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The Plain Packaging of Tobacco Products: A Submission to the New Zealand Parliament

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A SUBMISSION TO THE NEW ZEALAND PARLIAMENT

THE PLAIN PACKAGING OF TOBACCO PRODUCTS



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BIOGRAPHY

I am an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. I am an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I hold a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. I received a PhD in law from the University of New South Wales for my dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. I am a member of the ANU Climate Change Institute. I have published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. My work is archived at *SSRN Abstracts* and *Bepress Selected Works*.

I am the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). I explore the significance of key judicial rulings and consider legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. I have also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2010, and the *Trans-Pacific Partnership*.

I am also the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. I edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). I was also a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), and an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions (2003). I

am currently a chief investigator in an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). I have participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

I am a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (RED) Campaign, the Gates Foundation, and the Clinton Foundation. I am also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

I am a researcher and commentator on the topic of intellectual property, public health, and tobacco control. I have undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic. I have also participated in the New Zealand debate.

I am the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. I am currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

I also have a research interest in intellectual property and traditional knowledge. I have written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics.

EXECUTIVE SUMMARY

This submission draws upon a number of pieces of research and policy papers on the plain packaging of tobacco products including:

Articles and Book Chapters

1. Becky Freeman, Simon Chapman, and Matthew Rimmer, 'The Case for the Plain Packaging of Tobacco Products' (2008) 103 (4) *Addiction* 580-590.
2. Matthew Rimmer, 'Plain Packaging for the Pacific Rim: the Trans-Pacific Partnership and Tobacco Control', in Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013, 75-105, http://www.e-elgar.co.uk/bookentry_main.lasso?id=15407 SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368063 and BePress Selected Works: http://works.bepress.com/matthew_rimmer/167/
3. Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues*, London: Routledge, 2014 (forthcoming), SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368034 and BePress Selected Works: http://works.bepress.com/matthew_rimmer/168/

Submissions

4. Matthew Rimmer, 'A Submission to the Senate Legal and Constitutional Committee on the *Trade Marks Amendment (Tobacco Plain Packaging) Bill* (Cth)', September 2011, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=dabfcd75-9807-493f-bc99-4a7506bf493b>

Case Notes and Op-eds

5. Matthew Rimmer, 'Tobacco's Mad Men Threaten Public Health', *The Conversation*, 23 September 2011, <http://theconversation.edu.au/tobaccos-mad-men-threaten-public-health-3450>
6. Matthew Rimmer, 'Big Tobacco's Box Fetish: Plain Packaging at the High Court', *The Conversation*, 20 April 2012, <https://theconversation.edu.au/big-tobaccos-box-fetish-plain-packaging-at-the-high-court-6518>
7. Matthew Rimmer, 'The Olive Revolution: Australia's Plain Packaging Leads the World', *The Conversation*, 15 August 2012, <https://theconversation.edu.au/the-olive-revolution-australias-plain-packaging-leads-the-world-8856>
8. Matthew Rimmer, 'No Future?: End the Future Fund's Affair with Big Tobacco', *The Conversation*, 13 September 2012, <https://theconversation.edu.au/no-future-end-the-future-funds-affair-with-big-tobacco-9315>.
9. Matthew Rimmer, 'The Plain Truth: Australia, Tobacco Control, and South East Asia', *East Asia Forum*, 7 September 2012, <http://www.eastasiaforum.org/2012/09/06/the-plain-truth-australia-tobacco-control-and-southeast-asia/>
10. Matthew Rimmer, 'The High Court and the Marlboro Man: The Plain Packaging Decision', *The Conversation*, 18 October 2012, <https://theconversation.edu.au/the-high-court-and-the-marlboro-man-the-plain-packaging-decision-10014>
11. Matthew Rimmer, 'Big Tobacco and the Trans-Pacific Partnership', (2012) 21 (6) *Tobacco Control* 526-7, <http://tobaccocontrol.bmj.com/content/21/6/524.full?sid=3b0c6aa1-f2d4-4626-ad27-d7f562a7d158>

