



June 3, 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: Plain Packaging of Tobacco Products

The following is a submission from the Property Rights Alliance to the Australian Government regarding the Government's legislative proposal to amend product information standards to remove brands' trademarks and logos from tobacco packaging.

We thank the Australian Government for the invitation to make a submission regarding the legislation and its implications. We note our significant concern that, if enacted, the legislation will fail to achieve its objectives, while violating intellectual property rights and breaching numerous treaties to which the Australian government is a signatory.

The Property Rights Alliance

The Property Rights Alliance (PRA) is an advocacy organization, based in Washington, DC, dedicated to the protection of physical and intellectual property rights throughout the world.

The PRA produces the annual International Property Rights Index, a comparative study that measures the significance of both physical and intellectual property rights and their protection for economic well-being. In order to incorporate and grasp the important aspects related to property rights protection, the Index focuses on three areas: Legal and Political Environment (LP), Physical Property Rights (PPR), and Intellectual Property Rights (IPR). The 2011 study analyses 129 countries around the globe, representing ninety-seven percent of world GDP. The PRA notes that in 2011 Australia ranked ninth highest in protection of property rights of any country surveyed and commends Australia for its strong history of protecting both physical and intellectual property rights.

Intellectual Property Rights

If enacted, the proposed legislation will clearly violate the intellectual property rights of companies, by forbidding them from displaying their trademarks, and differentiating their products on the basis of said trademark. The protection of property rights, both physical and intellectual, is critical to economic development. Creating and maintaining an environment where both forms of property are protected and legally enforceable contributes to economic growth and stability.

We note that the Australian economy revolves significantly around businesses related to Intellectual property, whether it is pharmaceuticals, movies, music, books, software or inventions and industrial designs. As such, the continued protection of intellectual property is critical for the Australian economy to continue flourishing.

The protection of trademarks is a vital part of protecting intellectual property rights. The present revision scheme prohibits both the use of tobacco trademarks on non-tobacco products as well as tobacco advertising. Packaging is the critical way brand information can currently be provided to consumers and aside from pricing, it is the essential mechanism through which tobacco manufacturers can compete with each other for consumers. Tobacco companies have created significant intellectual property rights through their trademarks, as demonstrated in the significant degree of 'brand loyalty' in the market. Plain packaging legislation would significantly erode the value of these property rights.

By denying tobacco companies their right to use their trademark to identify their product, the proposed legislation strikes at the very core principles of corporate identity and consumer information that the Australian economy is based upon. As such, it not only violates the legal rights of the companies affected, but furthermore sets a very dangerous principle for the future of a government unwilling to respect intellectual property rights.

Finally, as tobacco remains a legal product, the assault on the centuries-old protection of trademarks represents a grave threat to the future of property rights, individual freedom, and freedom of speech, and as such, should be rejected without reservation.

Effects of the Proposed Legislation

The legislation will fail in its objectives to reduce the consumption of tobacco. There is no evidence in existence whatsoever to demonstrate that the implementation of plain packaging will lead to any decrease in the total quantity of tobacco products sold. Rather, the only effect would be brand substitution.

By denying companies the ability to compete on the basis of logo/trademark differentiation, consumers will be unable to differentiate products in any meaningful manner other than on price. As such, the proposed legislation will result in some cigarette manufacturers choosing to compete on the basis of price, leading to a fall in tobacco prices. Thus, the legislation might have the counter-intuitive effect of potentially *increasing* tobacco consumption.

Weakening of IP rights not only is detrimental to the economy, but also puts the public's health and safety at risk. The counterfeiting and falsification of tobacco products is an international problem of significant magnitude. According to the World Health Organization Framework Convention on Tobacco Control, the estimated 600 billion counterfeited and smuggled cigarettes crossing national borders each year represents a staggering \$50 billion (U.S.) in lost revenue, affecting nations throughout the world.

Counterfeit cigarettes harm individuals, who are unwittingly duped into smoking inferior and unhealthier cigarettes. A 2003 report by the BBC noted that counterfeit cigarettes contain 75% more tar, 28% more nicotine and about 63% more carbon monoxide" than genuine cigarettes in the UK market.

All available evidence demonstrates that trademarks remain one of the best controls on counterfeiting. By preventing the display of trademarks on tobacco products, the proposed legislation threatens a significant increase in illicit tobacco products, with negative effects for individuals.

Violation of International Obligations

If enacted, this law would violate several trade agreements in which Australia is a signatory including the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, the *Paris Convention*, and the *Australia-U.S. Free Trade Agreement*. Moving forward with such brazenly illegal activities that are so detrimental to the long-term economic health of Australia and its trading partners would be a grave and unfortunate error.

Conclusion

For the reasons outlined above, the proposed legislation would fail to achieve its objectives, while violating fundamental intellectual property rights and breaching numerous international obligations to which Australia is party to.

We submit in the strongest terms possible that the Australian government ought to abandon any effort to change the law.

Please do not hesitate to contact me for any further information.

Respectfully submitted,



Kelsey Zahourek
Executive Director
Property Rights Alliance