



Governing in ignorance:

**Australian governments legislating,
without understanding, intellectual
property**

**Institute of Public Affairs
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Free people, free society

Note: The original version of this paper was released for World IP Day on Monday, 26th April 2010. This research paper was written to address concerns resulting from the passage of the *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Bill 2009* and the proposed *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009*.

Following its publication the Australian government announced it intended to introduce the plain packaging of tobacco products by 2012.

Following the Federal Government's announcement there has been significant public debate about the government's proposed new laws to introduce plain packaging of tobacco products. As a consequence this research paper has been revised based on the commentary provided in public debate and the release of the submissions made to the Senate Community Affairs Committee's Inquiry into the *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009*.

However, because the draft legislation for the newly proposed plain packaging of tobacco products has not been provided by the government, all commentary contextually remains with the Bill being considered by the Federal Parliament at the time of the paper's original release.

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Abbreviations

AUSFTA	Australia United States Free Trade Agreement
EU	European Union
FCTC	Framework Convention on Tobacco Control
FTA	Free Trade Agreement
IP	Intellectual Property
Paris Convention	Paris Convention for the Protection of Industrial Property
TBT	Technical Barriers to Trade
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
US	United States
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

1.0 Executive summary

Monday, 26th of April 2010 is World Intellectual Property Day. Intellectual property is one of the most poorly understood areas of public policy, but also one of the most important to understand in a knowledge economy. Yet legislators regularly advocate for, and sometimes actually amend IP legislation without understanding how the consequences to Australia's international IP obligations. And there are two very real examples in the area of trademarks.

Recently the South Australian Parliament passed the *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Bill 2009* which requires the plain packaging of R 18+ videos, essentially stripping them of their trademarks.

The Federal Parliament is currently considering the *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009* designed to strip tobacco products of any branding other than government health warnings about the health consequences of smoking and limited descriptions sufficient for suppliers, retailers and consumers to differentiate products.

By introducing plain packaging, the intellectual property of films and tobacco products – their trademarks – will be stripped from packaging. The effect will be:

- As required under Section 51 (xxxix) of the Commonwealth Constitution, Australian taxpayers may be required to gift to film and tobacco companies billions of dollars to compensate for the loss of their trademarks. In the case of films an indicative calculated range (depending on the formula for calculations) could be \$108m to \$357m per year, and in the case of tobacco products the gift from taxpayers to tobacco companies could range from \$378m to \$3,027m per year.
- Australia may breach its international obligations under the Paris Convention for the protection of intellectual property, the World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights. Doing so may allow for compensation claims by companies for their property rights and retaliatory measures to be taken against Australia's exports.
- Under Australia's free trade agreements, equivalent compensation may be required as under Section 51 (xxxix) of the Constitution for the expropriation of an investor's property.

Considering Australia's international standing in major multilateral fora like the World Trade Organisation an open flouting of our obligations is likely to seriously damage Australia's international reputation and credibility as an honest broker for free trade.

Countries that export products affected by these Bills may be entitled to enact retaliatory measures against Australia's exports equivalent to the value of lost income.

And Australia will also lose significant moral authority internationally in arguing against violations of the patents, trademarks and copyright in other markets owned by Australian innovators, companies and creative artists.

2.0 Introduction

Intellectual Property is one of the most poorly understood areas of public policy, especially by legislators. Increasingly IP is in the spotlight because public policy issues are arising as a result of different perspectives and understandings of IP by consumers, owners and governments.

Internationally there are significant debates about the role of IP in promoting the development and access to medicines and climate change technologies as well as the role of copyright to promote the creation and access to artistic works.

But out of the three core forms of IP (patents, copyright and trademarks), trademarks are often ignored and fall prey to bad legislation. And there are two significant recent examples.

First, the South Australian Parliament passed the Family First-proposed *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Bill 2009*. The Act introduces the obligation for R 18+ classified films to be separated from non-R 18+ films. And if the films were not separated from non-R 18+ films they must be displayed in plain packaging. The only permissible branding on the film case is the “name of the film in letters of 10 millimetres or less in height” and necessary classification details.

Second, the Senate Community Affairs Committee is holding an Inquiry into the Family First-proposed *Plain Tobacco Packaging (Removing branding from Cigarette Packs) Bill 2009*. The Bill requires the removal of all branding from cigarette packaging in favour of a single colour (Pantone 154) packaging that, excluding health warnings and minor descriptors, removes any branding or labelling. The only permissible branding on the packet is standardised twelve point, black Helvetica font text on the front outlining the product’s contents, as well as equivalent text relating to the manufacturer in eight point on the side of the packaging.

This research paper will assess the recent trend towards plain packaging of trademarked goods and explore the potential consequences for Australia should it head down this path.

3.0 The trend toward stripping trademarks

There is plenty of literature assessing the impact of branding and trademarks and how they can increase the attractiveness of a product to consumers. But in the past few years there has been an emerging body of literature that seeks to assess the perceived negative or undesirable nature of branding and trademarks for certain products and the perceived benefits of removing it.