12. Matthew Rimmer, 'Cigarettes will Kill You: The High Court of Australia and the Plain Packaging of Tobacco Products' (2013) 1 *WIPO Magazine* 20-23 http://www.wipo.int/wipo_magazine/en/2013/01/article_0005.html
13. Matthew Rimmer, 'Ireland, Plain Packaging, and the Olive Revolution', *InfoJustice*, 24 March 2014, <http://infojustice.org/archives/32484>

DISCUSSION

The New Zealand Parliament is considering the adoption of plain packaging of tobacco products with the introduction of the *Smoke-Free Environments (Tobacco Plain Packaging) Amendment Bill* 2014 (NZ). There has been strong support for the measure amongst the major parties – including the National Party; the Maori Party; the Labor Party; and the Greens. The New Zealand parliamentary debate has considered matters of public health and tobacco control; the role of intellectual property law; and the operation of international trade and investment law.

The Minister for Health, Tony Ryall, a member of the National Party, has been proud of the New Zealand Government's work in respect of tobacco control and plain packaging: 'We have created a turning point in the campaign against tobacco with more effective action than ever before on an unprecedented scale - annual tobacco excise increases, systematic screening and cessation support, the end of retail displays, and the inevitability of plain packaging.'

The Associate Minister for Health, Tariana Turia, an MP for the Maori Party, has been a driving force behind the introduction of the legislative regime. In her first reading speech, she emphasized the need to address the brand imagery deployed by Big Tobacco to recruit consumers to use their addictive product:

In essence, the decision to introduce plain packaging for tobacco products in New Zealand is all about the branding. It takes away the last means of promoting tobacco as a desirable product. When tobacco manufacturers push tobacco, they are not simply selling a stick of nicotine; they are selling status, social acceptance, and adventure. The design and appearance

of tobacco products and, in particular, the way they are packaged influence people's perceptions about these products and the desirability of smoking. Brand imagery demonstrably increases the appeal of tobacco brands, particularly to youth and young adults, helping to attract new smokers and also implying wider social approval for tobacco use.

Tariana Turia observed: 'For too long tobacco companies have been creating brands in advertising to persuade us to think that smoking is glamorous, fun, cool, sophisticated, and a part of life, knowing that they had to sell only the myth, and the nicotine addiction would take over.'

In her speech, Tariana Turia emphasized that the introduction of plain packaging would protect the 'health of future generations while at the same time taking prudent responsibility for the use of taxpayer funds.' She stressed that plain packaging would support and complement existing tobacco control measures as part of a comprehensive public health strategy:

This bill is about sending a very clear message to tobacco companies that this Government is serious about ending unnecessary debts and poor health outcomes related to tobacco use. The intent of the legislation is to prevent the design and appearance of packaging and of products themselves from having any visual or other effect that could serve to promote the attractiveness of the product or increase the social appeal of smoking. The plain packaging regime will tightly control the design and appearance of tobacco product packaging and of the products themselves by allowing the brand name and certain other manufacturer information to be printed on the pack, but with tight controls—for example, on the font used, its size, its colour, and its position on the pack. It will standardise all other design elements of tobacco product packaging, such as the materials, colours, and type fonts that may be used. It will require the packaging to carry larger, more prominent, and more pertinent warning messages and graphic images, controlling the design and appearance of individual cigarettes and other

products. The colouring and wording used on tobacco packaging has been charred to create misconceptions that tobacco products are less harmful and that it is easier to quit than is in fact the case.

Tariana Turia noted the global tobacco epidemic identified by the World Health Organization: ‘Internationally, smoking remains the largest cause of preventable death’. She was concerned that tobacco use ‘contributes to profound health and social inequalities, and outcomes for Māori and Pasifika peoples’. Tariana Turia emphasized: ‘There is no other consumer product that is so widely used and that directly poses such a high level of health risk to users, particularly long-term users.’

