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A Submission to the New Zealand Government on the Plain Packaging of Tobacco Products

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A SUBMISSION TO THE NEW ZEALAND GOVERNMENT

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 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), with Alison McLennan.

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:

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, '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=dabfed75-9807-493f-bc99-4a7506bf493b>
- 3A. 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>
- 3B. 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>
- 3C. 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>
- 3D. 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>.
4. 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/>

5. Matthew Rimmer, 'Big Tobacco and the Trans-Pacific Partnership', *Tobacco Control*, 2012.

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

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 3

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

Recommendation 4

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

Recommendation 5

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* (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 6

The New Zealand Government 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 7

The New Zealand Government, though, 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.