In the August 2007 a study was released assessing the impact of branding and its contribution to the attractiveness of certain food products to children. The article published in the Archives of Paediatrics and Adolescent Medicine based on research from Stanford University's School of Medicine¹ found that by adding McDonald's branding to certain food products increased their attractiveness to children. The study also identified that by the age of 2 children were capable of understanding the value of brands.

The study involved a small group of children each tasting five pairs of different McDonald's foods with one in McDonald's packaging and one in plain packaging. After being fed the different food pairs the study found that children overwhelmingly preferred foods packaged from McDonalds. Table 1 outlines the preference rate for the foods in the study.

Table 1 | Preference for McDonald's food based on its packaging, per cent

McDonald's food	McDonald's packaged	Plain packaged
Hamburger	48.3	36.7
McNuggets	59	18
French fries	76.7	13.3
Carrots	54.1	23
Milk or apple juice	61.3	21

Source: Robinson, T. N., Borzekowski, D. L. G., Matheson, D. M. & Kraemer, H. C., 2007, "Effects of fast food branding on young children's taste preferences", in Archive of Paediatric and Adolescent Medicine, v161, n8

While the study was small, the result is indicative of the power of branding and the contribution it has product sales. In light of debates surrounding obesity rates in the developed world it is unsurprising that such studies that trademarks and branding should be considered in whether to make certain food products more, or less, attractive.

Advertising of branding appears regularly as a theme to be addressed in the National Preventative Health Taskforce's report either explicitly through recommendations to remove branding, or implicitly through the promotion of branding through advertising.

¹ Robinson, T. N., Borzekowski, D. L. G., Matheson, D. M. & Kraemer, H. C., 2007, "Effects of fast food branding on young children's taste preferences", in Archive of Paediatric and Adolescent Medicine, v161, n8

3.1 *Stripping trademarks from films*

The South Australian *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Bill 2009* appears to be without precedent. In Australia and overseas it has always been accepted that X 18+, or equivalent rated films, must be displayed separately from content accessible by minors.

However the introduction of plain packaging of R 18+ films is a new development that extends the theme of limiting access of certain film products to minors, but with the punishment of removing branding and trademarks if retailers choose not to comply.

3.2 *Stripping trademarks from tobacco products*

Internationally there has been a longstanding push to regulate the international trade of tobacco products and equally to develop international standards to be adopted on a country-by-country basis to limit the availability and consumption of tobacco products.

The high watermark of the international campaign against tobacco products was in 2003 following the negotiation of the Framework Convention on Tobacco Control under the World Health Organisation. The FCTC outlines a series of objectives that clearly seek to reduce the consumption of tobacco products and obligations for governments to develop laws and regulations to achieve this purpose within their sovereign territory, including on “packaging and labelling of tobacco products”.²

Article 11 of the FCTC includes the obligation to introduce measures such as health warnings on packets and to ensure that the packaging and labelling is not “false, misleading, deceptive or likely to create an erroneous impression about its characteristics”.³ Article 13 also includes regulations relating to advertising, promotion and sponsorship by the tobacco industry.⁴

Following the conclusion of negotiations of the FCTC, the WHO Secretariat has developed guidelines for implementation of the provisions of the FCTC. However the WHO has taken license and included under the implementation guidelines for Article 11 of the FCTC that “parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)”.⁵

² World Health Organisation, 2003, “World Health Organisation Framework Convention on Tobacco Control”, World Health Organisation, Geneva, Switzerland, pv, at <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>

³ World Health Organisation, 2003, “World Health Organisation Framework Convention on Tobacco Control”, World Health Organisation, Geneva, Switzerland, p9, at <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>

⁴ World Health Organisation, 2003, “World Health Organisation Framework Convention on Tobacco Control”, World Health Organisation, Geneva, Switzerland, p11, at <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>

⁵ World Health Organisation, 2009, “WHO Framework Convention on Tobacco Control: Guidelines for implementation Article 5.3; Article 8; Article 11; Article 13”, United Nations, Geneva, Switzerland, p41

It is important to note that these guidelines were developed by Contracting Party bureaucrats assigned to WHO matters and do not hold the same legal status as the FCTC text. Furthermore the original FCTC does not mention plain packaging.

In Australia the National Preventative Health Taskforce's report, *Australia the healthiest country by 2020*, released in June of 2009 included analysis and recommendations of potential regulations to limit the availability and consumption of tobacco products along the same lines as the provisions in the FCTC.

The Taskforce made reference to the idea of plain packaging in its second Technical Report that focused on tobacco and argued that "consumer research indicates that decreasing the number of design elements on the packet reduces its appeal and perceptions about the likely enjoyment and desirability of smoking".⁶ But what the Taskforce left out of its report is that the study cited relates to the evaluation of a training program for people with mental illnesses. The study used a basket of measures to discourage the consumption of tobacco products with no sufficient assessment of plain packaging in isolation to warrant such a claim.⁷

The reality is that there is no evidence that plain packaging works. In February 2009 in response to the submission of an e-petition calling for the introduction of tobacco product sales restrictions and plain packaging, the British Government highlighted that "no studies have shown that introducing plain packaging of tobacco would cut the number of young people smoking or enable people who want to quit, to do so".⁸

In fact the British government argued that "Given the impact that plain packaging would have on intellectual property rights, the Government would need strong and convincing evidence showing the health benefits of this policy before it would be acceptable at an international level".⁹

Britain is not the only country that has considered plain packaging, the proposal has also been debated in Canada and New Zealand and has been rejected in both countries.

