal relationships that impact on those concerns, such as legal culture, can be relevant.[116] Chapter 9 demonstrates that applying a human rights-based approach to health to the anti-counterfeiting case study raises complex issues, particularly when there is limited data available to quantify the nature of the health threat. One reason for this is government failure to either collect data or publish that data.[117] Significantly more data is available to understand *Plain Packaging Legislation*, but there have also been complaints that the government has also not been transparent in either collection or publication of data that would be relevant to understanding the effectiveness of the relevant

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Uruguay: Transnational Tobacco Control Network versus Philip Morris International' (2018) 27(2) *Tobacco Control* 185.

[112] Lukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigation and Regulatory Chilling Effect' (2014) 5(2) *European Journal of Risk Regulation* 242, 247; Eric Crosbie and George Thomson, 'Regulatory Chills: Tobacco Industry Legal Threats and the Politics of Tobacco Standardised Packaging in New Zealand' (2018) 131(1473) *New Zealand Medical Journal* 25.

[113] Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009); Ducoulombier, above n 28.

[114] Henckels, above n 57; Lorand Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017) 202.

[115] Helfer and Austin, above n 34, 520.

[116] Kimberlee Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties' (2016) 32(1) *American University International Law Review* 211, 231–236.

[117] Wolff, above n 105, 132–133.

measure.[118] The emphasis of a human right to health on monitoring and accountability reinforces the significance of these limitations.

The human rights-based approach taken in Chapter 9 emphasises the importance of considering whether attempts to realise health are appropriate and effective progressively. It also recognises that highly prescriptive anti-counterfeiting protection may constrain resources of some countries to address a range of other human rights concerns effectively, and therefore may not support broader objectives of international cooperation and assistance to help other states realise the right to health. This international cooperation obligation would not be found in public health but is recognised as binding states in human rights law.[119]

The Welfare Preservation Questions focus attention on the positive impact of the relevant intellectual property legislation. For the legislation to have a positive impact, it should be effective.[120] Recognising this can link the Welfare Preservation Questions to human rights considerations of effectiveness. The *Raising the Bar* amendments appear to have significantly changed the percentage of seized goods not being released.[121] The extent to which this benefits protection of the right to health depends on understanding the nature of the threat. One way to assess the threat to the right to health posed by counterfeiting would be systematic testing of all seized goods for compliance with relevant health and safety standards, such as the electrical standards considered in the mobile phone example considered in Chapter 9. It would be possible to assess such threats by using sampling methodology, which might limit the resource-intensive nature of the exercise. This is a concrete approach that would be important for effective protection of both human rights and intellectual property. The type of information provided would permit us to more effectively consider the consistency of existing standards with human rights-based protection for health. It would also greatly assist assessments of the effectiveness of anti-counterfeiting activities, which are relevant to the legitimacy of the policy as an intellectual property measure. Recognising benefits of intellectual property rights means that other justifications for protection of intellectual property owners against counterfeit activities

[118] Sinclair Davidson and Ashton de Silva, 'The Plain Truth about Plain Packaging: An Econometric Analysis of the Australian 2011 Tobacco Plain Packaging Act' (2014) 21(1) *Agenda: A Journal of Policy Analysis and Reform* 27, 31; Sinclair Davidson and Ashton de Silva, 'Did Recent Tobacco Reforms Change the Cigarette Market?' (2018) 37(1) *Economic Papers: A Journal of Applied Economics and Policy* 55, 69–70.
[119] *General Comment 14*, UN Doc E/C.12/2000/4, [51].
[120] See Chapter 8, Section 8.3.7.
[121] The Australian Customs and Border Protection 2013-2014 Annual Report noted that following the introduction of the *Raising the Bar* legislation amending the *Trade Marks Act* and *Copyright Act*, 99.9 per cent of seized goods suspected of being counterfeit were forfeited, either as a result of court order, voluntary forfeiture or deemed forfeiture. Previously the statistic was 25 per cent: Australian Government, Australian Customs and Border Protection Service, *Annual Report 2013-2014* (2014) 38.

are relevant.[122] Unfortunately, these benefits are also difficult to quantify.[123] Anti-counterfeiting legislation that is consistent with *TRIPS* (or *TRIPS*-plus mechanisms) may be generally effective as a deterrent, but other mechanisms may be even more effective.[124] If alternative protection measures, such as the implementation of technological protection mechanisms, are less restrictive of human rights, they should be considered.

