

June 2, 2011

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

Dear Sir or Madam,

The Institute for Policy Innovation (IPI) appreciates this opportunity to provide input and comments on your Tobacco Plain Packaging Bill 2010.

About the Institute for Policy Innovation

The Institute for Policy Innovation (IPI) is a 24 year-old non-profit, non-governmental organization (NGO) based in the United States. Among our policy areas of focus are trade policy and intellectual property policy. In pursuance of these policy areas, most recently on May 16 IPI hosted an event in Washington DC on the benefits and challenges of free trade which featured the Right Honorable Mike Moore, ambassador to the United States from your neighboring New Zealand.

Also pursuant to those policy goals IPI is an accredited observer NGO to the World Intellectual Property Organization (WIPO) in Geneva, Switzerland.

So, because of obvious impacts upon both international trade and international intellectual property policies, it should come as no surprise that IPI would like to comment on Australia's proposed plain packaging requirements for tobacco products.

Summary

The Institute for Policy Innovation (IPI) recognizes the important role of Australia's government in protecting and furthering the public health of Australia's citizens, and we do not question the sincerity of the proposal or that of its proponents. Nevertheless, we are particularly concerned about the *means* that are currently proposed. Specifically, it seems clear to us that the proposal

- 1) violation of not one but several international agreements to which Australia is a signatory;
- 2) intersects the Australian Constitution in a significant way;
- 3) reflects a very incomplete understanding of the importance of trademarks in an economy;
- 4) sets a harmful and misguided precedent that would inevitably be extended to other types of products; and
- 5) will inevitably lead to an increase in counterfeit tobacco products which by their very nature escape regulatory compliance.

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The Proposed Plain Packaging Regulation Is A Clear Violation of Not One But Several International Agreements to Which Australia Is a Signatory.

Australia's proposed plain packaging regulation is in clear violation of Australia's obligations under the World Trade Organization (WTO) Agreements, the Paris Convention for the Protection of Industrial Property (Paris Convention), and the US-Australia Free Trade Agreement. Additionally, plain packaging of tobacco is NOT required under the World Health Organization (WHO) Framework Convention on Tobacco Control.

Trade agreements are negotiated among nations precisely because of the tendency of nations to adopt policies harmful to their international trading partners because of domestic considerations.

Trade agreements are thus a negotiated discipline between countries to discourage domestic policies that harm their international trading partners, such as would the proposed regulations. And while protecting its citizens against tobacco may seem to proponents as morally superior to another country protecting itself against the importation of Australian wine or wool, it is the nature of international relations that countries disagree about both domestic and international priorities. Trade agreements are designed to prevent nations from either purposeful or inadvertent disruptions in the critical trade relations that not only promote economic growth, but also peaceful relations between nations.

It would seem that the proposed plain packaging regulation is an example of a policy intended for domestic purposes that would have the inadvertent impact of harming important trade relationships, so it should be no surprise that it violates agreements to which Australia is a signatory.

1. The Plain Packaging Regulation Is a Violation of Obligations Under WTO Agreements

A plain packaging requirement violates Article 20 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Article 20 states:

“use of a trade mark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trade mark, 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.”

While some may argue that the proposed regulation is “justifiable” for public health reasons, evidence to that effect has not been demonstrated. Indeed, as other comments have shown, the likelihood is that eliminating trademark differentiation will drive down prices to commodity levels and encourage counterfeit and subpar quality products contrary to the intentions of the proponents.

Further, according to an analysis by the law firm Sidley Austin LLP, the regulation is also likely to be found in violation of the WTO Agreement on Technical Barriers to Trade (TBT Agreement). The TBT Agreement prohibits signatory nations from adopting technical regulations that create “unnecessary barriers to trade” which are “more restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.” Further language insists that “available scientific and technical information” should be considered. Since proponents cannot muster scientific or economic studies proving that the proposed plain packaging regulation would accomplish the goal of reducing smoking to such a dramatic level that it justifies the economic damage done to the holders of the trademarks, the proposed regulation would seem to not meet the requirements of the TBT Agreement.

2. The Plain Packaging Regulation Is a Violation of Obligations Under the Paris Convention

Article 10*bis* of the Paris Convention prohibits

“all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.”

The stated intention of the plain packaging regulation is to create such confusion, because it purposely eliminates differentiation between brands.

