



PHILIP MORRIS
LIMITED

**Philip Morris Limited's submission to the
Senate Community Affairs Legislation Committee**

***Inquiry into Plain Tobacco Packaging
(Removing Branding from Cigarette Packs) Bill 2009***

30 April 2010

Introduction

Philip Morris Limited (PML) opposes Senator Fielding's *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009* (the Bill).

The Bill seeks complete government control of the pack – by requiring (1) that brand names be situated, sized, and type faced in a standard format; (2) a matt brown colour for the portion of the pack not covered by graphic health warnings; (3) specified pack dimensions and format; (4) use of “matt and rigid cardboard”; and (5) a pack size of 25 cigarettes.¹ By proposing this Bill, which embodies the notion of “plain packaging”, Senator Fielding is simultaneously asking the Australian Government to adopt a concept that has been rejected by every other government that has examined it – including the Australian Government in 1997 – and to effect a massive expropriation of valuable intellectual property.

The provisions contained in this Bill are not supported by any credible evidence to show that plain packaging will reduce smoking incidence. Nor does the evidence exist that this proposal will in any way protect children from the dangers of smoking. In addition, if implemented, the Bill would encourage the already flourishing illicit tobacco trade in Australia, breach Australia's obligations under international trade agreements, diminish free-market competition and deny adult smokers the ability to make legitimate product choices.

Plain packaging is untested, unproven and unprecedented

Repeatedly, Governments have rejected plain packaging, primarily due to inconclusive evidence:

- In 1994, Canada's Standing Committee on Health, while generally in favour of plain packaging, acknowledged concerns about inconclusive evidence.² In 1995, an Expert Panel commissioned by Health Canada found that the impact of plain packaging would vary and that the extent of change in smoking incidence was impossible to assess.³
- In 1995, Australia's Senate Community Affairs References Committee concluded that “on the basis of the evidence received, there is not sufficient evidence to recommend that tobacco products be sold in generic packaging.”⁴ In 1997, the Australian Government responded that plain packaging required further investigation, and no further policy action was taken.⁵
- More than ten years later, in June 2009, the UK's Minister of State (Public Health) explained, “No studies have been undertaken to show that plain packaging of tobacco would cut smoking uptake among young people or enable those who want to quit to do so.”⁶ The Minister further emphasised the need for evidence in light of international obligations: “Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need strong and convincing evidence of the benefits to health, as well as its workability, before this could be promoted and accepted at an international level—especially as no country in the world has introduced plain packaging.”⁷
- On 1 February 2010, the UK Department of Health released its tobacco control strategy. On the subject of plain packaging, the document stated that: “The Government believes that the

¹ See Schedule 2 to the Bill

² Report of the Standing Committee on Health, “Towards Zero Consumption, Generic Packaging of Tobacco Products”, Canada, June 1994

³ Expert Panel Report, “When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products”, Canada, March 1995

⁴ Report of the Senate Community Affairs References Committee, “The Tobacco Industry and the Costs of Tobacco-related Illness”, Australia, December 1995, pp.70 to 71

⁵ Government response to the report of the Senate Community Affairs References Committee, “The Tobacco Industry and the Costs of Tobacco-related Illness”, Australia, September 1997, pp.29 to 30

⁶ House of Commons, Public Bill Committee Debate, UK, 25 June 2009, Column 305

⁷ <http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s09.htm>

⁷ Ibid

*evidence base regarding 'plain packaging' needs to be carefully examined" and "(t)he Government will also seek views on, and give weight to, the legal implications of restrictions on packaging for intellectual property rights and freedom of trade."*⁸

- On 30 March 2010, the Lithuanian parliament rejected a plain packaging proposal, considering it to be contrary to fundamental principles embodied in the Lithuanian Constitution.⁹

Senator Fielding's Bill proposes that the Australian Government agree to a concept that no other country has supported. In fact, the UK Department of Health found *"the research evidence into this initiative is speculative, relying on asking people what they might do in a certain situation."*¹⁰

Similarly, economists who specialize in competition policy reviewed twelve such studies and found that not one provided *"a reliable answer on the existence of a causal link between branded cigarette packaging and youth initiation to smoking."*¹¹ Detailed analysis of these studies is contained in LECG's report, "A Critical Review of the Literature on Generic Packaging for Cigarettes."

Plain packaging would fuel the lucrative illicit tobacco trade

While all tobacco products cause harm, legally produced tobacco products in Australia are bound by multiple regulatory requirements and agreements with governments. These include an array of provisions from requirements to publish ingredients to printing health warnings on the majority of the pack.