However, the important concerns raised in Chapters 9 and 10 that need to be considered, even without further data, are that specific requirements of expansive anti-counterfeiting mechanisms, and the resources that could be required to implement them, may reduce flexibility and may also negatively impact on human rights. The nature of the potential conflict may not be sufficient to engage concerns about human rights restrictions using the Welfare Preservation Questions, but it is a genuine concern. The anti-counterfeiting case study suggests that sometimes understanding these human rights implications can be a complex exercise that is difficult to resolve in the absence of data. Helfer and Austin's approach may be most useful where there is relevant data to assess the Welfare Preservation Questions. However, where there is insufficient data available to make these assessments and a short time frame available for treaty analysis, other considerations may be necessary. Helfer and Austin's questions are useful additional considerations in rights-based assessments and reinforce links between justifications for human rights and intellectual property. However, given the uncertainty of risk assessment for proposed measures, caution should be exercised about any presumption of compatibility with human rights in human rights impact assessments. An additional relevant concern may be whether there is enough data to assess these Welfare Preservation Questions?[125] The fact that it is difficult to balance concerns against each other does not mean that the human rights scrutiny or the Welfare Preservation Questions lack utility.[126]

11.2.4 Considering Relevant Standards of Protection

Chapters 4 and 5 have addressed the importance of providing equivalent protection for economic, social and cultural rights and civil and political rights. Interpretation of the 'minimum' standards of protection proposed by Helfer and Austin as including the progressive

[122] Carsten Fink, Keith E Maskus and Yi Qian, 'The Economic Effects of Counterfeiting and Piracy: A Review and Implications for Developing Countries' (Policy Research Working Paper No 7586, World Bank Group, 29 February 2016) 2–3.
[123] Ibid 2–3, 33–36.
[124] See Tim K Mackey and Gaurvika Nayyar, 'A Review of Existing and Emerging Digital Technologies to Combat the Global Trade in Fake Medicines' (2017) 16(5) *Expert Opinion on Drug Safety* 587.; Thomas Bocek et al, 'Blockchains Everywhere: A Use-Case of Blockchains in the Pharma Supply-Chain' (Paper presented at *2017 IFIP/IEEE Symposium on Integrated Network and Service Management*, Lisbon, Portugal, 8-12 May 2017).
[125] Forman notes the potential value of involving empowered yet independent human rights institutions to collect data in human rights impact assessment: Forman, above n 61, 363.
[126] Zucca argues the importance of recognising these conflicts in Zucca, above n 49, 37.

realisation of rights is consistent with providing equal protection for both sets of rights. Recognition of the importance of all human rights should be a feature of trade marks protection. Chapter 8 has emphasised that it is important to restrict retrogression in realisation of economic, social and cultural rights. Usefully, Yu's model can also support progressive realisation. The extent to which this is recognised in Geiger's model will depend on different jurisdictional approaches to interpreting relevant required standards of economic, social and cultural rights. Domestically appropriate progressive realisation will vary between jurisdictions. This is evidenced in the limitations on the protection of economic, social and cultural rights that can be identified in South African jurisprudence.[127]

A core minimum approach could be utilised to support human rights protection for tobacco plain packaging. An obligation of comparable priority to a core minimum obligation pursuant to the right to health is the obligation for states to protect against endemic and epidemic diseases.[128] Global tobacco consumption has been characterised as a global health epidemic by the World Health Organization.[129] However, other bases for Australia's obligation to protect the human right to health by implementing *Plain Packaging Legislation* might not fit within this core minimum standard. For example, the interpretation by COMRC of a child's right to information as including protection against misinformation might be considered to expand beyond core minimum obligations.[130] Chapter 4 has identified serious criticisms of the appropriateness of a core minimum approach for realisation of the right to health.[131] These criticisms support a progressive realisation approach to health, which is another mechanism recognised by Yu.[132]

It remains unclear how the tripartite obligations to respect, protect and fulfil the right to health fit into a core minimum obligations approach. This makes it much more difficult to understand the extent to which the protections provided through anti-counterfeiting against third-party threats to health would be protected by core minimum standards in Yu's approach. The nature

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[127] See, for examples, *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17 (Constitutional Court); *Minister of Health v Treatment Action Campaign (No 2)* [2002] 5 SA 721 (Constitutional Court).

[128] *General Comment 14*, UN Doc E/C.12/2000/4, [44]. *ICESCR* Article 12(2) sets out that further steps to protect the right to health include 'to prevent, treat and control epidemic, endemic, occupational and other diseases.'