3. The Plain Packaging Regulation Is a Violation of Obligations under the US-Australia Free Trade Agreement

Chapter Eleven of the US-Australia FTA insists that signatory states provide “fair and equitable treatment” for foreign investments in that country, and “investments” is defined in the agreement to include intellectual property rights. It is inconceivable that the proposed plain packaging regulation is anything other than complete nullification of the value of the intellectual property of tobacco brand holders. It is equally inconceivable that destruction of the value of trademark value could be characterized as “fair and equitable treatment.”

Interestingly, Chapter Eleven also demands that if a signatory nation either directly or indirectly expropriates the value of an investment, the signatory nation must compensate investors. The proposed plain packaging regulation certainly at least indirectly expropriates the value of the trademarks of the brand holders and thus would obviously also trigger the compensation provision of the US-Australia FTA. Our guess is that, regardless of the importance that Australia puts on discouraging smoking, Australia is probably not willing to quantify that urgency by voluntarily complying with the compensation provision of the US-Australia FTA. Which is, after all, the intention of the compensation provision, which demands that nations “put their money where their mouth is” if they intend to purposely violate Chapter Eleven of the agreement.

These violations of Australia’s international agreements are not insignificant. To willingly violate not one but several international agreements would call into question Australia’s commitment to the international trading system, which is entirely based on such agreements. In pursuing its goal of improving the health of Australia’s citizens, Australia should consider other means that do not do violence to Australia’s existing international obligations.

Along those lines, it is interesting to note that plain packaging of tobacco is NOT required under the World Health Organization’s Framework Convention on Tobacco Control (FCTC), though in Section 3 of the Bill, the drafters imply that it is.

Articles 11 and 13 of the FCTC prohibits “false or misleading advertising,” or advertising that creates “the false impression that a particular tobacco product is less harmful than other tobacco products.” The trademarks of brand holders clearly do neither of these prohibited activities, leaving aside the important distinction that packaging is not advertising, and trademark is not advertising. So plain packaging is not required by the FCTC.

It is true that non-binding implementation guidelines created by WHO suggest plain packaging. It is important to understand, however, that guidelines are drafted by WHO staff and are not negotiated by WHO member states. Such guidelines are non-binding, are not included in the FCTC language, and do not even constitute “international standards” as defined in the WTO TBT Agreement (see above).

Finally, neither the FCTC nor the implementation guidelines can modify existing obligations Australia has in the international agreements discussed above.

The Proposed Plain Packaging Regulation Intersects the Australian Constitution in a Significant Way

Section 51 (xxxix) of the Australian Constitution provides that the federal government may only acquire property “on just terms.” Because the proposed regulation is almost certainly a taking of property from its holders, it may be that the federal government will be required to compensate the holders on just terms. The price tag for such a taking is almost certain to be in the hundreds of billions of dollars.

The Proposed Plain Packaging Regulation Reflects an Incomplete Understanding of the Importance of Trademarks in an Economy

It is not a small thing to pass a law that sweeps aside the trademarks of a holder, regardless of what someone thinks of their products.

Protection of the branding of legal products goes beyond the specific product to protection of the image of the company itself. To quote *economiesuisse*:

Trademarks play a number of roles, including distinguishing one’s goods from those of another; symbolizing the quality, goodwill and reputation associated with the product and its manufacturer; promoting innovation by facilitating the introduction of new products within brand families; and informing, reassuring and protecting consumers. Proposed regulations that limit or prohibit the use of words, figurative elements, colors or other terms that are intended to differentiate one product from its competitors, obviously preclude the ability of the trademark to fulfill its main functions. Furthermore, they reduce manufacturer’s incentives to invest in quality and new products and lead to a price-based competition.

The proposed regulation would undermine consumer choice, restrain freedom of communication, cause confusion on the part of tobacco consumers, and hinder an effective and efficient marketplace.

Furthermore, the proposed regulation seems to miss the important distinction between packaging and advertising. It is advertising that attempts to persuade and sell, not packaging. Importantly, *Australian law already prohibits tobacco advertising to consumers*. Packaging, by contrast, communicates important information to consumers, such as whether or not the product is filtered, the taste or flavor characteristic of the product, and the level of quality to be expected within the package. In other words, it is much more likely that packaging affects existing smokers rather than potential smokers, who would be more subject to advertising than to packaging.

The Proposed Plain Packaging Regulation Sets a Harmful and Misguided Precedent Which Would Inevitably Be Extended to Other Types of Products

This is the “thin end of the wedge” or the “slippery slope” argument—namely, that today it’s tobacco, but tomorrow it will be something else—other products deemed harmful to public health, or to public morals, or other products for other reasons.

