



International Chamber of Commerce

*The world business organization*

## The Secretary General

The Hon Dr Craig Emerson  
Minister for Trade  
PO Box 6022  
House of Representatives  
Parliament House  
Canberra ACT 2600

20 April 2011 JG/ETD/rmn

*By email and post*

### **Subject: ICC views on the current Australian government proposal to mandate plain packaging**

Dear Dr Emerson,

As the world's business organization, the International Chamber of Commerce (ICC) represents thousands of member companies and associations from some 120 countries operating in every major industrial and service sector. For more than 90 years, ICC has worked to facilitate rules-based trade and high standards of business practice through the development and dissemination of rules, codes and guidelines.

It is our understanding that the Australian government has publicly stated its intent to require that tobacco product packaging be stripped of all trademarks and trade dress (i.e., colors, logos, design, etc.) and that such packaging only include large graphic health warnings and be plain in color with government prescribed small typeface at the bottom of the pack allowing for the name of the brand. The stated intention of the government is that this requirement be enacted into law by January 1, 2012, and implemented by July 1, 2012.

I am writing to express our concern regarding the 'generic or plain packaging' proposal being considered. Let me state unambiguously from the outset that our members strongly support the protection of public health. In fact, our views pertain mainly to the impacts on intellectual property rights and counterfeiting while we are not questioning the adverse consequences of long term tobacco use. On behalf of global business we urge the Australian Government to consider policy alternatives to the current "plain packaging" proposal as it would have negative consequences far beyond the aims of the policy while also serving to undermine the very intent of the policy as a result of its unintended consequences.

By eroding the means of asserting intellectual property rights (IP), the measure proposed would restrain trade, hamper consumer choice and safety, subvert trademark

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and IP laws and increase counterfeiting and illicit trade while encouraging lower priced legal and illegal commerce in tobacco products.

From a global and trade perspective, ICC believes that the removal of the branding on products undermines the goals of the Australian Government and its trading partners, namely to foster and encourage trade and growth of markets for Australian and global products. Brands and trademarks indicate the source of goods and/or services and assure proper accountability. With the plain packaging principle, the elimination of branding creates a severe trade restraint, interfering with the legitimate growth of markets and very real adverse precedential implications for other legal and branded products and services. Australian goods that are exported already face challenges emanating from non-science based and IP threatening measures. Therefore, we would suggest that pursuing a measure as draconian as plain packaging where your government – which has been a leading voice in support of IP and rules based commerce - would outrightly mandate the elimination of trademarks and trade dress and, in turn, branding capacity bears re-consideration.

From the citizen-consumer and the brand's perspective, plain packaging constitutes a direct suppression of freedom of communication and would increase confusion and open up consumers to risk, which is not a solution that serves public interest. Restricting trademarks and branding of products removes a valuable accountability and responsibility mechanism that consumers depend on to make the best choices in the marketplace. A name, brand, logo, image, signature, seal of guarantee are the elements used to express a brand commitment. They determine and support the relationship engaging both the consumer and the brand itself. This relationship builds common respect and accountability. This measure would cause significant collateral damage to brand value generally.

From the perspective of IP analysis, the issue of plain packaging will drastically go against the fair trade principle and associated protection. To encourage commerce, international law rightly protects trademarks and intellectual property. Several laws and treaties prohibit actions which would harm trademark ownership rights, including the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property. These laws protect branding and trademarks for all legal products. Denying the ability to create, maintain and use trademarks, to distinguish products, frustrates the very purpose of that intellectual property and would also thus prevent the legitimate full functioning of brands in a marketplace.

ICC is also very concerned that plain packaging would increase the prevalence of counterfeit goods in the market and reduce brand owners' ability to take action against such activity, besides undermining the ability of consumers to make informed purchasing decisions. Trademarks serve these important functions in the market for all branded goods and therefore plain packaging is also likely to increase rather than decrease burdens on already overstretched public agencies working to enforce intellectual property protections



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in the face of escalating counterfeiting and piracy throughout Australia and worldwide. Trademarks and branding also serve to enhance the pricing power of products in the market, which is consistent with tobacco control policies structured to increase the consumer price of such products. Eliminating trademarks and in turn branding capacities will drive price based competition while also facilitating the presence of illegal commerce and counterfeiting to the detriment of tobacco control policies. ICC therefore urges the Australian Government to carefully consider its recommendation regarding plain packaging within the wider context of IP protection policies, laws and enforcement regimes and impacts on business and government's ability to effectively fight against the problems of counterfeiting and piracy and protect the public's health.

Due to all of these very real risks, ICC members urge the Australian Government to steer away from the "plain packaging" option and favor alternative policy options consistent with Australia's trade obligations and that focus on providing consumers with more information – rather than restricting or eliminating it.

We appreciate the opportunity to express these views on behalf of the global business community.

Yours sincerely,

Jean-Guy Carrier

cc: **Senator the Hon Kim Carr**  
Senator for Victoria  
Minister for Innovation, Industry, Science and Research

**The Hon Julie Bishop MP**  
Shadow Minister for Trade  
Deputy Leader of the Opposition

**The Hon Peter Dutton MP**  
Shadow Minister for Health

**Mrs Sophie Mirabella MP**  
Shadow Minister for Innovation, Industry and Science

**Public Sector**  
The Director  
International Intellectual Property Section