Conversely, illicit tobacco products such as "chop chop", are not manufactured and sold pursuant to any regulations, restrictions or guidelines, including the complete absence of any health warning labels. Moreover, as the UK Department of Health has stated and as is widely recognised, illicit trade "makes tobacco far more accessible to children and young people."¹²

The Australian Minister for Home Affairs recognised the important distinction between regulated and unregulated tobacco products when, in December 2008, he commented that, *"Smugglers attempt to bring in cigarettes and tobacco that are typically produced in unregulated factories that may not meet hygiene standards and do not contain mandatory health warnings, making the goods a greater risk to the community."*¹³

The very existence of the illicit tobacco trade shows that consumers are willing to smoke illegal tobacco products when other tobacco products become too expensive or less distinguishable from one another. A recent report of the Ontario Tobacco Research Unit provides a perfect real-world illustration of this market dynamic from Canada:

Tobacco control measures such as advertising bans, public awareness campaigns, and point-of-sale display bans have had the cumulative effects of denormalizing traditional cigarette brands, stripping them of the social significance they once had. As big tobacco company brands have been denormalized, there has been growth in demand for "no-name" cigarettes and discount brands. This burgeoning demand has been filled by the contraband

⁸ Department of Health, "A Smokefree Future. A Comprehensive Tobacco Control Strategy for England", UK, February 2010, p. 39 http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_111749

⁹ Plain packaging was considered to contradict the constitutional principles of free enterprise, competition and consumers' rights (Article 46) and violate obligations deriving from international treaties (Article 138)

¹⁰ Department of Health, "Consultation on the Future of Tobacco Control", UK, May 2008, p. 41

¹¹ Dr Jorge Padilla and Dr Nadine Watson, "A Critical Review of the Literature on Generic Packaging for Cigarettes", LECG Consulting Belgium, 4 January 2010, p. 5. Full report can be accessed at: <http://www.LECG Literature Review on generic packaging 2010.pdf>

¹² UK Department of Health's Consultation on the Future of Tobacco Control (31 May 2008) at p. 21.

¹³ Minister for Home Affairs, "Customs smokes out tobacco smugglers", Media Release, 24 December 2008

*market through baggies [clear plastic bags of loose cigarettes] and Native brands of cigarettes.*¹⁴

A recent report examining the black market in cigarettes estimated the excise revenue foregone due to illicit tobacco may be up to \$624 million a year.¹⁵ There is growing concern about the involvement of organised crime in illegal tobacco smuggling.¹⁶

The Federal Government's 2009 "Commonwealth Organised Crime Strategic Framework" notes that "serious organised crime groups with the capacity to operate across several jurisdictions – domestic or international – represent the highest threat to Australia". The document also notes that "operating outside legitimate systems may also provide organised crime with competitive advantages against legitimate market participants complying with regulatory and government revenue processes".¹⁷

Enactment of legislation that eliminates brands on legitimate tobacco products will provide greater profit incentives to organised crime and further motivate consumers to switch to cheaper unbranded alternatives. This will worsen the existing problem of illegal tobacco by removing consumer choice and preferences which provide the incentive to purchase legitimate, higher-quality products rather than counterfeit or contraband.

Mandating plain packaging will make it easier and less costly for counterfeiters to produce cigarette packages. The United States Chamber of Commerce's Global Intellectual Property Centre has noted that plain packaging would "increase global counterfeiting activities ... and empower illicit traffickers at the expense of legitimate business activity and consumer confidence".¹⁸ Plain packaging also provides an additional incentive for counterfeiters and smugglers of *branded* packs.

There is no doubt that the market will further develop for counterfeit and smuggled branded packaging. While the evidence does not suggest that consumers will reduce smoking because of plain packaging, it is likely that when presented with a choice between branded and plain packaging, a smoker will choose a branded pack which would convey through the branding the impression of providing higher quality tobacco products. Of course, this will provide more incentive for counterfeiters of branded packs and smuggled genuine product.

By introducing plain packaging, Australia risks becoming more attractive to those involved in illegal activity. There is no public health benefit when government policy results in consumers merely shifting to unregulated and illicit tobacco products.

Plain packaging would expropriate valuable intellectual property

The Bill's provisions for plain packaging represent a violation of Australia's domestic and international legal obligations. In Australia, Senator Fielding's plain packaging proposal represents an unconstitutional property acquisition for which compensation would be due. PML is the owner and licensee of highly valuable intellectual property used in the course of its business, including registered trade marks, registered designs, brand goodwill and cigarette packaging. These are exactly the elements of the pack Senator Fielding's Bill seeks to control. PML's property rights, including the exclusive right to use its registered trade marks, registered designs, brand goodwill, cigarette packaging and cigarette packaging not yet in existence,¹⁹ are all species of property

¹⁴ The Ontario Tobacco Research Unit, "Anti-Contraband Policy Measures: Evidence for Better Practice", June 2009, p. 41

¹⁵ Pricewaterhouse Coopers, "Australia's Illegal Tobacco Market: Counting the Cost of Australia's Black Market", 8 February 2010

¹⁶ Paul Maley, "Tobacco tax to 'boost profits for smugglers'", The Australian, 8 August 2009

¹⁷ Commonwealth of Australia, "Commonwealth Organised Crime Strategic Framework: Overview", 2009, p.9

¹⁸ World Trademark Review, February/March 2010, p.34

¹⁹ The High Court of Australia has held that the property guarantee applied in relation to property rights in respect of "future property" in *Andrews v Howell* (1941) 65 CLR 255

protected by section 51(xxxi) of the Commonwealth Constitution. Commonwealth legislation which acquires property other than on “just terms”, including the payment of reasonable compensation, is constitutionally invalid pursuant to the property guarantee contained in section 51(xxxi) of the Constitution.