The Taskforce's recommendations for the first phase (2010 – 2013) of its proposed plan is the elimination of "the promotion of tobacco products through design of packaging ... (including) amend(ing the) Tobacco Advertising Prohibition Act 1992 to require that no tobacco product may be sold except in packaging of a shape, size, material and colour

⁶ National Preventative Health Taskforce, 2009, "Tobacco Control in Australia: Making smoking history", National Preventative Health Secretariat, Technical Paper 2, Canberra, Australia, at [http://preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/96CAC56D5328E3D0CA2574DD0081E5C0/\\$File/tobacco-jul09.pdf](http://preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/96CAC56D5328E3D0CA2574DD0081E5C0/$File/tobacco-jul09.pdf)

⁷ Prochaska, J., Fromont, S., Leek, D., Suchanek Hudmon, K., Louie, A., Jacobs, M. & Hall, S., 2008, "Evaluation of an Evidence-Based Tobacco Treatment Curriculum for Psychiatry Residency Training Programs", *Academic Psychiatry*, v322, pp484 – 492, at <http://ap.psychiatryonline.org/cgi/reprint/32/6/484>

⁸ Number10.gov.uk, 2009, "Tobaccoyouth – epetition response", Government of Great Britain and Northern Ireland, September 25, at <http://www.number10.gov.uk/Page20708>

⁹ Number10.gov.uk, 2009, "Tobaccoyouth – epetition response", Government of Great Britain and Northern Ireland, September 25, at <http://www.number10.gov.uk/Page20708>

prescribed by government(, and) amend Trade Practice CPIS (Tobacco) Regulations 2004 to specify exact requirements for plain packaging”.¹⁰

The *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009* was being scrutinised by the Senate Community Affairs Committee. But the day before submissions to this inquiry were set to close the Federal government announced it would proceed with plain packaging of tobacco products by 2012.

While the idea of plain packaging is not new, because Australia is the first country in the world to seriously consider legislation the Parliament is entering uncharted legal waters and the unintended consequences of passing this Bill need to be appropriately scrutinised.

¹⁰ National Preventative Health Taskforce, 2009, “Australia: The healthiest country – National Preventative Health Strategy – Overview”, National Preventative Health Secretariat, Canberra, Australia, p17, at [http://preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/AEC223A781D64FF0CA2575FD00075DD0/\\$File/nphs-overview.pdf](http://preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/AEC223A781D64FF0CA2575FD00075DD0/$File/nphs-overview.pdf)

4.0 The plain packaging bills

On the 29th of April 2009 Leader of the Family First Party in the South Australian Parliament and Legislative Councillor, Dennis Hood, introduced the *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Bill 2009*. The Bill sought to regulate the display of R 18+ films in South Australian retail outlets to make them inaccessible to children unless they appeared in plain packaging. Should a film be plain packaged it must specifically:

- bear “no images or markings”
- only have “the name of the film in letters of 10 millimetres or less in height”
- and “markings relevant to its classification”.¹¹

The Bill also includes penalties for retailers who do not comply and equivalent regulations and penalties related to the promotion of films.

With low public awareness of the Bill or its impact, the Bill passed the South Australian Parliament at the end of 2009 and came into force in January 2010.

On the 20th of August 2009 Leader of the Family First Party and Victorian Senator, Steve Fielding, introduced the *Plain Tobacco Packaging (Removing branding from cigarette packs) Bill 2009*. The Bill primarily seeks to regulate the outward display of cigarette packs by removing the capacity for a product to include any branding or the presentation of a trademark. The specific requirements are that cigarette packets must be:

- the “colour identified as PMS 154 on the Pantone Matching System, reproduced with a non-gloss finish”
- be “without illustration or decoration” including “decorative ridges, embossing, bulges or other irregularities”
- may only include the “brand name of the product” in black, non-bolded, Helvetica size 12 text on the bottom of the front side of the packet and the number of cigarettes in the packet and/or the weight of tobacco only
- may only include size 8 text naming the “manufacturer or importer of the package” with their contact details.¹²

The Bill also stipulates the size of the packet, that no packaging (for example transparent plastic) around the main packet can have additional information, branding or bear trademarks, and that the maximum number of cigarettes in each pack is limited to twenty-five.¹³

