

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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July 21, 2011

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House of Representatives
Standing Committee on Health and Ageing
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Submission No. 36
(Plain Packaging Bill)
A.O.C. Date: 25/07/2011

Dear Sir/Madam:

The U.S. Chamber of Commerce (the U.S. Chamber) submits these comments in response to the Inquiry into the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill, which is currently pending before the Standing Committee on Health and Ageing. While the U.S. Chamber fully supports the stated objectives of the Bill, we have serious concerns regarding the particular means chosen in the Bill to pursue these goals.

The U.S. Chamber is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. One of the issues of greatest importance to our organization is the protection of intellectual property (IP) rights. IP rights, including trademarks, are essential to the ability of businesses to compete and thrive in the global economy. IP rights are vital to creating jobs, advancing economic growth, and generating breakthrough solutions to global challenges. Many of our members hold intellectual property rights that are critical assets for their business. Although well-intentioned, the Bill would significantly infringe upon global IP and trademark protections.

The Value of Trademarks

Trademarks protect the reputation of companies and their products, and prevent consumers from being confused by materially different, and potentially inferior, products improperly bearing a logo identical to, or confusingly similar to, the company logo. For many of our members, the brand itself, and its reputation built over years of providing quality goods and services, is the most valuable asset of a company. The protection of these property rights is a priority for the U.S. Chamber. The U.S. Chamber's efforts through the Global Intellectual Property Center and the Coalition Against Counterfeiting and Piracy are illustrative of our extensive efforts to counter threats to these valuable assets.

The Bill Will Destroy the Value of Critical Trademarks without Advancing Its Stated Objectives

The Bill would prohibit the use of brands, trademarks, and logos on cigarette packaging. The only mark that would be permitted would be the brand name in 12-point black Helvetica font. In addition, the Bill would require that the color of the remaining packaging be matte brown.

The Bill is unlikely to achieve the three stated objectives of: (a) reducing initiation of tobacco use, tobacco consumption and quitting relapse; (b) enhancing the effectiveness of package warnings; and (c) removing the package's ability to mislead and deceive consumers. A plain packaging requirement could promote an influx of low priced generic and possibly counterfeit products that could increase cigarette availability and consumption.

On a broader policy level, the US Chamber is concerned that the strict requirements in the Bill would seriously undermine, if not entirely eviscerate, the value of the trademarks and trade dress used by international companies that operate in Australia. The plain packaging requirements may ultimately result in an increased risk of consumer deception and confusion, and severely damage companies and their workers who have invested in building the reputations associated with those marks. Such consequences should be avoided, especially since there exists no credible, scientific evidence to support the conclusion that plain packaging would actually work in the ways assumed under the Bill.

The damage done to the intellectual property system could also have significant economic consequences for Australia. Trademarks are such a critical asset of multinational businesses today that companies may decide to forego opportunities and investments in Australia if they do not have confidence that their trademarks and dress will be protected. Indeed, such commercial opportunities as now exist in Australia could be substantially diminished if companies are forced to commoditize their products and compete solely on the basis of price rather than on the quality and reputation their trademarks represent.

The Bill Is Inconsistent with Australia 's International Obligations

The proposed Bill is inconsistent with Australia's international obligations, including its obligations under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), the Paris Convention for the Protection of Industrial Property (Paris Convention), the WTO Agreement on Technical Barriers to Trade (TBT Agreement), and the Australia-U.S. Free Trade Agreement (AUSFTA).

- **TRIPS Article 20** states: ‘{t]he 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.’ The Bill would eliminate the use of most trademarks, which are a critical means for consumers to distinguish among products. The limits in the Bill on the use of the trademarks are not supported, and will likely exacerbate consumer confusion.
- **TRIPS Article 15** and **Paris Convention Article 7** provide that the nature of the goods to which a trademark is to be applied “shall in no case form an obstacle to registration of the trademark.” Australian law provides that a trademark may be refused registration if

“its use is contrary to law.”¹ Because the prohibition would be imposed only because the marks are associated with cigarettes, the Bill would improperly make the nature of the goods to which the trademark is to be applied an obstacle to the registration of a trademark.

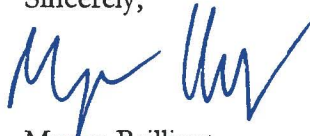
- **Paris Convention Article 6** requires that: “[every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union.” In violation of this provision, the Bill may result in the rejection or invalidation of trademarks registered and protected in their country of origin.
- **Article 2.2 of the TBT Agreement** requires that technical regulations, including packaging and labeling requirements, be no more trade restrictive than necessary to fulfill a legitimate objective. While protection of public health is clearly a legitimate objective, the U.S. Chamber is concerned that the plain packaging requirements will impede the transportation of goods and increasing logistical costs throughout the distribution network.
- The **AUSFTA** includes important protections for investments, including trademarks. In violation of those provisions, the Bill will deny fair and equitable treatment of U.S. investors owning Australian trademarks and will deprive those marks of legitimate value.

Conclusion

While the U.S. Chamber fully supports the Bill’s stated health objectives, we are deeply concerned about the systemic and economic impacts of the approach taken in the Bill. The Bill has the potential to undermine trademark and other intellectual property rights and ultimately result in consumer confusion as to the origin of the relevant products. The consequences for manufacturers, raw material suppliers, and distributors could be severe in terms of lost revenues, lost jobs, and long-term damage to critically important brands. The impact on Australia’s economy could also be significant if Australia loses its reputation for strong intellectual property protection through the improper expropriation of registered marks. Accordingly, we request that Australia consider alternatives that would be equally or more effective in terms of protecting public health but which would not inflict the type of damage on the international system for protecting trademarks the Bill would cause.

Should you have any questions, or should the opportunity for the U.S. Chamber to testify before the Committee arise, please contact Catherine Mellor, director, Asia, U.S. Chamber of Commerce at cmellor@uschamber.com or 202-463-5669.

Sincerely,



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