

June 1, 2011

Assistant Secretary, Drug Strategy Branch
Attention: Tobacco Reform Section
Department of Health and Ageing
GPO Box 9848
Canberra, ACT 2606

tobaccoplainpackaging@health.gov.au

Re: Comments on Tobacco Plain Packaging Bill 2011 – Exposure Draft

Dear Sir or Madam:

I am writing on behalf of the Emergency Committee for American Trade (ECAT) to provide our comments on the Tobacco Plain Packaging Bill 2011 – Exposure Draft and the regulatory proposals contained in the August 7, 2011 Consultation Paper. ECAT is an association of leading U.S. business enterprises with global operations. ECAT was founded more than four decades ago to promote economic growth through expansionary trade and investment policies. Today, ECAT's members represent all the principal sectors of the U.S. economy – agriculture, financial, high technology, manufacturing, merchandising, processing, publishing and services. ECAT companies are strong supporters of negotiations to eliminate tariffs, remove non-tariff barriers and promote trade liberalization and investment worldwide through strong rules and enforcement mechanisms, including through strong standards on the protection of intellectual property rights. Many ECAT companies have significant operations throughout Australia.

ECAT is submitting these comments to urge the Australian government to reject the plain-packaging proposal and to seek more effective ways of accomplishing health objectives on smoking reduction. As discussed in depth herein, the plain-packaging proposal blatantly violates longstanding international agreements that both our countries have joined. While the issues raised here are on tobacco, Australia's pursuit of this legislation will have far-reaching and highly negative consequences for Australian and American industries well beyond this one industry.

ECAT strongly shares Australia's health concerns and supports appropriate measures that are designed to reduce smoking in an effective manner that does not violate international norms. But just saying that a measure is intended to address a certain objective does not make it so. As discussed below, there is no evidence that plain packaging will accomplish its objectives, and it very well may undermine progress on the very important health objective of reducing smoking, as well as lead to other serious problems.

Detailed Comments

Plain Packaging Violates Longstanding International Obligations of Importance to Australia

Trademarks and other forms of branding represent a core intellectual property right. Companies throughout all industries in the United States and Australia rely on trademarks as a valuable and integral part of their business that conveys the essence of the company and its reputation. Trademarks also

convey important information to the consumer on quality and product characteristics, helping to differentiate products in the marketplace. Trademarks are highly important to prevent consumers from being confused or from purchasing goods that may be materially different or inferior to the trademarked product. Given the importance of trademarks, numerous international agreements – which have been approved by both Australia and the United States – provide strong protections for all trademarks.

Adoption of a plain-packaging requirement for tobacco products is contrary to Australia’s obligations under several international agreements, particularly the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Paris Convention for the Protection of Industrial Property (Paris Convention), the WTO Agreement on Technical Barriers to Trade (TBT) and the U.S.-Australia Free Trade Agreement.

- WTO TRIPs Agreement

Article 20 of the TRIPs Agreement lays out the following requirement for trademarks:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as . . . 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.

Australia’s plain-packaging proposal seeks to prohibit the use of any tobacco trademark or other aspects of design on a tobacco product, except for the brand name in common typeface. In addition, the package would be required to have graphic health warnings over 75 percent of the front-package surface and 90 percent of the back surface. If adopted, the plain-packaging legislation and regulations would constitute a prohibition on the use of the manufacturer’s own trademark and would be detrimental to a manufacturer’s ability to distinguish its goods from others on the market. Given that there is no credible evidence that this requirement would effectively address health concerns, but could actually exacerbate them, this type of requirement would be found to be unjustifiable under TRIPs Article 20.

Furthermore, Article 15(4) of the TRIPs Agreement also provides that:

The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

Article 7 of the Paris Convention includes an identical requirement. Clearly, the plain packaging option, if adopted, would be directly contrary to these provisions.

Contrary to some claims, TRIPs Article 8(1) does not provide Australia with the right to take this type of measure. This provision states that:

Members may, in formulating or amending their laws and regulations, adopt 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, provided that such measures are consistent with the provisions of this Agreement.

Under this provision, Australia would need to prove that the measure is both necessary *and* consistent with the TRIPs Agreement. As explained above, the plain-packaging proposal is clearly contrary to the TRIPs agreement. As explained further below, Australia cannot establish that this measure is “necessary.”

- Paris Convention

Article 6quinquies(A)(1) of the Paris Convention provides that:

Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union. . . .

Requiring plain packaging, as proposed by the Exposure Draft, would eliminate protection for the manufacturer by prohibiting its use of the trademark contrary to this provision.

- WTO TBT Agreement

Article 2.2 of the TBT agreement requires that:

. . . technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create.

The adoption of a plain-packaging requirement is more restrictive than necessary, particularly given that there is no credible evidence that this requirement would effectively address health concerns, but could actually exacerbate them. There are also a number of far less trade-restrictive measures that could be taken to achieve the health objectives.

For all of these reasons, Australia’s plain-packaging proposal would violate longstanding international norms guaranteeing the protection of intellectual property rights.