¹¹ Hood, D., 2009, “Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Bill 2009, South Australian Parliament, April 29, at [http://www.legislation.sa.gov.au/LZ/B/ARCHIVE/CLASSIFICATION%20\(PUBLICATIONS%20FILMS%20AND%20COMPUTER%20GAMES\)%20\(R%2018%20FILMS\)%20AMENDMENT%20BILL%202009_HON%20DENNIS%20HOOD%20MLC/UNOFFICIAL%20ROYAL%20ARMS/CLASSIFICATION%20FILMS%20AMENDMENT%20BILL%202009.UN.PDF](http://www.legislation.sa.gov.au/LZ/B/ARCHIVE/CLASSIFICATION%20(PUBLICATIONS%20FILMS%20AND%20COMPUTER%20GAMES)%20(R%2018%20FILMS)%20AMENDMENT%20BILL%202009_HON%20DENNIS%20HOOD%20MLC/UNOFFICIAL%20ROYAL%20ARMS/CLASSIFICATION%20FILMS%20AMENDMENT%20BILL%202009.UN.PDF)

¹² Fielding, S., 2009, “Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, Senate, The Parliament of the Commonwealth of Australia, August 20, at http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s724_first/toc_pdf/0916020.pdf;fileType=application/pdf

¹³ Fielding, S., 2009, “Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, Senate, The Parliament of the Commonwealth of Australia, August 20, at

In his second reading speech to Parliament Senator Fielding argued that “responsible legislators ... need to do our very best to put in place measures that will discourage as many people from smoking as possible”. And that the legislation will “take the polish and attractiveness off cigarette branding and positive images that tobacco giants try to associate with their products”.¹⁴

http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s724_first/toc_pdf/0916020.pdf;fileType=application/pdf

¹⁴ Fielding, S., 2009, “Second reading speech: Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, Senate, The Parliament of the Commonwealth of Australia, at http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-08-20/0026/hansard_frag.pdf;fileType=application/pdf

5.0 Unintended constitutional consequences

These Bills face significant challenges. Under Section (xviii) of the Commonwealth Constitution the Commonwealth Parliament has legislative power over “copyrights, patents of inventions and designs, and trade marks”.

The spirit of the *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Bill 2009* is clearly to encourage the placement of R 18+ films in a separate location from films with a lower classification such as MA 15+, M 15+, PG or G. However, the effect of the legislation, should retailers decide not to separate R 18+ films, is to strip them of their branding and trademarks for display.

Considering the conflict between the powers of the Commonwealth over IP law and the South Australian Parliament’s legislation stripping legal products of their trademarks, the South Australia’s legislation may conflict with Federal powers.

The Commonwealth *Plain Tobacco Packaging (Removing branding from cigarette packs) Bill 2009* is explicitly designed to introduce plain packaging for all tobacco products and deliberately remove branding and trademarks.

Under Section 51 (xxxi) of the Commonwealth Constitution the Parliament has legislative power over “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”. As a consequence the Commonwealth is legally entitled under Australian law to legislate plain packaging and the devaluing of trademarks.

However, there is a legitimate and open debate about whether stripping trademarks is “acquisition of property” under Section 51 (xxxi) of the Constitution. On plain packaging of tobacco, concerns have been raised by the International Trademark Association in their submission to the Senate Community Affairs Inquiry into the *Tobacco Packaging (Removing branding from cigarette packs) Bill 2009*, that plain packaging may equate to acquisition of property.¹⁵

Interpretations of the acquisition of property could reasonably be limited to the government taking possession of property, which would include trademarks. But under plain packaging the government does not seek to take ownership of the trademark, it is only restricting its use.

Arguments have been proposed that restricting the use of a trademark on a product only equates to a further extension of regulation of intellectual property. And that legal precedents show that limitations on the use of property needn’t amount to the acquisition of property.

¹⁵ Steinmeyer. H., 2010, “Submission to the Senate Community Affairs Inquiry into the *Tobacco Packaging (Removing branding from cigarette packs) Bill 2009*”, International Trademarks Association, New York, United States of America, available at http://www.aph.gov.au/senate/committee/clac_ctte/plain_tobacco_packaging_09/submissions/Sub20.pdf

A more mainstream example of expropriation could be a decision by government to build a freeway around a person's home. While the government may not have taken possession of an individual's home to have done so, it has expropriated the value of the home and may therefore be obliged to pay compensation.

Similarly, if it is decided that stripping trademarks of their display on a product expropriates its value, there may be justification for claims of compensation.

Deciding whether expropriation occurs is difficult. However the Trade Marks Act 1995 is instructive. Under Section 20 of the Act the rights conferred on the registration of a trademark includes the exclusive right "(a) to use the trademark" as defined under Section 7 of the Act which includes "use of the trade mark upon, or in physical or other relation to, the goods (including second-hand goods)" under point 4. And as outlined under Section 21 trademarks are "personal property" and have equity enforceable under law "in respect of any other personal property".

It would appear under the Trade Marks Act 1995 that there is an obligation for a trademark to be used. A similar view also appears to be held by the Institute of Patent and Trade Mark Attorneys of Australia.¹⁶

Based on the rights afforded under the Trade Marks Act to allow a trademark owner to (a) use their trademark, and to (b) allow others to use their trademark, it is possible that the government may have acquired these rights by severely limiting the use of a trademark.