[129] Andrew D. Mitchell and Tania Voon 'Introduction,' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 1, 1. See World Health Organization, *WHO Report on The Global Tobacco Epidemic, 2017: Monitoring Tobacco Use and Prevention Policies* (2017).

[130] *CRC General Comment 4*, UN Doc CRC/GC/2003/4, [21].

[131] Tobin, above n 54, 252; Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016) 54–55.

[132] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', above n 3, 1113–1123.

of the obligations could be relevant if they were balanced against protected civil and political rights, such as the right to fair trial or the right to privacy, that might be engaged by international anti-counterfeiting legislation.[133] Despite this, Chapter 9 has demonstrated that there is a genuine threat to health posed by counterfeit goods. A progressive realisation approach would permit recognition of this in a manner that is consistent with a state's resource limitations, which is likely to place greater obligations on a developed country like Australia.

A culture for human rights needs to recognise that *ICESCR* requires progressive realisation and CESCR interprets this as prohibiting retrogression in *General Comment 3*.[134] The analytical approach proposed in Section 11.3 below directs states to recognise this complex issue.

11.2.5 How to Recognise the Normative and Positivist Dimensions of Murumba's Spectrum?

As noted in Chapter 2, a deliberative or positivist model framework is used to identify the relevant standards applied in this research. However, normative considerations have been used to continue to assess the legitimacy of the laws that are being considered.[135] Positivism should not be asserted where a law is normatively inconsistent. Consequently, theoretical justifications have been used to consider legitimacy and criticise the extent to which modern trade mark law expands the property rights of trade mark owners in a manner inconsistent with the underlying objectives of human rights law.

Chapters 2 and 6 have disputed the normative justifications for expanded trade marks protection. Murumba suggests that enforcement of global intellectual property protection corresponds to command sanction theory, which may not be consistent with justice.[136] Human rights measures that address this, such as *Plain Packaging Legislation*, can be justified by assessing Murumba's approach of identifying relative detriment intensity. Alternative legal and policy measures that might be equally or more effective in reducing commencement of tobacco consumption are likely to include a complete ban on the manufacture and sale of tobacco.[137] In terms of relative detriment intensity, such a measure would be far more restrictive than regulating the use of trade marks on tobacco packaging.[138] The analytical approaches considered in this chapter are important because they seek to address this emphasis on order at the expense

[133] Zucca, above n 49, 27–28.
[134] *General Comment 3* permits retrogression that is fully justified by reference to a totality of *ICESCR* protected rights: *General Comment 3*, UN Doc E/1991/23, [9].
[135] See, eg, Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18(2) *Yale Journal of Law & the Humanities* 273.
[136] Murumba, above n 4, 125–126.
[137] Ibid 146–147.
[138] Ibid.

of justice. They provide mechanisms to recognise normative considerations using positivist tools grounded in human right agreements that bind Australia and the majority of members of the United Nations. Murumba's approach of recognising both positivist and normative dimensions of the debate is consistent with a recognition of the importance of human rights in each analytical approach.[139]

Murumba's approach recognises that there are international obligations to protect both human rights and intellectual property. In Chapter 2, it was used to explore the normative consistency of the *Laugh It Off* decision with justifications for human rights law and intellectual property law. Chapter 2 concluded that the decision was in harmony with both sets of justifications. It is possible that normative and doctrinal coexistence is possible in the majority of interactions between intellectual property and human rights. However, Chapter 10 identified problems with the current international framework that suggest that intellectual property rights can restrict states' ability to implement their human rights obligations. This thesis has highlighted circumstances where the recognition of obligations for both fields suggests conflict not coexistence. Chapters 4 and 5 have established the importance of participation and accountability to ensure that human rights obligations are not abrogated. Important tools to implement this are human rights-based analytical approaches, which will now be considered.

11.3 What Analytical Approach is Useful for Considering the Human Rights Implications of Domestic Intellectual Property Laws?