Plain Packaging Is Inconsistent with Australia’s Longstanding Interests in Intellectual-Property Protection

Beyond the international obligations to which Australia has committed is the underlying purpose of the intellectual-property protection for trademarks. As noted above, trademarks are integrally linked to the brand of enterprises in every major sector of the Australian economy and provide important benefits to such enterprises, their workers and consumers that rely on them for information on the quality and characteristics of a product. Indeed, Australia itself has raised concerns in the WTO about similar actions by the Government of Thailand to mandate package requirements that undermine rights of Australian alcoholic-beverage producers.

ECAT has long valued the U.S.-Australian partnership in international trade and investment, given that both countries typically seek to adopt and enforce strong standards and open markets. Given the lack of credible health justifications, Australia’s adoption of plain-packaging would send precisely the

wrong message to other countries that seek to undermine intellectual property rights for protectionist reasons.

Efficacy of Plain Packaging

We are deeply concerned that the Australian government admits that it has “no proof” that plain packaging will reduce smoking rates, as was reported in the [Melbourne] Herald Sun (May 24, 2011), but continues to support it despite clear treaty obligations. We find the Australian government’s justification wholly insufficient, lacking both compelling empirical evidence and any analysis of alternative means of reducing smoking rates.

For example, we note that the Consultation Paper relies only on “research evidence to June 2009 [that] is set out in detail in the reports of the Preventative Taskforce.” The referenced “Taking Preventative Action” report relies upon one study to justify plain packaging – Wakefield MA, Germain D, Durkin SJ, “How does increasingly plainer cigarette packaging influence adult smokers’ perceptions about brand image? An experimental study,” **Tobacco Control** 2008;17. This study has numerous flaws including:

- Its lack of peer review.
- Its self-selection model (based on an online survey of self-selected respondents).
- Its limited sample size (813 adults).
- Its failure to look at youth and whether plain packaging would have any impact on their smoking rates.
- Its failure to determine if plain packaging would result in any change in behavior.

We are aware of a number of other studies like that one, listed in the government’s Consultation Paper and elsewhere, including the recent Cancer Council Australia report, but all are subject to the same flaws. Significantly, none of the studies listed by the government provides any estimate of the amount by which plain packaging would reduce smoking rates, and none considers less-restrictive alternatives. In sum, the evidence that plain packaging will reduce smoking is lacking.

Moreover, in promoting the plain-packaging proposal, the Consultation Paper fails to look at its impact on prices of tobacco products. Price is regarded as the single-most-important determinant of smoking behavior, with higher prices leading to substantial reductions in smoking rates. By removing the only non-price factor that brands can use to inform customers and to compete, the only remaining form of competition will be price. Lower prices have long been shown to increase smoking rates. While Australia has significant taxes on tobacco, there are still substantial price differentials between branded and generic cigarettes in Australia’s market. By removing trademarks and all other brand imagery and information from the packs, price competition is expected to intensify, which would likely increase tobacco consumption, especially by youth.

In sum, Australia’s health justification for plain packaging is not supported by actual evidence and seems more likely to cause an increase in smoking rates, not a reduction.

Plain Packaging Would Lead to Counterfeit and Illicit Activity

By removing trademarks, the plain-packaging proposal would eliminate the most-effective means to curb counterfeit and illicit trade in tobacco. Indeed, the removal of trademarks would more likely facilitate the illicit trade in counterfeit products that Australia itself recognized in the “Taking Preventative Action” report as important to combat. Counterfeit product and illicit trade will have even more negative consequences on prices, lowering them and, thereby, increase smoking rates. Moreover, plain packaging will facilitate the sale of unregulated tobacco products and result in criminal activity and the loss of government tax revenue.

Plain Packaging Is Not Required or Recommended by the Framework Convention on Tobacco Control

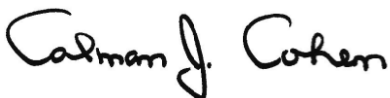
It should also be noted that contrary to section 3 of the proposed legislation, Australia’s adoption of this plain-packaging proposal would not “give effect” to Australia’s “obligations” under the WHO Framework Convention on Tobacco Control (FCTC). In fact, the FCTC does not require the adoption of plain packaging. The FCTC’s non-binding *Guidelines for implementation* of Articles 11 and 13 (“*Guidelines*”) recommend that the Parties “consider” plain packaging, but do not require it as a obligation, provide any evidence of its efficacy or set any standards for its adoption. In short, there is no WHO FCTC “obligation” to adopt plain packaging as the legislation incorrectly states.

Conclusion

Australia’s objective to reduce tobacco consumption is very important. At the same time, how it seeks to do so is also important and should not be considered lightly. Rather than pursuing a superficial plain-packaging “fix” that violates international obligations, undermines Australia’s own industries and is more likely to result in smoking-consumption increases, ECAT urges Australia to pursue those initiatives on price and combating illicit activity that will help Australia to meet its objectives. For all of these reasons, we strongly urge the rejection of the plain-packaging proposal.

Please do not hesitate to contact me if further information would be helpful.

Sincerely,



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