The issue of expropriation therefore depends on the breadth of interpretation of both where the value of a trademark rests, and also whether removing the use of a trademark directly expropriates the value of the trademark.

Table 2 | Indicative compensation range for trade mark loss by product per year, AUD\$m

	Products	Expenditure	10%	30%
Films ¹	Inc. tax	\$1,193	\$119	\$357
	Exc. tax ²	\$1,084	\$108	\$325
Tobacco	Inc. tax	\$10,091	\$1,009	\$3,027
	Exc. tax ³	\$ 3,784	\$378	\$1,135

Notes: ¹ Based on Australia-wide data, SA-specific data not available

² Based on excluding the GST equivalent to 10 per cent

³ Based on excluding Federal government excise and GST at 62.5 per cent of the final price

Source: IPA calculations, based on 2006 data from Scollo, M.M. & Winstanley, M.H. (Eds), 2008, "Tobacco in Australia: Facts and Issues", Chapter 2, Third Edition, Cancer Council Victoria, Melbourne, Australia, at http://www.tobaccoaustralia.org.au/downloads/chapters/Ch2_Consumption.pdf, and Australia Visual Software Distributors Association, 2008, "Statistics" at <http://www.avsda.com.au/statistics.asp?format=dvd>

¹⁶ Makrigiorgos, A., 2010, "Submission to the Senate Community Affairs Inquiry into the *Tobacco Packaging (Removing branding from cigarette packs) Bill 2009*", The Institute of Patent and Trade Mark Attorneys of Australia, Hawthorn, Australia, available at http://www.aph.gov.au/senate/committee/clac_ctte/plain_tobacco_packaging_09/submissions/sub09.pdf

Because Australia is the first country to take action along these lines it remains a contested point. Should a court rule in favour of the non-use of a trademark amount to expropriation compensation would need to be made on “just terms” to compensate film and tobacco companies for the acquisition.

With annual retail sales for films at \$1 billion per annum and tobacco products at \$10 billion per annum¹⁷ it is possible that the removal of trademarks would result in taxpayers being required to contribute hundreds of millions of dollars, and potentially billions.

Research has been completed identifying the overall contribution trademarks make to the productivity of companies ranging from ten to thirty per cent.¹⁸ Table 2 outlines the potential cost that may need to be compensated by taxpayers to the affected industries from stripping trademarks from films and tobacco products per year.

It is substantially less likely that film companies could seek compensation for the loss of their trademarks since they have an alternative to their loss. But the same does not apply to tobacco products. Additionally, the loss would need to be made by the South Australian government. However, compensation for the expropriation of intellectual property may be securable through Australia’s international free trade agreement obligations as outlined in Section 6.2.2.

6.0 Unintended International legal and reputational consequences

The introduction of plain packaging also poses serious risks that Australia will breach a number of its international obligations under relevant trade and intellectual property treaties.

6.1 The Paris Convention

Australia has been a ratifying Party of the *Paris Convention for the protection of Industrial property* since October 1925 and its provisions have informed the development of Australia’s patent and trademark regime.

6.1.1 Relevant Articles

Article 6_{quinquies}(A)(1) of the Paris Convention makes it clear that Australia has an obligation to recognise trademarks, stating:

¹⁷ Scollo, M.M. & Winstanley, M.H. (Eds), 2008, “Tobacco in Australia: Facts and Issues”, Chapter 2, Third Edition, Cancer Council Victoria, Melbourne, Australia, at http://www.tobaccoinaustralia.org.au/downloads/chapters/Ch2_Consumption.pdf

¹⁸ Greenhalgh, C. & Rogers, M., 2007, “Trade Marks and Performance in UK Firms: Evidence of Schumpeterian Competition through innovation”, Oxford Intellectual Property Research Centre, University of Oxford, Oxford, United Kingdom, at <http://www.economics.ox.ac.uk/Research/wp/pdf/paper300.pdf>

“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, subject to the reservations indicated in this Article”.¹⁹

Article 6_{quinquies}(B) includes the “reservations” for either denying the registration or invalidating a trademark:

“1. when they are of such a nature as to infringe rights acquired by third parties in the country here protection is claimed.

2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed.

3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order”.²⁰

Article 7 further clarifies that *“The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark”.²¹*

6.1.2 Discussion

Article 6_{quinquies}(A)(1) of the Paris Convention clearly states the obligations of a country to register a trademark and respecting foreign trademarks, except in the situation of the “reservations”.

Of the “reservations” included under Article 6_{quinquies}(B) none provide a justification to limit the registration of a trademark. Article 6_{quinquies}(B)(3) could be misinterpreted as giving some justification because R 18+ films and tobacco products may be “contrary to morality or public order”, but this section explicitly states that it is relevant to the trademark, and not the product.

Article 7 reinforces this point making it clear that the nature of R 18+ films and tobacco products “shall in no case form an obstacle to the registration of the (trade)mark”.