11.3.1 Human Rights-Based Approach to Intellectual Property

The case studies have utilised a human rights-based approach to health. Analysing the way in which conceptual models apply to the case study analysis permits us to draw conclusions about an appropriate methodological approach for understanding broader human rights implications of intellectual property legislation. This methodological approach can be modified to address circumstances that do not engage the right to health. Chapter 4 adopted Hunt's recommendations for including certain analytical categories in a rights-based approach to health that are generally relevant to economic, social and cultural rights: recognition of interdependent rights, thresholds of progressive realisation, and obligations of international cooperation and assistance.[140] These analytical categories raise potential human rights considerations in the case

[139] Ibid 140–141.
[140] Hunt, above n 30, 111.

study analysis that have not been completely addressed by the three prescriptive models considered in this chapter. [141]

The analytical approach taken in the case studies of balancing other relevant rights provides a strong foundation that can be adapted to assess the broader human rights impact of intellectual property legislation. The approach to human rights analysis utilised in the case studies can be modified so that it is not specific to health. Appropriate considerations for civil and political rights in this exercise include any relevant internal limitations on the right. Although the obligations of international cooperation and assistance that were considered in the case study are specific to the right to health, Articles 55 and 56 of the *United Nations Charter* provide a basis for considerations of obligations of international cooperation and assistance in the global realisation of human rights.[142]

The following questions in relation to legislation could also be applied to the scrutiny of international agreements:

1. What human rights are implicated by the legislation? How do any relevant internal limitations or concerns of progressive realisation apply for each right?
2. If the rights are restricted, can they be balanced against each other? Does this balancing avoid unjustifiable retrogression?
3. Is the operation of the legislation consistent with human rights standards of participation?
4. Does the legislation operate in a system that requires human rights monitoring and accountability?
5. Are relevant international assistance and cooperation obligations met?

This approach to human rights analysis recognises elements of a human rights culture identified in this thesis and applied in human rights analysis. They include participation and accountability; recognition of the interdependent and interrelated nature of rights; emphasis on progressive realisation of economic, social and cultural rights; and recognition of obligations of international cooperation and assistance. When applied to trade agreements, this approach is consistent with the findings in Chapter 10 of the need to consider international cooperation and assistance obligations and include transparency, participation and accountability mechanisms that permit ongoing assessment of human rights into a human rights-based approach to trade agreements.

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[141] Yu considers identifies does not completely address the problem of interdependent rights: Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property', above n 22, 78.
[142] *Charter of the United Nations* arts 55, 56.

11.4 HUMAN RIGHTS CULTURE FOR TRADE MARKS

The analysis of the relationship between the models and the case studies indicates that each prescriptive model considered can be useful in understanding the human rights implications of trade marks, strengthening harmonisation between the two fields and recognising considerations of both justice and order.[143] This section integrates those findings with other findings from the thesis to identify features of a culture that harmonises trade marks and human rights. The analytical tools approaches used in this chapter can be used to strengthen a human rights culture for trade marks that acknowledges both the protective and restrictive dimensions of the relationship between human rights and trade marks.

Geiger and Yu's approaches help to define what protections human rights might offer in relation to trade marks. Geiger's suggestion of three alternative approaches might also be adapted to recognise domestic differences. Chapter 1 of this thesis argues that Yu's model might be expanded to recognise protection for some trade marks that qualify as literary and artistic productions in order to encourage the production of culturally significant trade marks. Implementing one of Geiger's approaches into domestic and regional constitutions, and using Yu's model of analysis to understand what intellectual property protections might qualify for human rights protection, can better integrate existing intellectual property protection into a human rights framework. Practice and recognition of a human rights-based approach to intellectual property protection could influence the inclusion of human rights considerations in the interpretation of *TRIPS* in the WTO. The plain packaging case study demonstrates the relevance of human rights considerations to WTO disputes. This practice and recognition could also be relevant to the human rights-based approach to bilateral and regional trade agreements proposed in Chapter 10.

Section 11.3 has used the case study analysis to modify a human rights-based approach to health for use in intellectual property that remains relevant when the right to health is not engaged.[144] This analysis tool could be used in Australia in treaty analysis and parliamentary scrutiny. It could also be useful for civil society to highlight the human rights implications of intellectual property where relevant, and for the Australian Human Rights Commission if its mandate is expanded to include *ICESCR*. Chapter 5 recommended expansion of this mandate and emphasised the need for Australia to provide fundamental justiciable protection for human

[143] Murumba, above n 4, 140–141.
[144] Helfer and Austin characterise the impact assessment space as crowded: Helfer and Austin, above n 34, 518. Yet MacNaughton and Forman note limited examples of implementation of assessment practices in relation to the right to health: Lisa Forman and Gillian MacNaughton, 'Moving Theory into Practice: Human Rights Impact Assessment of Intellectual Property Rights in Trade Agreements' (2015) 7(1) *Journal of Human Rights Practice* 109, 122.