Moreover, the Associate Minister for Health emphasized that the legislative regime was consistent with New Zealand’s international obligations: ‘This bill will support New Zealand in meeting its international obligations and commitments under the *World Health Organization Framework Convention on Tobacco Control*, and it will align the tobacco plain packaging legislation in Australia consistent with the *Trans-Tasman Mutual Recognition Agreement*’.

Dr Paul Hutchison – of the National Party – added that ‘the purpose of this legislation indeed is to introduce plain packaging for tobacco products, but particularly the aim is to reduce the tobacco uptake particularly among young people.’ He noted: ‘As the Hon Tariana Turia mentioned in her speech, branding can be very appealing to young people in its many forms and sorts, and in fact it can be very appealing to all people’. Hutchinson emphasized: ‘The whole aim of the tobacco companies is to induce that Pavlovian dog reflex whereby the person who sees the brand just cannot help but get stuck into the goodies, and the whole idea of this legislation is indeed to help reduce

the glamorisation of packaging that the tobacco companies have been just so very happy to use, despite the harm tobacco causes.’ Dr Paul Hutchison emphasized that his party would defend the tobacco control measures in international trade debates: ‘We have clearly signalled that we will not compromise our sovereign right to protect the public health of our people.’ He stressed: ‘This legislation is another step in protecting the public’s health from the proven harms of tobacco.’

Iain Lees-Galloway – representing Labour for Palmerston North – welcomed that the introduction of plain packaging of tobacco products. He emphasized that the Labour Party had a proud record on public health and tobacco control: ‘It goes right back, of course, to 1989-90, when the Smoke-free Environments Act, the Act that this bill amends, was first passed by the Labour Government under then health Minister Helen Clark’. He noted: ‘This is just another step in a long line of measures that have over the last three decades moved us towards a smoke-free future, but now we have the absolute goal that we want New Zealand to be smoke-free by 2025’. Lees-Galloway commented that plain packaging would be a useful, effective measure:

There is no reason for branding to be used to differentiate cigarettes, because tobacco is tobacco is tobacco. It does not matter what you wrap it up in; it kills. Five thousand people are killed every year as a result of tobacco-related diseases. It kills around half its users. That is not a normal product that ought to be treated normally like any other consumable. It does not belong in dairies next to the bread and the milk and the lollies. And it does not deserve to have branding designed to entice young people to use this lethal product.

Lees-Galloway observed: ‘The tobacco industry wails and cries every time a measure like this is implemented, and the more it wails, the more I am convinced that we are

doing the right thing’. He supported the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill* 2014 (NZ): ‘What it seeks to do is to get rid of the last bastion of tobacco advertising.’

In a powerful speech, Clare Curran – representing Labour in Dunedin South – noted the insidious influence of marketing by the tobacco industry: ‘That is why we have so many people in our country and in our world who smoke—because of the really clever marketing and because the product is so addictive.’ She applauded the introduction of plain packaging of tobacco products in Australia, and the ruling of the High Court of Australia that the regime was constitutional. Clare Curran offered a devastating critique of Big Tobacco’s arguments about trade and intellectual property:

I want to say that the argument that is used by big tobacco—the apologists that pretend that this is a debate about intellectual property rights or removing barriers to trade—is wrong and that that has been proven. The sovereign right of Parliament to make its own laws on matters of public interest should be something that we should all fight for. I want to refer quickly to a paper called “Packaging phoney intellectual property claims. How multinational tobacco companies colluded to use trade and intellectual property arguments they knew were phoney to oppose plain packaging and larger health warnings. And how governments fell for their chicanery.” I urge everybody to track down this paper and to read it, because it shows that the companies decided to fight plain packaging on trade grounds because it provided them a more solid footing than allowing health issues to enter the debate.

Highlighting the ruling of the High Court of Australia, Clare Curran concluded: ‘We should not be taking notice of Big Tobacco’s argument that this is an intellectual property argument, because it is not. There is no basis in law for that argument.’

Phil Goff – representing Labour in Mt Roskill – provided a critique of the trade arguments of Big Tobacco and its fellow travellers.