Neither legislation proposes to limit the registration of a trademark. However, it is likely from the relevant provisions that should rights be necessarily conferred as part of

¹⁹ World Intellectual Property Organisation, 1883, “Paris Convention for the protection of industrial property”, Geneva, Switzerland, at http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf

²⁰ World Intellectual Property Organisation, 1883, “Paris Convention for the protection of industrial property”, Geneva, Switzerland, at http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf

²¹ World Intellectual Property Organisation, 1883, “Paris Convention for the protection of industrial property”, Geneva, Switzerland, at http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf

registration the introduction of plain packaging may restrict the registration of a trademark for R 18+ films and tobacco products and may breach Australia's obligations under the Paris Convention.

6.2 The World Trade Organisation

To become a member of the WTO requires countries to accept the full obligations of the numerous WTO Agreements such as the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services and numerous other agreements, including, relevantly, the Agreement on Trade Related Aspects of Intellectual Property Rights.

TRIPS has always been an extremely controversial agreement because of the binding obligations it places on WTO members to administer and enforce an IP regime. However, for a country like Australia the passage of TRIPS was relatively uncontroversial because we already had an operating and affective IP regime. TRIPS merely reiterated our obligations with nominal changes to domestic legislation.

A relatively short Agreement, TRIPS builds on the principles of the WIPO Administered treaties including the Paris Convention and binds WTO members that were not already parties to these treaties or enforcing them.

6.2.1 Relevant Articles

As an agreement, TRIPS is primarily focused on requiring individual countries to have an IP regime and gives broad obligations that give countries license to adapt the principles of the Agreement into domestic legislation based on their unique legal system and governance systems.

However, there are some specific requirements in TRIPS such as the minimum twenty year patent life requirement from the filing date under Article 33.

And another specific section of the Agreement is Section 2, Article 20 that stipulates:

"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, 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".²²

Article 16 also states that in addition to exclusive rights to stop others using their trademark *"shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use".²³*

Further, under Section 2, Article 15(4) it states:

²² World Trade Organisation, 1994, "Agreement on the Trade Related Aspects of Intellectual Property Rights", Geneva, Switzerland, at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

²³ World Trade Organisation, 1994, "Agreement on the Trade Related Aspects of Intellectual Property Rights", Geneva, Switzerland, at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

*“The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark”.*²⁴

Section 2, Article 17 of TRIPS states there are exceptions provided for governments to the overall obligations described, however the agreement only allows for *“limited exceptions ... such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties”.*²⁵

The wording of this Article strongly suggests that exceptions should be limited and interpreted narrowly.

Principles for TRIPS are also outlined under Article 8 (1) may *“adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”.*²⁶

6.2.2 Discussion

TRIPS was one of the most heavily negotiated and contentious international agreements that exists because of its binding obligations on WTO members irrespective of their earlier participation in IP treaties administered by WIPO.

As a consequence, many TRIPS provisions provide significant flexibility for individual countries to take the principles of IP and then to legislate them based on their own national circumstances and values. As a result there are few specific provisions in the Agreement.

In debate surrounding plain packaging some commentators have rightly identified that words do not appear in TRIPS guaranteeing trademark owners the right to use their trademark.²⁷

But the relevant passages relating to the recognition and restrictions on trademarks are descriptive and explicit.

Section 2, Article 20 is such a provision that makes clear that a trademark cannot be *“unjustifiably encumbered by special requirements ... in a manner detrimental to its*

²⁴ World Trade Organisation, 1994, “Agreement on the Trade Related Aspects of Intellectual Property Rights”, Geneva, Switzerland, at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

²⁵ World Trade Organisation, 1994, “Agreement on the Trade Related Aspects of Intellectual Property Rights”, Geneva, Switzerland, at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

²⁶ World Trade Organisation, 1994, “Agreement on the Trade Related Aspects of Intellectual Property Rights”, Geneva, Switzerland, at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

²⁷ Davison, M., 2010, “Big tobacco’s huff and puff is just hot air”, The Age, at <http://www.theage.com.au/opinion/society-and-culture/big-tobaccos-huff-and-puff-is-just-hot-air-20100503-u3p0.html>

*capability to distinguish the goods or services of one undertaking from those of other undertakings”.*²⁸

But that is precisely what plain packaging for R 18 + films and tobacco products seeks to and would achieve by removing trademarks that would enable consumers to distinguish between products and brands.

There’s little doubt that there is conflict between the lack of the use of a trademark being explicitly included in an exclusive right and provisions under Article 20. But the absence of a right to use a trademark doesn’t nullify the entitlements afforded under Article 20.