rights. Such protection should include constitutional recognition of the right to benefit from science and culture to ensure that existing protection of property rights in the *Australian Constitution* is balanced when the protection is applied to intangible property, in order to recognise broader objectives of intellectual property. Constitutional recognition in other jurisdictions may generate decisions that are beneficial tools to aid understanding of the nature of the right.[145] This, and application of Yu's analytical approach, can be useful interpretive aids for actors advocating a human rights culture for intellectual property. They may use this to contest corporate attempts to expand human rights protection for intellectual property beyond appropriate boundaries.[146] These tools could also aid more sophisticated parliamentary scrutiny of *ICESCR* Article 15 in Australia. Helfer and Austin's Welfare Preservation Questions can be part of a balanced approach to intellectual property that recognises the benefits of intellectual property. Consequently, scrutiny by parliament and analysis by other actors could separate restrictions on human rights caused by intellectual property from other restrictions.

The normative and hierarchical claims considered in the first three chapters of this thesis can be useful tools to justify the need to build a positive human rights culture for trade marks. Australia needs to continue to recognise the importance of human rights in the negotiation of these treaties and also in WTO disputes. Transparency needs to improve to permit the individuals whose rights can be restricted in these circumstances to understand those restrictions and advocate for the government to recognise them and address them. The conclusion in Chapter 10 that bilateral and regional trade agreements can preference intellectual property law over human rights law reinforces the importance of recognition of both normative and positivist dimensions of the relationship. This should require positive recognition of human rights rather than reliance on it as a corrective.[147] Each model supports recognition of a level of human rights primacy. This level depends on the relevant threshold for human rights protection. In the models of Helfer and Austin, and Yu, civil and political rights are subject to little restriction. In relation to economic, social and cultural rights, Yu relevantly considers both a core minimum approach to protection and a progressive realisation model. He suggests, but does not prescribe, how the approaches can be used together. This thesis concludes that progressive realisation is the appropriate threshold to be considered in assessing human rights protection. This corresponds to recognising that a positive approach to fostering and promoting human rights forms part of states' binding human rights obligations. This would permit states to argue that they need to maintain approaches justified by the progressive realisation of human rights in order to avoid

[145] Petersmann, above n 1, 297. See Geiger, above n 3.
[146] Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003); Yu, 'Ten Common Questions about Intellectual Property and Human Rights', above n 82.
[147] Murumba describes the use of human rights as a 'weapon of last resort': Murumba, above n 4, 135.

retrogression in circumstances like the plain packaging disputes, where the relevant standard might be restricted by the assertion of intellectual property rights by other actors in international law.[148] However, retrogression is permitted in exceptional circumstances so, if this mechanism was not used in good faith, the progressive realisation standard might appropriately be modified.[149] These thresholds should also be recognised in the constitutional regimes that Geiger's model engages.[150]

Another feature of a human rights culture for trade mark protection that has been considered in this thesis is the development of an appropriate forum for resolving serious conflicts between human rights and intellectual property. The concept of systemic integration that was introduced in Chapter 3 is also relevant to understanding which dispute resolution mechanisms might be most appropriate for permitting recognition of both human rights and intellectual property. Chapter 3 found that systemic integration is less likely in the human rights institutions as they are presently structured. Although Chapters 3 and 8 have identified the potential for the inclusion of human rights considerations into the WTO dispute mechanisms, this has not yet occurred in the small number of decided cases involving *TRIPS*. The WTO disputes involving tobacco plain packaging have been extremely protracted, which can intensify the phenomenon of regulatory chill that was analysed in Chapter 10. Problems with delay in the WTO dispute settlement system could also encourage future regime shifts towards bilateral and regional trade systems.[151] Features of more recent trade agreements include a European Investment Court.

Dissatisfaction with the WTO could place renewed emphasis on agreements that are administered by WIPO. Ricketson suggests that the problems with implementation in the WTO may mean that the *Paris Convention* has increased relevance.[152] Arguably the *Australia – Plain Packaging* decision and recent actions against China in the WTO reaffirm the relevance of *TRIPS*. As noted in the introduction to this thesis, there is already evidence of a human rights culture in WIPO.[153] Although it has never been used, the judicial mechanism for the *Paris Convention* is the International Court of Justice. This could be an appropriate mechanism for