It is a condemnation of not only the tobacco industry but the fellow travellers and the apologists for that industry, who would pretend that they can dictate to this country about what we should do in terms of tobacco promotion. It is a long list: the Emergency Committee for American Trade, the National Association of Manufacturers, the National Foreign Trade Council, the US-ASEAN Business Council, the US Chamber of Commerce, and the United States Council for International Business. Shame on those groups, which in many other aspects of their work do responsible work, that they should act as apologists for a product that kills people. They may pretend that the debate is about intellectual property. They may pretend that the debate is about removing barriers to trade. I am a believer in reasonable protection for intellectual property and I am a strong believer that we should remove barriers to trade, but neither argument stacks up to defend the promotion of a product that kills people if used as the manufacturer intends. Neither argument stands up. They are red herrings. Those councils, those vested interest groups, should butt out of our debate. New Zealand, as every country does, must have the sovereign right to legislate and to regulate for the public good.

Goff encouraged the New Zealand Parliament: ‘We should not lack the courage to confront the vested interests that promote for their own material benefit the peddling of tobacco as a lethal product.’ He emphasized that the regime is aligned with the *World Health Organization Framework Convention on Tobacco Control*: ‘We should not be frightened to bring this legislation in on the date that we consider appropriate and to take on those corporates, because we would have the support of the World Health Organization.’ He was rightly sceptical of challenges to Australia’s plain packaging regime under the World Trade Organization: ‘I do not believe for a moment that another international body, the World Trade Organization, would in the end defend the right of companies to kill people with their products.’ Goff highlighted

the need to ensure that tobacco control measures – such as the plain packaging of tobacco products – were not undermined by the *Trans-Pacific Partnership*.

Lees-Galloway emphasized the need for transparency in respect of the Trans-Pacific Partnership: ‘The real concern is that the Trans-Pacific Partnership will foist upon New Zealand rules and regulations that stop us from doing exactly this, which is to legislate in the best interests of the public health of New Zealanders’. He warned of the danger of investor-state dispute settlement regimes: ‘We are watching Australia closely, but I want New Zealanders to understand that the agreement that Australia has with Hong Kong was poorly drafted in this area and left Australia exposed to the type of litigation that it is facing’. Lees-Galloway observed: ‘We need to know whether the *Trans-Pacific Partnership* will have any bearing on the implantation of this legislation, and we on this side of the House are concerned that the reason the Government does not want this legislation to be implemented as soon as it is passed by Parliament, and instead is handing that right over to itself, the Government, is that it wants to keep in the back pocket the opportunity not to enforce this legislation, in the event that it sells off to American interests that are pushing their agenda through the Trans-Pacific Partnership our right—our Sovereign right—to legislate in the interests of the public health of New Zealanders.’ He concluded: ‘New Zealand is a Sovereign nation that ought to be able to say that we do not accept that 5,000 of our citizens are killed every year by tobacco, and that we do not accept that the tobacco industry has the right to push its product on to youngsters to try to get them hooked at an early age so that when they do make the decision that they want not to smoke any more, they are addicted to nicotine and unable to get away from the habit’. The

politician stressed: 'We do not want the tobacco industry to be able to do that, and we do not want to give up our right to regulate in the interests of New Zealanders.'

Metiria Turei – the co-leader of the New Zealand Greens – expressed her concern about the health impacts of tobacco: 'For every person I love who smokes cigarettes, that cigarette is a direct threat to their life'. She observed: 'That cigarette increases their chances of dying of some horrible disease much, much younger than they would otherwise'. She was also concerned that tobacco had a particularly significant and harmful impact on Maori communities. Turei commented: 'What is most important to me about this legislation is that it controls the industry.' She emphasized

We do have controls on advertising and other forms of regulatory control over the industry, but more is needed and this is a great first step. We—the country, the Government, the community—are being threatened by the tobacco industry. We saw it in today's paper that there are further threats by the tobacco industry for the consequences of this policy. We are quite right in saying that if that is it, so be it, bring it on. We are in the job of making good policy for the health and well-being of our country, and none of us make any apologies for that whatsoever. If that causes a cost to an industry that peddles a drug that kills, well, then so be it. They bear that cost. They are in that industry. That is a cost that they have to take.