The Bill is clearly a law with respect to the acquisition of property. The Bill itself explicitly states that it is “A Bill...to remove brands, trade marks and logos from tobacco packaging...” If implemented, the Bill could only operate practically by abolishing or sterilising PML’s proprietary rights in relation to its registered trade marks, registered designs, brand goodwill and cigarette packaging. A plain packaging requirement removing PML’s rights to use and control the cigarette packaging it produces would effectively extinguish and render redundant PML’s rights in relation to each of these species of property.

The extinguishment of these property rights would afford the Commonwealth the benefit of having full control of the cigarette packaging, freed from competing rights of PML to control the cigarette packaging and, in particular, to use its registered trade marks, registered designs, brand goodwill and cigarette packaging. Such a property acquisition would be unconstitutional in the absence of “just terms” including the payment of reasonable compensation by the Commonwealth for PML’s highly valuable intellectual property. Please see attached letter from PML’s counsel, Allens Arthur Robinson dated October 9, 2009²⁰ (attachment 1).

Plain packaging would violate Australia’s international trade obligations

Internationally, intellectual property is protected by trade agreements to which Australia is a party. Trade marks are regarded as an “object of property” and trade mark owners are entitled to have their registered trade marks accorded the consideration and protection due to all other objects of property.

As a member of the World Trade Organization, Australia is bound to comply with the provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and of the Paris Convention for the Protection of Industrial Property. Both set minimum mandatory standards for the protection of trade marks, copyright and other intellectual property rights. By preventing trade mark owners from registering and using valuable trade marks and thereby installing a dual-class system of trade marks (one for tobacco products and one for other goods), this legislation would be in conflict with Australia’s international legal obligations arising from these treaties.

Implementation of this Bill would send a negative message to Australia’s trading partners; it would suggest that Australia does not respect intellectual property and would effectively undermine the country’s reputation as a reliable destination for international trade and investment.

Furthermore, as cautioned by a recognised international trade law firm, a number of additional international obligations would be violated. *“If passed, the Bill would be inconsistent with a number of Australia’s international obligations, including, but not limited to, its obligations under the TRIPS Agreement and the U.S.-Australia Free Trade Agreement. In considering whether to adopt the Bill, the Australian legislature should carefully consider Australia’s international obligations and consider adopting less trade-restrictive means for achieving the stated objectives.”*²¹ Further information is provided in the attached analysis prepared by Sidley Austin LLP (attachment 2).

Professor of Law and international trade expert, Professor Moens, also concludes that a plain packaging requirement would be contrary to Australia’s obligations under TRIPS, the Paris Convention, the Technical Barriers to Trade Agreement and the US-Australia FTA. In addition, it may

²⁰ Letter from Allens Arthur Robinson to Hon Nicola Roxon MP dated 9 October 2009 (attachment 1)

²¹ Sidley Austin LLP, “Proposed Legislation Pending Before the Australian Parliament on Cigarette Packaging would be Inconsistent with Australia’s Trade Obligations”, p.7 (attachment 2)

give rise to actions under various bilateral investment treaties to which Australia is a party. Further information is provided in a report and addendum prepared by Professor Moens and Adjunct Professor Trone (attachment 3).

Far from being an abstract concept, a violation of its international obligations would have a serious impact on Australia's trading partners. *"...Member States of the ... WTO that take such measures would be in breach of their international obligations and would therefore expose themselves to dispute settlement proceedings initiated by other members within the framework of the WTO."*²² Further information is provided in the Lalive memorandum (attachment 4).

Plain packaging would diminish free-market competition

Trade marks and other unique visual packaging elements are important competitive tools. Manufacturers use trade marks to differentiate their products from those of competitors. The function of trade marks is of utmost importance in terms of ensuring and developing competition among producers. Plain packaging will make it impossible for manufacturers to differentiate their brands and significantly diminish their ability to compete.

Trade marks signify the quality of the product and also the trust and goodwill which the consumer associates with a particular product. These functions ensure that consumers are free to make an informed, conscious choice among the various competing products available to them. This legislation would deprive consumers of this basic freedom.

Conclusion

Tobacco products are legal products that cannot be used in virtually any public place; cannot be advertised; are sold in packs dominated by graphic health warnings; are subject to higher taxes than any other consumer good; and are the subject of significant public health campaigns.

In fact, today, use of tobacco trade marks is effectively limited to the package containing the product. Senator Fielding now proposes that these trade marks be removed from tobacco packages, rendering them essentially useless and without value. Undoubtedly, plain packaging would benefit counterfeiters and further exacerbate the problems associated with Australia's existing illicit tobacco trade. Plain packaging constitutes an expropriation of intellectual property, which is unconstitutional and in violation of Australia's legal obligations under various international treaties.

Plain packaging is not supported by evidence and has been repeatedly rejected by Governments, including the Australian Government. Senator Fielding's proposal for plain packaging of tobacco products should be rejected as unproven and unlawful.

²² Lalive, "Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris Convention", p.1 (and see also pp.14 to 16) (attachment 4)