[148] Geiger does not reference the concepts of core minimum or progressive realisation in his approach: Geiger, above n 3.
[149] *General Comment 3*, UN Doc E/1991/23, [9].
[150] Ducoloumbier questions this in Europe: Ducoulombier, above n 28, 39–41.
[151] See 'No WTO Judgment in Tobacco Packaging Dispute until at Least 2016' *Reuters (online)*, 14 October 2014 <https://www.reuters.com/article/us-wto-tobacco/no-wto-judgment-in-tobacco-packaging-dispute-until-at-least-2016-idUSKCN0I313W20141014>. Gruszczynski describes a strategy of delay by corporations in Gruszczynski, above n 112, 247. However, there are also concerns about delays in investment arbitrations: Eric Crosbie, *Constraining Government Regulatory Authority: Tobacco Industry Trade Threats and Challenges to Cigarette Package Health Warning Labels* (PhD Thesis, University of California, 2016) 146 <https://escholarship.org/uc/item/7tr077rr#main>.
[152] Ricketson, above n 8, 755–793.
[153] For example, the *Marrakesh Treaty* is the first treaty in international law that explicitly focuses on intellectual property and human rights.

systemic integration as it has jurisdiction to consider human rights obligations. This is an area for future consideration.

11.5 CONCLUSION

This chapter has applied the prescriptive models introduced in Chapter 1 to the case studies, which demonstrates that there are important features in each model that can contribute to a human rights culture for trade marks. This culture is focused on mechanisms that are useful for understanding the relationship between human rights and trade marks within states and that enables states to implement binding obligations for both fields harmoniously. The case study analyses supports the inclusion of the assessment tool proposed in Section 11.3, which recognises specific features of economic, social and cultural rights such as progressive realisation. The chapter has also used the case studies to demonstrate that analytical tools from each model that harmonise human rights and intellectual property obligations contribute towards building a human rights culture for trade marks, although use can vary depending on local legal culture and economic conditions. Recognising these differences and addressing them increases the likelihood that a human rights culture for trade marks can be implemented sufficiently broadly to influence cultural change internationally. Widespread recognition of principles underpinning a human rights culture in the WTO may also create conditions for the WTO Dispute Settlement process to be more inclusive of human rights. WIPO remains an important institution for future integration of human rights and intellectual property, and the International Court of Justice may be a forum to resolve some disputes. This chapter establishes that features of a human rights culture for trade mark protection could be useful in guiding future development of trade marks protection, consistent with human rights obligations, and reclaiming the legitimacy of trade mark protection in international law. It has also identified ways in which these features can influence how trade marks are protected in bilateral and regional trade agreements, so that it is possible to address the concerns about expanding trade mark rights identified in this thesis and to take steps to build a more positive human rights culture for trade marks.

CONCLUSION

INTRODUCTION

Understanding the relationship between intellectual property and human rights has assumed increasing significance as progressive increases in protection for intellectual property illuminate potential restrictions on human rights. Protection for trade marks has grown, but there has been limited recognition of their relationship with human rights. The primary emphasis has been on potential protection for trade marks through regional protection for a limited human right to property, but in practice this has rarely engaged human rights protection. Models conceptualising the relationship between intellectual property and human rights have concentrated on the human rights implications of protection for copyright and patents. This thesis focuses on the role of trade marks in models characterising the relationship as conflicting, coexisting or possibly harmonising, if the frameworks they prescribe are adopted.

Trade marks engage human rights as a consequence of their cultural and economic significance. The cultural significance of trade marks means that they can be relevant to human rights to benefit from science and culture. Creators of trade marks may be entitled to the protection of moral and material interests in trade marks that constitute a literary or artistic production. While trade mark rights can sometimes be modified to support the realisation of human rights, their economic significance can encourage trade mark owners to resist this. This is exemplified by the resistance of owners of tobacco-related trade marks in domestic, bilateral and multilateral actions disputing plain packaging measures that can promote the human right to health. The economic value of trade marks also incentivises more extensive protection against their unauthorised use, particularly in respect of counterfeit activities. Counterfeit activities potentially threaten the ability of states to protect individuals against third-party threats to their health and to realise the right to health. Increasing sophistication in counterfeiting activities makes detection increasingly difficult and encourages further international regulation, which can restrict rights to a fair trial and privacy. Paradoxically, increasing regulation of this nature may restrict protection of the right to health by making it more difficult for states to focus on alternative protection measures that are more likely to be effective but also require resource investment.

