



27 May 2011

Assistant Secretary, Drug Strategy Branch  
Attention: Tobacco Reform Section  
Department of Health and Ageing  
MDP 701  
GPO Box 9848  
CANBERRA ACT 2601

[tobaccoplainpackaging@health.gov.au](mailto:tobaccoplainpackaging@health.gov.au)

Dear Sir / Madam

**Ref: Tobacco Plain Packaging Bill 2011 Consultation**

As an international organisation Filtrona Coated & Security Products (C&SP), trading as Payne, Payne Security & FractureCode, is a provider of value added consumer packaging, authentication & ID and track & trace solutions for customers worldwide. We welcome the opportunity to respond to the Consultation Paper published by the Department of Health & Ageing. Specifically we are responding to the proposals to introduce legislation mandating that all tobacco products be sold in 'generic or plain packaging by 1 July 2012'.

We would like to clearly state that Filtrona C&SP strongly supports the responsible marketing of tobacco products and protection of public health according to Australian & worldwide legislation. Our comments are in relation to our beliefs in regard to the consequences on trade, intellectual property and impact on counterfeit & illicit tobacco sales from the proposals set out in the Consultation Paper.

We consider it necessary to voice our concerns regarding the proposals to introduce 'generic or plain packaging' raised in the Consultation Paper and the potentially negative implications on several industry sectors, and would urge the Australian Government to take into account the full role of branding on packaging within this process.

It is our strong belief that brand differentiation exists to facilitate consumer choice, information and convenience. Branding on packaging covers all aspects of packaging design and generic or plain packaging will vastly increase consumer confusion without even discouraging the use of the product itself. We therefore believe the following points should be taken into account as part of the review with reference to the evidence based research available.

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### **Barrier to trade**

Limiting the ability to brand, limits the ability to differentiate and compete. Limiting the ability to compete is a restriction of trade. We believe this precedent is especially dangerous to the general market economy of our society, in that all of business is based on the ability to compete, and the Australian proposal takes that away.

A plain packaging requirement would also constitute an unjustified barrier to international trade in contravention of the Australian Government's international obligations under the General Agreement on Tariffs and Trade 1994 (GATT) and the Technical Barriers to Trade Agreement (TBT).

### **IPR Trademarks**

It is our belief that, as a rule, brands should not be unduly restricted with regard to legally sold products. The beneficial effects of brands are protected by national and community trademarks.

Trademarks are recognised property rights and protected under various national and international laws and treaties. It is our firm view that plain packaging legislation would unduly restrict pre-existing rights of trademark owners and deprive them of their property with regard to their established intellectual property rights.

'By introducing plain packaging Australia will also lose significant moral authority internationally in arguing against violations of the patents, trademarks and copyright in other markets to the detriment of Australian innovators, companies and creative artists.'  
(Institute of Public Affairs)

We believe that the proposal aiming to prevent companies from using their own trademarks in packaging will establish a very dangerous precedent for all legally sold products.

### **Counterfeit & Illicit Trade**

Generic or plain packaging will further facilitate the production of counterfeit cigarettes and tobacco products, which has already an unacceptable high level in many markets including Australia. Branding and packaging plays an important role in product identification for the consumer, potentially providing a significant role in assuring quality. Plain packaging will stimulate the counterfeiting of tobacco products, by making it easier and cheaper to copy their packaging and by increasing the burden on enforcement agencies.

With a strong position in providing technologies to both governments and businesses to protect brands from counterfeit, Filtrona C&SP agree with the position set out previously by policy experts and trade associations such as the Business Action to Stop Counterfeiting and Piracy (BASCAP) and the Anti-Counterfeiting Group who have raised serious concerns against plain packaging:

'BASCAP is concerned that this action would increase the prevalence of counterfeit goods in the market because counterfeit products will become easier to make, distribute and sell. Further, plain packaging enables the counterfeit industry to 'adopt' brand imagery: both counterfeiters and contraband operators would assume, correctly, that plain packaging



would result in a significant increase in demand for illicit products in particular amongst sections of society that many regulatory measures seek to protect most. It would further reduce brand owners' ability to take action against such activity;' [Business Action to Stop Counterfeiting and Piracy, International Chamber of Commerce]

'We believe plain packaging represents both an invitation to counterfeiting and a potential and significant restriction on branding in the UK and branding's ability to contribute to consumers and the economy.' Source: Anti-Counterfeiting Group and British Brands Group response to UK DOH Consultation 5 September 2008

In the article by Durkin, T.G., and Klass, J.M., Global Push for "Plain Packaging" on Consumer Products Will Burn Intellectual Property Rights, Washington Legal Foundation Newsletter, 11 September 2009, pp. 1-2 stated 'Counterfeiters are likely the only group that would benefit from a switch to plain packaging. Without the need to copy tobacco packaging, counterfeit tobacco packaging would become virtually impossible to detect. Counterfeit tobacco products would flood the market causing prices to drop, and, ironically, making products like cigarettes (counterfeit and legitimate alike) more affordable'.

The US Chamber of Commerce Global Intellectual Property Center, World Trademark Review, 16 February 2010 also stated plain packaging would 'increase global counterfeiting activities...and empower illicit traffickers at the expense of legitimate business activity and consumer confidence'.

A paper by Gabler, N., and Katz, D., Contraband Tobacco in Canada: Tax Policies and Black Market Incentives, Fraser Institute, July 2010, p. 20 also noted the serious adverse effect of illicit trade on both public health and revenues: "To the extent that smokers evade excise taxes by purchasing contraband, the use of excise taxes to discourage smoking is rendered ineffective. As such, the market for contraband cigarettes simultaneously undermines both of the major policy objectives of tobacco taxation: additional tax revenue and reduced smoking.

'Efforts to combat counterfeit trade hinge upon the maintenance of a principled, balanced and coherently articulated system of national and international treaties, laws and regulations, particularly in regards to trademarks and related intellectual property rights. Plain packaging would make both counterfeiting and smuggling more attractive. This presents the risk of an uncontrolled market for illegal products, potentially undermining the intention of plain packaging legislation to reduce smoking by instead leading to a prevalence of cheaper counterfeited or smuggled items.'" (The Institute of Patent and Trade Mark Attorneys of Australia)

"Furthermore, the requirement to use simple brown matte packaging and standard typeface will make it easier to manufacture and distribute counterfeit and contraband products, thereby increasing consumer confusion." "In addition, plain packaging likely will cause an increase in the production and distribution of counterfeit products by making it easier to copy the packaging in a manner that is not discernible to the typical consumer. (National Foreign Trade Council, Inc.)





Due to the risks and potential consequences of the proposals we ask the Australian Government to review further their plans for generic or plain packaging outlined in the Tobacco Plain Packaging Bill 2011. We would ask for greater consideration to be given to the alternative options available, which are consistent with international trade and intellectual property obligations and that also take into account the consequences in relation to the use of and trade in illicit & counterfeit tobacco.

We would like to thank you for the opportunity of contributing to this consultation.

On behalf of Filtrona C&SP,

A handwritten signature in black ink that reads "Tony Edwards". The signature is stylized with a long horizontal line extending to the right.

Tony Edwards  
**Divisional Managing Director**