

# Counterfeiting perspectives

## How Australia's Tobacco Plain Packaging Bill erodes IP rights

**There has been much debate over Australia's plans to remove branding from tobacco products. It is an issue that brand owners in other industries should follow**

On July 6 2011 the Australian federal government introduced into Parliament the Tobacco Plain Packaging Bill and the related Trademarks Amendment Bill. They both passed the House of Representatives in August and are expected to go through the Senate in October. The plain packaging rules will require that all tobacco products in Australia be sold in generic packs carrying graphic warnings, with brand information reduced to the bare minimum of a uniformly sized and styled brand name. Logos and trademarks will all but disappear from a legitimate, albeit harmful, consumer product.

The stated rationale behind this unprecedented 'experiment', as the government calls it, is that the removal of branding from cigarette packs will diminish the allure of tobacco products and make health warnings more visible to consumers. As the first bill of its kind, the legislation sets a dangerous precedent. By July 1 2012 trademark rights will no longer be a universally protected asset, and what Australia will have done for tobacco may be done to other products and in other countries. The negative implications for international trade, as well as for efforts to deter the flow of counterfeit goods, will be severe.

### Consumer choice

Trademarks provide consumers with a quick and reliable reference with which to identify a product and make an informed purchasing decision. While no studies have shown that selling legitimate tobacco products in plain packs reduces consumption, there is a wealth of data to prove that consumer loyalty and choice are inextricably tied to branding: it serves as a valuable mechanism for accountability and responsibility, and allows consumers – of any product – to form a view of the quality that they can expect from one purchase to the next.

With most tobacco products now behind counters, out of reach and sometimes even out of sight, non-smokers can hardly be said to be lured into smoking by packaging.

However, if all packs look the same, confusion and slow transactions between retailers and existing smokers will become the norm. Strip away the brands, hide the alternatives and you leave consumers with only one piece of information on which to base their choice: price.

Thus, by design, the Plain Packaging Bill will undoubtedly lead to intense competition based on price. Everyone knows that affordability partly drives demand; this bill could therefore inadvertently lead to an increase in the consumption of tobacco products.

### Counterfeit and contraband

Once brands are removed and all packaging is made to look the same, it is easy to imagine how much simpler it will be to counterfeit a pack of cigarettes. Many have warned that plain packaging will reduce brand owners' ability to take action against counterfeiting and will increase the burden on already overstretched public agencies as they try to keep illicit products away from consumers. To the extent that smokers are attracted to branded products, plain packaging will encourage the smuggling of foreign brands from abroad. If smokers simply decide that they want their product cheap, they will turn to counterfeits, some of which having been shown to contain higher levels of toxicants than legal cigarettes.

With the worldwide trade in counterfeit and smuggled tobacco already worth several billions of dollars a year, there appears to be a vast business opportunity for criminal networks. It will be impossible to prosecute manufacturers of counterfeit tobacco products for counterfeit practices – technically speaking, there will be no illegal act of counterfeiting because there will be no trademark infringement! From the government's perspective, the corresponding loss in revenue will have an impact on its ability to fight this new menace. Plain packaging, in effect, will turn trademarks – and large sections of the market – over to illicit trade.

### Trademark implications

By prohibiting the use of an entire range of trademarks, the plain packaging bill directly expropriates owners of their rights. Many

business leaders, legal experts and government authorities take the position that the legislation violates globally recognised protections of intellectual property. In particular, there are strong reasons to believe that the bill may violate Australia's obligations under the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights and the Agreement on Technical Barriers to Trade.

These binding international agreements provide some flexibility and discretion for governments to regulate in a manner necessary to protect public health. However, this discretion is not boundless. A WTO member state cannot simply assert health-related grounds to justify an experiment, especially when the measure in question is highly restrictive to trade and when it becomes clear that no objective evidence supports the claim that it will materially contribute to the health objective.

As long as tobacco is a legal product, it must enjoy the same protection as other businesses. The IP world should be rightly concerned, as once the dam breaks, there are likely to be further initiatives to undermine IP protection for all kinds of product.

### Final thoughts

Trademarks pose no threat to health. In themselves, they neither harm nor promote health – they merely facilitate consumer choice. There are numerous options for reducing tobacco consumption that are less contentious. Raising taxes, increasing and strictly enforcing the minimum age for purchasing tobacco and targeting policies at particular high-risk groups or socially disadvantaged people have been shown to work. Other countries have been highly effective in combating smoking without attacking consumer choice and business trademarks. Why did the Australian government not look to them first?

By mandating the expropriation of brands, the government is hampering competition in a legitimate and regulated market where such competition is conducted by using lawfully registered and valid trademarks. Australia's plain packaging legislation will remove the basis for such consumer choice and encourage illicit activities. Regrettably, it signals a growing disregard for IP rights and international trade obligations. [WTR](#)

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