

Subject: ABPI's comments on the Australian Government Consultation Paper on Tobacco Plain Packaging

Dear Sirs,

ABPI – Brazilian Intellectual Property Association, is a not-for-profit organization, founded on 16 August 1963, which currently congregates over 650 companies, firms and individuals from Brazil and several other countries.

ABPI is devoted to the study of Intellectual Property and related matters, aiming at the improvement of legislation, doctrine and case law involving such subjects. Our association also hosts international conferences, sponsors various publications and cooperates with a number of international associations in this field.

In this regard, on April 7, 2011 the Australian Government published a [bill of law](#) together with a [public consultation](#) for the interested parties to present its comments on the bill until June 6, 2011. The proposed legislation directly affects Intellectual Property Rights (IPR), particularly in the field of trademarks, and which are likely to adversely impact on innovation, competition and, ultimately, the consumer, possibly in an international level.

We stress out that ABPI acknowledges the importance and fully supports effective measures to clearly inform consumers about the risks of tobacco products.

Nevertheless, our Association firmly understands that the institution of *Plain Packaging* seriously jeopardizes the international protection system of Intellectual Property, which has been in constant evolution since well before international benchmarks such as the Paris and Bern Conventions, in the XIX century, the creation of WIPO, in the 1960s, and the adoption of the TRIPS Agreement, an international acknowledgement of the importance of Intellectual Property to world commerce.

As a matter of fact, the imposition of this type of restriction to trademarks in a specific field of industry should be viewed as discriminatory, in clear breach of Article 15 (4) of the TRIPS Agreement and Article 7 of the Paris Convention.

In addition, Article 20 of TRIPS agreement clearly provides that *“the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as (...) use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings”*.

This article is grounded in the universal principle of proportionality that must guide all legislators. Under such light, compliance with such principle calls for a careful analysis on whether a given measure (as the one at stake) is actually necessary to achieve its purported aim, that is, if there would not be a less costly means for achieving the same objective.

While there is no concrete evidence that Plain Packaging would protect public health more effectively than any other means (such as education campaigns or better enforcement of minimum age regulations), it places a heavy burden upon owners of Intellectual Property.

Indeed, by preventing registrants from using their legally acquired trademark rights, the proposed legislation would tantamount to expropriation of private property, without payment of appropriate compensation, a major breach of long accepted Customary International Law, as well as of some International Conventions applicable to several States.

Therefore, the exceptions established by Article 8 (1) of the TRIPS Agreement are not applicable in this case, as the proposed measures are entirely inconsistent with International Law, let alone the provisions of the referenced Agreement.

Furthermore, we note that the proposed regulation includes some provisions in an attempt to prevent loss of trademark rights due to the non-use of trademarks (Chapter 2, Part 2). Notwithstanding, it is ABPI's opinion that these provisions are not only insufficient to protect the interests of IPR holders, but confirm that Plain Packaging amounts to *de facto* seizure of property, for their owner will be forbidden from adequately and freely using it for its original purpose.

Moreover, without a tool as important as a trademark to identify their goods, manufacturers will be led to a mere price competition, which tends to decrease retail price of tobacco goods, making them each time more affordable and accessible to consumers, particularly younger ones. This would naturally be entirely inconsistent with the rationale of the proposed measures.

In addition, such commoditization of cigarettes will lead to a halt on innovation, which adversely affects the economy as a whole and impact several other enterprises in different fields, such as Design and Technology. This further demonstrates the unreasonable nature of the measures sought to be implemented.

Finally, ABPI urges Australian authorities' attention to the possible increase on counterfeiting, as plain packaging would likely make it easier and cheaper.

As a result of Brazil fight against counterfeiting, it has become quite clear to our association that counterfeiting is a global issue, for counterfeiters are internationally organized.

Therefore, any measures that could potentially make counterfeiting easier also have global effects, since any profits obtained in a given market is likely to be used to increase counterfeiting levels on other countries, even if such countries are over 8,000 miles apart.

We appreciate the opportunity to convey our opinion on the proposed adoption of Plain Packaging in the tobacco industry and hope our comments will help put under the spotlight our Association's concerns on the detrimental effects these measures will have upon Intellectual Property.

Yours Faithfully,



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ABPI  
Brazilian Association of Intellectual Property