

Submission No. 38
(Plain Packaging Bill)
A.O.C. Date: 26/07/2011

House Standing Committee on Health and Ageing
House of Representatives
PO Box 6021, Parliament House
Canberra, ACT 2600
Australia

22 July 2011

Subject: ICC BASCAP comments on Tobacco Plain Packaging Bill 2011 and Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011

Dear Madame/Mr. Secretary,

This constitutes a submission of comments from the International Chamber of Commerce (ICC) and its Business Action to Stop Counterfeiting and Piracy (BASCAP) initiative on the Tobacco Plain Packaging Bill 2011 and related Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011, which have been referred to the House Standing Committee on Health and Aging for consideration.

BASCAP is a coalition of multinational companies, all with business interests in Australia, concerned about the theft of their intellectual property by counterfeiters and copyright pirates. BASCAP works globally to combat the growing problems of counterfeiting and piracy on behalf of its member companies, and more importantly, global consumers who are at risk from dangerous and poor quality fake goods.

- Our members are very concerned about the Plain Packaging Bill 2011 and the related Trademark Amendment Bill. We believe that plain packaging legislation, even if targeted only at tobacco products, creates a dangerous precedent that will have far-reaching impacts on the rights of trademark owners, on intellectual property rights in general, and most important, on Australian consumers.
- Our members strongly support the protection of public health, and we are not questioning the adverse consequences of long-term tobacco use or the Australian Government's role in reducing tobacco use. We recognize the accomplishments made by the Government in achieving this goal through the programs already undertaken in this regard. Our objections to the proposed plain packaging legislation are focused solely on the impact these regulations will have on intellectual property protection and product counterfeiting. While we recognize that the regulations today apply only to tobacco products, we believe it will establish a precedent regarding the future use of trademarks and intellectual property that could be applied in the future to other product categories.
- The requirements of the plain packaging legislation remove the rights of trademark owners to fully use their intellectual property to differentiate their product from those of competitors. It removes an important tool for providing consumer choice and consumer recourse and accountability for poor performance, quality or general concerns. In this regard, plain packaging makes it easier for packaging to be copied by counterfeiters, exposing consumers to products of unknown and potentially dangerous ingredients.
- We are very concerned that not only will plain packaging lead to an increase in counterfeit goods, it will further reduce brand owners' ability to take action against such activity and increase the burdens on already overstretched public agencies working to enforce intellectual property protections, including Customs officers and other law enforcement officials. In addition it is likely to encourage the smuggling

of cheap legitimate brands. As consumers are motivated to make their purchase decision solely on price, the criminal gangs importing and selling poor quality, unregulated cigarettes without payment of duty are presented with an enormous business opportunity.