OUTCOMES OF RESEARCH AND RECOMMENDATIONS

The objectives of this research have been to understand the relationship between trade marks and human rights better, and to use this analysis to propose methods for ensuring that the operation of trade mark law is consistent with human rights. Although the focus in the literature

has previously been on the relationship between trade marks and freedom of expression, the thesis has focused on the relationship between trade marks and the right to health. Previous considerations of the relationship between trade marks and health have tended to focus on the public health dimensions of the relationship. However, state obligations in relation to the right to health that include monitoring and accountability can differ significantly from obligations in relation to public health. More broadly, monitoring and accountability are important features of a human rights culture, features which make it easier to identify and recognise conflict between the fields of intellectual property and human rights. Other important features identified in this thesis and considered in the human rights analysis undertaken are the interrelated and interdependent nature of rights; progressive realisation of economic, social and cultural rights; very limited permissible restrictions on rights; and obligations of international cooperation and assistance.

The case studies demonstrate ways in which trade mark legislation can foster and restrict human rights. The anti-counterfeiting case study shows the way in which anti-counterfeiting legislation engages Australia's obligations to protect individuals from threats that third-party counterfeiters pose to their health. Although there are significant health and safety concerns related to the activities of counterfeiters, an accountable obligation of this nature is much more difficult to assert in public health. Similarly, disputes about plain packaging demonstrate that the primary emphasis for health in international intellectual property law remains a public health exceptions approach, which states are permitted but not obliged to use. This absence of obligation and these differences between requirements of public health and human right to health obligations can limit state protection of the human right to health. The case studies also demonstrate the way in which the legislation studied engages multiple other human rights considerations, suggesting that the best approach to analysis of intellectual property permits an integrated assessment of relevant human rights implications of legislation.

The case studies and related analysis in Chapters 10 and 11 highlight the domestic and international relationship between trade marks and human rights. Human rights are important to consider as Australia is bound to observe them in international law. Chapters 2 and 3 identify stronger claims of normative and doctrinal primacy for human rights in international law than for intellectual property. Although Australia provides limited accountability for individuals against the state in relation to human rights, it remains bound by these obligations, which are important standards that can be used to scrutinise domestic law. The lens of the human right to health requires further assessment of the way in which relationships between trade marks and health are consistent with principles of progressive realisation and international cooperation and assistance. This is also relevant for other economic, social and cultural rights.

In practice, considerations of human rights are not frequently integrated into many other fields of international law. This reflects the fragmentation of international law. Fragmentation increases the likelihood of conflict between trade marks and human rights remaining unidentified or unaddressed where it does not engage direct conflict. This may have a negative impact on the realisation of human rights. Problematically, the structure of bilateral, regional and multilateral trade agreements encourages compliance more strongly than relevant human rights mechanisms can, when conflicts between the two fields crystallise in disputes. Analysis of the plain packaging case study identifies the chilling regulatory impact of disputes about plain packaging legislation at domestic, bilateral and international levels on the realisation of the right to health. As this chilling effect has restrained other states from implementing similar legislation, despite their stated desire to do so, the actions of the disputing tobacco companies have indirectly restricted states from progressively realising their right to health protection obligations in international law. An emphasis on human rights scrutiny is important in order to recognise and address the impact of regulatory chill of this nature. Detailed human rights scrutiny of international agreements containing intellectual property related provisions, as well as existing and prospective intellectual property legislation, is necessary.

This thesis focuses on the ways in which mechanisms such as human rights scrutiny can be used to build a human rights culture for trade marks. It has identified analytical approaches found in prescriptive harmonising models that seek to address conflict between human rights and intellectual property. It has also considered the way in which these mechanisms apply to each case study in order to assess their suitability for preventing and addressing conflicts at a domestic and international level. A human rights culture for trade marks has both domestic and international aspects, but diverse local conditions mean that it may operate differently between states. The absence of horizontal accountability for human rights in Australia through constitutional protection for individual human rights means that a greater emphasis may be necessary on legislative scrutiny mechanisms, as well as participation by relevant actors in legislative development and negotiation of international agreements. Transparency is an important cultural feature that supports these activities, but as Chapter 10 has recognised, it is more broadly important for permitting assessment of accountability with human rights standards.

Appropriate mechanisms for promoting and fostering a human rights culture for trade marks have been considered throughout the thesis, particularly by applying principles and mechanisms from conceptual models to the case study analysis. Assessment of the utility of models conceptualising the relationship between human rights and intellectual property changes when it is recognised that a human rights culture for trade marks will vary domestically. These models

prescribe important analytical approaches, yet the applicability of each tool can vary between jurisdictions. Geiger's incorporation of the right to the benefits of science and culture into constitutional protection may not be directly applicable to a state like Australia that lacks effective constitutional protection for human rights. However, a growing international recognition of the right to benefit from science and culture in other jurisdictions, which do incorporate this protection, may be indirectly relevant if it influences parliamentary scrutiny. Similarly, principles from Yu's models can influence policy analysis, civil society activity, and scrutiny of legislation and international agreements that engage human rights protection for creators of scientific, literary and artistic productions.