Interestingly the same commentator highlighted that “a seminal decision ... addressing the nature of trademark owner’s rights stated categorically that trademark owners do not have the right to use their trademarks”.²⁹ Considering the extremely small number of WTO disputes around the use of Article 20, and trademark disputes generally, Davison’s commentary has been interpreted as referencing the Indonesia – Autos case that deals with the Indonesia government’s National Car Programme. Specifically related to trademarks, the United States complained that to comply and receive the benefits of the National Car Programme by entering into partnership with a company that was part of that program the vehicles were required to be branded with an Indonesian trademark owned by Indonesian nationals. The United States argued that this encumbered the use of other trademarks under Article 20. However the Dispute Settlement Panel dismissed the complaint because it was a known component of entering into a commercial arrangement.³⁰

It is unlikely that this case is likely to heavily influence the outcome of a plain packaging dispute. Indonesia – Autos relates to encumbering trademarks based on contractual arrangements to seek assistance under government programs. Plain packaging is simply about the ordinary operation in the marketplace. And in Indonesia – Autos a trademark is displayed, but the assessment of which trademark is based on the terms and conditions of a commercial arrangement designed to secure preferential treatment from a government program. In the case of plain packaging the use of a trademark is essentially removed.

Similarly Section 2, Article (15)(4) is also a clear provision stating that the nature of goods and services cannot be an “obstacle to registration of the trademark”. While the provisions of the Bill do not seek to limit the registration of a trademark, it would seek to limit the intended value of such a mark, including the exclusive right to exploit its recognition.

Some may argue that the public health Principles under Article 8 (1) may support the argument for plain packaging, especially in the case of tobacco products. However there is also an expectation that they must be “consistent with the provisions of this Agreement”.

²⁸ World Trade Organisation, 1994, “Agreement on the Trade Related Aspects of Intellectual Property Rights”, Geneva, Switzerland, at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

²⁹ Davison, M., 2010, “Big tobacco’s huff and puff is just hot air”, The Age, at <http://www.theage.com.au/opinion/society-and-culture/big-tobaccos-huff-and-puff-is-just-hot-air-20100503-u3p0.html>

³⁰ World Trade Organisation, 1998, “Indonesia – Certain Measures Affecting the Automobile Industry”, DS59, Geneva, Switzerland, at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds59_e.htm

However, considering in the past public health has been interpreted under TRIPS on the basis of access to medicines through the watering down of the exclusive rights of patents, it is a radically different proposition that a trademark may need to be removed on the basis of seeking to restrict access to a product. Similarly it would be a reasonable expectation that there would need to be both significant evidence of the efficacy of such a proposal, but also consideration to why tobacco remains a legal product considering the public health concerns.

It's also important to note that Australia's bilateral free trade agreements require the continued observance of TRIPS in their intellectual property chapters.

By adopting plain packaging Australia would not just be violating its obligations under the WTO, but also its obligations under free trade agreements with ASEAN countries,³¹ Chile,³² New Zealand,³³ Singapore,³⁴ Thailand³⁵ and the United States.³⁶

For example, the Chapter 17 of the AUSFTA covers intellectual property rights and obliges members to reaffirm their obligations under the Paris Convention under Article 1(2) and to the TRIPS Agreement under Article 1(3).

Furthermore, the government should also be concerned with investment chapters in free trade agreements that could invoke the same principles as Section 51 (xxxi) of the Constitution that oblige compensation for directly or indirectly expropriated or nationalised investment.

For example, Chapter 11 of the AUSFTA includes provisions related to direct or indirect "measures equivalent to expropriation or nationalisation"³⁷ of investment that may require the Commonwealth to compensate film and tobacco companies for the deliberate expropriation of the value of their trademark.

³¹ Department of Foreign Affairs and Trade, 2009, "ASEAN-Australia-New Zealand Free Trade Agreement", Chapter 13, Commonwealth of Australia, Canberra, Australia, at <http://www.dfat.gov.au/trade/fta/asean/aanzfta/chapters/chapter13.html>

³² Department of Foreign Affairs and Trade, 2008, "Australia-Chile Free Trade Agreement", Chapter 17, Commonwealth of Australia, Canberra, Australia, at http://www.dfat.gov.au/geo/chile/fta/FTA_Text_17.html

³³ Department of Foreign Affairs and Trade, 2009, "ASEAN-Australia-New Zealand Free Trade Agreement", Chapter 13, Commonwealth of Australia, Canberra, Australia, at <http://www.dfat.gov.au/trade/fta/asean/aanzfta/chapters/chapter13.html>

³⁴ Department of Foreign Affairs and Trade, 2003, "Singapore-Australia Free Trade Agreement", Chapter 13, Commonwealth of Australia, Canberra, Australia, at http://www.dfat.gov.au/trade/negotiations/safta/chapter_13.pdf

³⁵ Department of Foreign Affairs and Trade, 2005, "Thailand-Australia Free Trade Agreement", Chapter 13, Commonwealth of Australia, Canberra, Australia, at http://www.dfat.gov.au/trade/negotiations/aust-thai/tafta_chapter_13.html

³⁶ Department of Foreign Affairs and Trade, 2005, "Australia-United States Free Trade Agreement", Chapter 17, Commonwealth of Australia, Canberra, Australia, at http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html

³⁷ Department of Foreign Affairs and Trade, 2005, "Australia-United States Free Trade Agreement", Chapter 11, Commonwealth of Australia, Canberra, Australia, at http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_11.html

The validity of the potential for the expropriation of a trademark is further highlighted in Article 17(5) of Chapter 11 which recognises the potential expropriation of IP so long as the “limitation, or creation” of the trademark “is consistent with Chapter Seventeen” of the AUSFTA.