Alcohol is also harmful to public health—arguably, more harmful than tobacco. It’s difficult to conclusively prove the impact of “secondhand” smoke, but it’s not difficult to identify the victims in a drunk driving accident. Shall we force alcohol products, perhaps produced in Australia, into plain

packaging? We suspect domestic producers such as Penfolds and Fosters might have a problem with that.

How about products containing trans fats? Processed sugar? It's even possible that these products have a more harmful impact on public health than tobacco, especially in light of the burden on the public health system imposed by Type II diabetes. Shall we take away the trademark rights of fast food products and chocolate bar producers such as Violet Crumble?

Sometimes "slippery slope" arguments aren't persuasive, but in Australia's case, plain packaging of products deemed harmful seems to already be extending to other products. For instance, we're aware that *the Government of South Australia has already imposed plain packaging regulations on R18+ films sold or rented in a retail establishment.*

It is not our intention to comment on the plain packaging regulation for other products. Rather, we simply mention these examples to demonstrate that there appears to be a tendency with Australia's policymakers to expropriate branding and intellectual property rights from certain products and services deemed harmful, while there are better means of accomplishing social goals that are grounded in sound science and do not violate international agreements.

Importantly, we note that the Australian trade ministry commented on a Thailand proposal to add large graphic health warnings to alcoholic beverages indicating such proposals violated international agreements. These are the same arguments we make here against plain packaging. This appears to be a double standard when you consider you are asking another country not to impose labeling standards because it may impede on the trademark of an Australian company. This appears to simply be an attack on tobacco because it is politically convenient and easy to do.

The Proposed Plain Packaging Regulation Will Inevitably Lead to an Increase in Counterfeit Tobacco Products Which by Their Very Nature Escape Regulatory Compliance

With the ability to protect and distinguish brands, comes the ability to differentiate by price. The proposed regulation eliminates a company's incentive to promote and protect their brands, so it is logical to assume that companies will put less effort into protecting brands, resulting in easy to counterfeit commoditized products.

There is already an enormous amount of counterfeiting in the cigarette marketplace, even with all of the proactive policing of counterfeits that is driven by brand holders. What is likely to happen to the level of counterfeiting of cigarettes when a) package design is simplified and mandated by government regulation, and b) the right to use color, logos and other branding elements is expropriated by the Australian government?

The answer is obviously that inferior counterfeit tobacco products will explode in Australia, and counterfeit products by their very nature ignore safety and other regulatory compliance issues. Counterfeiting is not only a crime, but it is also increasingly a source of income for highly organized crime syndicates.

Additionally, counterfeit cigarettes are generally sold with counterfeit tax stamps or other revenue documentation, meaning that counterfeits will deprive the Australian Government of expected tax revenue. Because governments derive significant revenues from tobacco sales, the revenue impact of increased counterfeiting in Australia could be significant.

Governments recognize that they do not have the resources to combat counterfeiting on their own, and often depend on the private efforts of brand holders. What incentive will brand holders have to fight counterfeiting under the proposed regulation? Certainly less than they do today.

Other Implications

Other implications of the proposed plain packaging regulation that concern IPI are a) whether a society that values free speech should be restricting the rights of companies that sell a legal product from communicating freely in the marketplace with their consumers; and b) the likelihood that resulting lower tobacco prices will actually result in more, rather than less, smoking. One of the best indications of a free society is whether or not the society trusts its ability to process information freely communicated within the marketplace. The proposed plain packaging regulation suggests that Australia does not trust companies and consumers to freely exchange information within a legal marketplace, which we would think would be offensive to independent, freedom-loving Australians.

Finally, our survey of the literature and research suggests that there is little or no evidence that the proposed plain packaging regulation will actually accomplish its goals of reducing smoking. We have focused our comments on the harm done to Australia's international obligations, and the likelihood of economic harm to consumers and producers. In light of the lack of evidence that the proposed regulation would actually accomplish its goal, these would seem to be high prices to pay for little or no benefit.

Conclusion

The Institute for Policy Innovation (IPI) appreciates the opportunity to share our views with you. Based on our comments, we urge the Australian Government to reject the proposed plain packaging regulation and find other methods and means for achieving the desired health outcomes that will not violate Australia's international obligations and agreements, and that will not encourage widespread counterfeiting of tobacco products. We would be delighted to work further with the Australian Government along these lines.

Sincerely,

A handwritten signature in blue ink that reads "Tom".

Tom Giovanetti
President
Institute for Policy Innovation (IPI)