Human rights scrutiny appears to be the most important tool for understanding both protective and restrictive relationships between human rights and trade marks. The human rights-based approach to scrutiny of intellectual property legislation and international agreements, which has been developed and modified throughout this thesis, permits recognition of important features of economic, social and cultural rights grounded in the legislative analysis of each case study. The approach provides standards of analysis that should be useful for a range of actors. Helfer and Austin's Welfare Preservation Questions can also recognise state obligations to protect intellectual property, although the anti-counterfeiting example suggests these questions may not be conclusive if relevant data is insufficient. Scrutiny in Australia needs to be broader than existing legislative scrutiny. An important initial step would be expanding the mandate of the Australian Human Rights Commission to include economic, social and cultural human rights.

Objectives of systemic integration between intellectual property and human rights can be realised if states use interpretive tools in international law to emphasise the relevance of human rights to intellectual property. The plain packaging case study suggests that the relevance remains underemphasised in the World Trade Organization (WTO). Alternative venues for adjudication that may permit systemic integration include the International Court of Justice. Regime shifts away from the WTO towards regional and bilateral mechanisms suggest a need for greater human rights scrutiny of the obligations and dispute resolution mechanisms than currently exists.

AVENUES FOR FURTHER RESEARCH

This research focuses on trade marks. This is significant as the primary emphasis of existing analysis in the field is on patents, copyright and traditional knowledge. The research identifies important human rights implications of trade mark law. However, the unifying potential of a human rights culture that supports the promotion and fostering of human rights in other fields of intellectual property is important. The tools considered and developed in this research can be

applied to other fields of intellectual property to determine what a human rights culture could mean for diverse fields, including designs, geographical indications, copyright and patents. This will also permit identification of mechanisms that could have specific utility in certain fields. Mechanisms proposed by other theorists considering the relationship between human rights and intellectual property may also be useful to broaden the analysis. The rights-based approach to intellectual property developed in Chapter 11 has not yet been applied to case studies that do not engage the right to health, and it may be useful to apply it to fields of protection that engage significant implications for civil and political rights.

The research also focuses on Australia, a developed country that is a net importer of intellectual property. It could be useful to apply the models and the rights-based approach to intellectual property in a developing country, a least developed country, or a developed country that is a net exporter of intellectual property. The findings may be quite different and reinforce a conclusion of this research that a human rights culture for trade marks will need to be flexible so that it can respond to local conditions. The concept of a human rights culture for trade marks incorporating a range of mechanisms that can be used in different contexts recognises the need to respond to this potential diversity of local economic conditions.

It is also relevant that Australia has an underdeveloped system of human rights protection. The analysis could be conducted on trade marks legislation in a developed country that is a net importer of intellectual property and has a stronger framework for human rights. Subsequent findings could be influenced by limitations in effective protection for economic, social and cultural rights in those countries.

This thesis was in the final stages of drafting when *Australia – Plain Packaging Measures* was published. Given the importance of the decision in relation to *TRIPS* Article 20 to the thesis, analysis of that part of the decision has been integrated into the work. Future research in this field can more broadly develop analysis of the decision and its implications for the relationship between trade marks and human rights.

CONCLUSION

A human rights culture for trade marks fosters and protects human rights. The case studies in this thesis highlight the complex relationship between trade marks and human rights. The human right to health implications of each case study are significant. They support greater emphasis on understanding the human right to health implications of trade marks. The case studies also show that there are further, interrelated human rights that human rights-based analysis of trade marks should consider. Accordingly, the methodology used in the case studies

was adapted, resulting in the recommendation of an approach to human rights analysis for intellectual property mechanisms that supports the progressive realisation of economic, social and cultural rights. Importantly, this analytical approach should be only one component of a broader human rights culture influencing the protection of trade marks. In many circumstances, additional questions that emphasise the benefits of intellectual property should supplement the analytical approach. Constitutional recognition of the right to benefit from science and culture can be compatible with approaches that permit an understanding of what those rights protect and how they should be balanced against other rights. Domestic application of these mechanisms should be relevant internationally, and this may influence current restrictions on recognition of human rights in existing international intellectual property structures. A culture of human rights to support trade marks will need to be adapted to recognise local differences. A flourishing human rights culture for trade marks and intellectual property is a longer-term goal but, in progressing towards this, all steps, no matter how small, are important.

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