Turei dismissed the arguments of Big Tobacco about plain packaging of tobacco products. She noted: 'Actually, the argument by them really was: we want to keep our branding, we want to keep control of the industry.'

Kevin Hague – the spokesperson on Health for the New Zealand Greens – emphasized that nothing is 'more fundamental to the role of a Government than to prevent the

death of its citizens'. He hoped that the New Zealand Government implemented plain packaging of tobacco products, without delay or hesitation:

In the face of the size of this problem and the role that this measure can play in solving that problem I do not believe that that kind of delay can possibly be acceptable. Tobacco companies are scared of this bill. They are scared of this measure. Indeed, it falls into a pattern that has existed for every one of the tobacco control measures that has been implemented in every country every time. Tobacco companies have fought them tooth and nail and the ferocity of their fighting has been proportional to the likely effectiveness of the measure being considered. Their sole motivation is profit maximisation. That is not a goal that our State, our Parliament ought to share.

Kevin Hague stressed that 'every nation has the sovereign right to protect the health of its people.' He warned that 'Delaying implementation is caving in to the threats, extortion, and delaying tactics of an evil industry.'

Barbara Stewart of NZ First expressed uncertainties about the legislation, and its impact upon public health. She noted: 'This is a very thought-provoking piece of legislation. I am not a smoker.' She observed: 'It is important, we believe, to get the views of the submitters on a bill such as this, because it can have unintended consequences, both positive and negative.'

John Banks – the leader of ACT – provided some opposition to the introduction of plain packaging of tobacco products. He asserted that the plain packaging of tobacco products violated the intellectual property rights of tobacco companies:

This bill guts the intellectual property rights of tobacco companies, and someone will say: well, who cares? But do we want to gut the intellectual property rights of KFC or Red Bull sugar drinks? Because KFC and Red Bull sugar drinks are putting this country's level of obesity up at the top of the OECD. They help to contribute to that. It may be seen as a long bow, but the removal of intellectual property rights of tobacco companies and the names and brandings of their products without compensation is wrong, because which international company selling products that are bad for our health will be the next target? The State is effectively seizing their property because it does not like health effects of their still lawful business.

Such arguments are misconceived and ill-founded. In a decisive 6-1 majority, the High Court of Australia emphasized that intellectual property was designed to serve larger public interests – such as the protection of public health. The High Court of Australia emphasized that plain packaging did not constitute an acquisition of property. The High Court of Australia also emphasized that its decision was focused upon tobacco control, rather than any other field – such as food labelling or soft drink labelling.

In light of this debate, the New Zealand Parliament should introduce the plain packaging of tobacco products in order to protect the public health of its citizens. Such a measure would help fulfil New Zealand's obligations under the *World Health Organization Framework Convention on Tobacco Control* 2003 – in particular, Articles 11 and 13 of the agreement, and the accompanying guidelines. The New Zealand Parliament should introduce plain packaging of tobacco products without delay or prevarication. The Australian Government has a strong case in defending the plain packaging of tobacco products under both the *TRIPS Agreement* 1994 and the

Agreement on Technical Barriers to Trade 1994. Australia's opponents have been engaged in dilatory tactics, and have been seeking to stall or delay the disputes.

The New Zealand Parliament should take note of the debate in the Australian Parliament over the plain packaging of tobacco products, and emulate the Australian legislative model of *The Tobacco Plain Packaging Act* 2011 (Cth). The New Zealand Parliament should also take heed of the decisive ruling of the High Court of Australia – which decisively rejected the intellectual property arguments of Big Tobacco about the plain packaging of tobacco products. The New Zealand Parliament should also ensure that its plain packaging regime is not exposed to challenge by tobacco companies under investor-state dispute settlement clauses. There is a need to ensure that the *Trans-Pacific Partnership* does not undermine tobacco control measures in the Pacific Rim. New Zealand should play a leadership role in the Pacific, and promote the adoption of measures, such as graphic health warnings, and the plain packaging of tobacco products in the region.