- Plain packaging infringes on trademark and intellectual property rights and violates international IP and free trade norms and standards. While we have seen public assurances that Australia's plain packaging measures will be implemented in a way that are consistent with Australia's intellectual property, trade and investment obligations, we continue to believe that the Plain Packaging Bill may violate important WTO obligations of Australia under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement") and the WTO Agreement on Technical Barriers to Trade (the "TBT Agreement").
 - These binding international agreements provide regulatory flexibility and discretion for governments to regulate in a manner necessary to protect public health. However, this discretion is not boundless. A WTO Member cannot simply assert health-related grounds to justify a measure, especially when the measure is highly trade restrictive and when it becomes clear that there exists no objective evidentiary support that the measure will materially contribute to the health objective. We are not aware of any evidence indicating that plain packaging will reduce smoking and, therefore, improve public health. The provisions of the relevant WTO agreements confirm that the Government of Australia may not simply assert a health objective for the measure to be justified under WTO law.
 - Furthermore, Article XX(b) of the general rules of the General Agreement on Tariffs and Trade ("GATT"), provides a "general exception" for measures "necessary to protect human, animal or plant life or health." However, as the text of Article XX makes clear, measures otherwise inconsistent with the provisions of the GATT can only be justified under this exception if they are proven to be "necessary" to achieve health objectives.
 - GATT and WTO jurisprudence has established that an examination of whether a measure is "necessary" and even if the preliminary conclusion that the measure is necessary, Members must confirm this justification by examining whether less trade restrictive alternative measures that are equally effective would be reasonably available.
 - The same "necessity" test is clearly part of the TBT Agreement, Article 2.2 that prohibits technical regulations relating to packaging that create "unnecessary" obstacles to trade, *i.e.*, restrictions to trade that are not "necessary" to achieve the legitimate policy objective.
 - Australia's plain packaging measure fails this necessity test because it undermines the balance between different rights and obligations of WTO Members in respect of health and trade spheres.
 - No convincing evidence exists regarding the contribution of plain packaging to the reduction of smoking. Actually, there is substantial evidence that unintended consequences would defeat the health objective that Australia seeks to attain. In any case, plain packaging is not at all "necessary" because less trade restrictive alternatives are available such as raising taxes, increasing and strictly enforcing the minimum age for purchasing tobacco products, or targeting specific policies at particular high risk groups or socially disadvantaged persons. Other countries have been equally or more effective in combating smoking without plain packaging, thus underlining that plain packaging is not at all "necessary."
 - Australia's proposed plain packaging measure is an unnecessary obstacle to trade that violates Australia's obligations under Article 2.2 of the TBT Agreement.

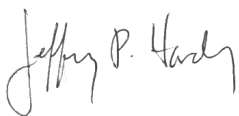
- In addition, the plain packaging measure will impact on intellectual property rights specifically protected under the TRIPS Agreement. The Australian plain packaging measure violates, *inter alia*, Article 20 of the TRIPS Agreement which prohibits the unjustifiable encumbrance of the use of trademarks by the imposition of special requirements. Examples of such unjustifiable encumbrances provided in Article 20 are the required use of the trademark in a particular form or its use in a manner detrimental to the capability of the trademark to distinguish products from one producer from those of other producers. Plain packaging qualifies under both examples as it prohibits any trademark to appear on a cigarette pack and allows only a standardized brand name to appear in a particular form and place.
 - Australia's plain packaging measure is inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement because it is not necessary to the protection of health. Even if provisionally justified because of a purported health objective, however, it is not reasonably related to the achievement of such objective, is disproportionate, and is, at least in part, inconsistent with this objective such that the measure constitutes an *abus de droit*.
 - In sum, Australia is denying competitive opportunities and thus restricting trade in a legal and regulated market where such competition is based primarily on lawfully registered and valid trademarks. Trademarks do not pose a threat to health. Tobacco products trademarks are legal, as is the case with many other products for which there are health concerns. Trademarks as such neither harm nor promote health; they merely facilitate consumer choice. Australia's plain packaging measure has removed the basis for such consumer choice and has thereby violated its international trade obligations.
- The elimination of branding dictated by plain packaging regulations interferes with the legitimate growth of business by limiting an important element of marketing and consumer loyalty.

On behalf of BASCAP members and the ICC we urge the Australian Government to consider policy alternatives that will not have the far-reaching and severe negative consequences presented by the proposed plain packaging legislation. The Australian Government has been a leading voice in support of IP and of rules-based commerce, and we urge the Government not to take a step back from this leadership by now mandating the elimination of trademarks and trade dress, and seriously eroding the ability of companies, including Australian businesses, to brand their products as protected by IP laws and rules.

We, therefore, urge the Australian Government to consider the broader context and precedent this proposed legislation will have on IP protection policies, laws and enforcement regimes and the impacts on business and government's ability to effectively fight against the problems of counterfeiting and piracy. We ask that the Government find other policy options that are consistent with Australia's trade obligations and business and trade development goals.

We will, naturally, welcome the opportunity to discuss or further elucidate these views.

Respectfully submitted,



Jeffrey Hardy
BASCAP Coordinator