6.3 Broader implications

The strength of Australia’s position in multilateral trade fora, and in particular the WTO, is based on an international recognition of Australia’s capacity to act as an ‘honest broker’.

The foundations of that position are built on our traditionally strong commitment to multilateralism, our recent history of unilateral liberalisation and commitment to trade liberalisation which aligns Australia closely to the objectives of the WTO. And also because of the general international recognition that we uphold our obligations under the WTO including acting as a market economy built on respect for property rights.

The benefits of a strong standing enables Australia to shape the agenda in the WTO and ensure that both liberalisation and our national interest are advanced.

But the passage of plain packaging legislation puts that standing at risk. Knowingly and flagrantly breaching our international obligations is likely to harm Australia’s profile as an honest broker in these fora. Australia would be openly flouting its WTO and WIPO Treaty obligations that would become a basis for other countries to ignore their equivalent obligations.

Internationally IP rights are controversial. Australia is one of the few countries that has a long standing, credible and respected IP regime and we rightly seek to educate the world in establishing, operating and enforcing their IP regimes to promote their and our mutual national interest.

By introducing plain packaging Australia will also lose significant moral authority internationally in arguing against violations of the patents, trademarks and copyright in other markets to the detriment of Australian innovators, companies and creative artists.

In the past Australia has instigated dispute settlements through the WTO and has acted as a third party in IP specific WTO disputes.³⁸ But passing plain packaging would also harm Australia’s credibility in the WTO’s dispute settlement process because we would be knowingly ignoring our obligations.

The passage of plain packaging will also open an opportunity for countries that export products stripped of their trademarks to Australia to enact retaliatory measures under the WTO against Australian exports equivalent to the harm incurred on their exports. As a consequence many industries may face new trade barriers in established or emerging markets.

³⁸ World Trade Organisation, 2009, “China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights”, World Trade Organisation, Geneva, Switzerland, DS362, at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm

And it is highly likely that the world's largest exporter of IP, the United States, will complain about the South Australian Parliament's legislation stripping film products of their trademarks through the WTO.

The same is likely to apply to tobacco products. Arguing that the public health risks associated with tobacco consumption will decrease opposition from countries through the WTO does not stand scrutiny.

Countries are willing to raise breaches on tobacco products in WTO fora. In November 2009 a number of countries raised concerns about trade restrictions perceived to be trade barriers at the Technical Barriers to Trade Committee meeting.³⁹

³⁹ World Trade Organisation, 2009, "Tobacco and poultry among members' trade concerns", World Trade Organisation, Geneva, Switzerland, 6 November, at http://www.wto.org/english/news_e/news09_e/tbt_05nov09_e.htm

7.0 Conclusions

Irrespective of the good intentions of plain packaging legislation, they both risk serious, unintended consequences.

Removing trademarks from R 18+ films and tobacco products may significantly devalue the intellectual property rights giving them the opportunity to demand compensation on “just terms”. Similarly compensation may also be required under investment provisions in free trade agreements like the USFTA. And with compensation calculated to range from \$108 million to \$3.4 billion per year the price tag is not cheap.

On a moral ground most Australians would be offended that up to \$3 billion of their tax dollars could be handed to the profits of tobacco companies because the Parliament decided to pass ill-considered legislation.

The removal of trademarks may also breach Australia’s intellectual property obligations under the *Paris Convention for the protection of industrial property*, the World Trade Organisation’s *Agreement on Trade Related Aspects of Intellectual Property Rights* as well as free trade agreements requiring that these agreements be respected.

The consequences of Australia’s international standing and credibility in multilateral fora will be diminished and our capacity to credibly criticise other countries who flaunt their international IP requirements will also be harmed.

Because of a potential WTO violation, the countries affected will also be entitled to impose retaliatory measures that will harm Australia’s exports in key markets.

Should Australia continue down the plain packaging path, we would be the first country to do so and would be heading into uncharted waters in violating Australia’s international obligations.

Before passing this Bill the Parliament should give serious consideration to whether it is prepared to accept the financial and reputational consequences of its passage.

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9.0 About the Institute of Public Affairs

The Institute of Public Affairs, founded in 1943, is the world's oldest free market think tank. The IPA is a not-for-profit research institute based in Melbourne, Australia with staff and associates based around Australia.

Think tanks act as public policy incubators and develop public policy solutions. The objective of the IPA is to promote evidence-based public policy solutions rooted in a liberal tradition of free markets and a free society. The IPA achieves these objectives by:

- undertaking and disseminating research.
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The IPA has a demonstrated track record of contributing to, and changing the terms of the public policy debate in Australia and internationally. In particular, in recent years the IPA has been at the centre of public discussion in Australia and in appropriate international fora on:

- Regulation
- Trade
- Intellectual property
- Water
- Energy
- Housing
- Industrial relations
- Taxation
- Investment

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