RECOMMENDATIONS

Recommendation 1

New Zealand should introduce the plain packaging of tobacco products in order to implement the *World Health Organization Framework Convention on Tobacco Control 2003* – in particular, Articles 11 and 13 of the agreement, and the accompanying guidelines.

Recommendation 2

New Zealand should implement plain packaging of tobacco products, without delay or hesitation. There is no good reason to wait for the resolution of the five disputes between Australia and other countries in the World Trade Organization. Australian Government has a strong case. Its opponents have been seeking to stall and delay the disputes.

Recommendation 3

In my expert opinion, the plain packaging of tobacco products is consistent with the *TRIPS Agreement 1994*. In particular, the measure is consistent with Article 8 (1) of the *TRIPS Agreement 1994*, which clearly acknowledges that ‘members may, in formulating or amending their laws and regulations, 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.’

Recommendation 4

The plain packaging of tobacco products is consistent with the *Agreement on Technical Barriers to Trade 1994*

Recommendation 5

The New Zealand Parliament should emulate the Australian legislative model of *The Tobacco Plain Packaging Act 2011* (Cth).

Recommendation 6

The New Zealand Government should take notice of the Australian Parliamentary inquiries into the plain packaging of tobacco products. The Senate Legal and Constitutional Committee report on the *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011* (Cth) is particularly instructive. The Senate Legal and Constitutional Committee considered and rejected many of the arguments raised by Big Tobacco in respect of the plain packaging of tobacco products – for instance, in relation to counterfeiting; freedom of speech; and alleged impacts upon other industries.

Recommendation 7

The New Zealand Parliament should take notice of the ruling by the High Court of Australia in *JT International SA v. Commonwealth of Australia*; *British American Tobacco Australasia Limited & Ors v. Commonwealth of Australia* [2012] HCA 43.

The High Court of Australia summary noted:

‘On 15 August 2012 the High Court made orders in two matters concerning the *Tobacco Plain Packaging Act 2011* (Cth) ("the Act"). Today the High Court delivered its reasons in those matters. A majority of the High Court held that the Act was valid as it did not acquire property. It therefore did not engage s 51(xxxi) of the Constitution, which requires any acquisition of property effected by a Commonwealth law to be on just terms. The Act imposes restrictions on the colour, shape and finish of retail packaging for tobacco products and restricts the use of trademarks on such packaging. The plaintiffs brought proceedings in the High Court challenging the validity of the Act,

arguing that the Commonwealth acquired their intellectual property rights and goodwill otherwise than on just terms. A majority of the Court held that to engage s 51(xxxi) an acquisition must involve the accrual to some person of a proprietary benefit or interest. Although the Act regulated the plaintiffs' intellectual property rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Commonwealth or any other person. As a result, neither the Commonwealth nor any other person acquired any property and s 51(xxxi) was not engaged.'

Recommendation 8

The New Zealand Parliament should exclude investor-state dispute settlement clauses from all trade and investment regimes – given the actions by Big Tobacco against Uruguay's graphic health warnings, and Australia's plain packaging of tobacco products under investment clauses.

Recommendation 9

The New Zealand Parliament should be concerned about the impact of the *Trans-Pacific Partnership* upon public health concerns. In particular, there is a need to ensure that tobacco control measures are not undermined by the intellectual property chapter; the investment chapter; the technical barriers to trade chapter; and the text on tobacco control. There is a need to ensure that the *Trans-Pacific Partnership* does not undermine any of the tobacco control measures contemplated by the *World Health Organization Framework Convention on Tobacco Control* 2003 – whether now, or in the future.

Recommendation 10

The New Zealand Parliament and the New Zealand Government should play a leadership role in the Pacific, and promote the adoption of measures, such as graphic health warnings, and the plain packaging of

tobacco products in the region. Such leadership would support the World Health Organization, and the *World Health Organization Framework Convention on Tobacco Control* 2003.