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**Tobacco’s mad men threaten public health**

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*Non-communicable diseases – Matthew Rimmer examines plain packaging as a way to curb tobacco use. Smoking is one of the biggest causes of non-communicable diseases.*

In an episode of the television show *Mad Men*, Don Draper, the creative director of advertising agency Sterling Cooper, declares that tobacco is “the greatest advertising opportunity since the invention of cereal”.

The mad men of the tobacco industry have long used packaging to undermine health warnings; to engage in false and misleading advertising; and to encourage consumers to initiate and maintain the use of its addictive products.

Recent subversive tobacco packaging in the United Kingdom attests to this:

The World Health Organization (WHO) considers “tobacco use as one of the greatest threats to public health the world has ever faced” and its *Framework Convention on Tobacco Control* (FCTC) – subscribed to by 174 countries – is an evidence-based treaty designed to address the epidemic of tobacco-related illnesses.

The framework addresses measures to control the use of packaging, labelling, advertising, promotion and sponsorship aimed at encouraging consumption of tobacco products.

And the recently released *WHO Report on the Global Tobacco Epidemic 2011* emphasizes...
that the combination of health warnings and plain packaging are best practice for tobacco control.

The Australian Government – led by the Minister for Health and Ageing, Nicola Roxon – has introduced the Tobacco Plain Packaging Bill 2011 (Cth) and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth) as an effective means of implementing its obligations under the FCTC.

The bills will be debated in the Senate within the next few days and, with the support of the Greens, they will become law.

WHO Director-General Dr Margaret Chan describes the proposal to introduce plain packaging as a “bold and breakthrough” initiative, and has given Roxon special recognition for her leadership on this issue.

In response, the tobacco industry has mounted a legal campaign against the introduction of plain packaging as part of a larger strategy of seeking to frustrate and delay the implementation of regulation of FCTC.

It has threatened to challenge the constitutionality of the legislation – co-opting the language of human rights and civil liberties, and invoking the language of property rights, freedom of speech and due process.

But a close inspection of Australian constitutional law suggests such arguments will be ineffective.

And plain packaging of tobacco products certainly doesn’t involve political communication and doesn’t raise any larger questions of freedom of speech.

The outlandish, greedy submissions by Big Tobacco for billions dollars of compensation for an acquisition of property under the Australian Constitution are without merit and will no doubt be given short shrift by the High Court of Australia.

**Public law**

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At the international level, the tobacco industry has encouraged its allies to claim the introduction of plain packaging in Australia is a violation of the *TRIPS Agreement* 1994.

The Dominican Republic, for instance, has complained the law would be a “special requirement” that would “unjustifiably” encumber the use of trademarks “in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those
of other undertakings”.

But the tobacco industry is privately pessimistic about such arguments about international law. It is worth recalling that internal documents from British American Tobacco noted “current conventions & treaties afford little protection” for tobacco companies.

Critically, the documents say arguments against plain packaging about intellectual property, trade, and property rights under GATT/TRIPS would provide “little joy”.

The *TRIPS Agreement* 1994 clearly recognises “members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health”.

The World Health Organization has provided strong evidence about the problem of tobacco packaging, and the efficacy of plain packaging. And the *Doha Declaration* 2001 acknowledges that member states may make use of flexibilities in the *TRIPS Agreement* 1994 to address public health concerns.

Any worthy international lawyer knows the *TRIPS Agreement* 1994 should be read in harmony with the *WHO Framework Convention on Tobacco Control*.

**Double standards**

It shows effrontery on the part of tobacco industry to demand compensation from the Australian government over some perceived slight to its trade marks when it has been notoriously evasive about providing compensation for damage done by tobacco to smokers.

The epic litigation in Australia involving Rolah McCabe, and the reluctance – some might even say the recalcitrance – of the tobacco industry to provide her with fair and just compensation for lung cancer is only one such instance.

More generally, the tobacco industry has been evasive in admitting liability for tobacco-related health harm and damage, and has been embroiled in long-running litigation with governments around the world.

The annual social and health costs of tobacco in Australia are estimated at $31.5 billion.

Health systems around the world are similarly afflicted by what the World Health Organization has called the tobacco epidemic. No wonder there has been enormous international interest in Australia’s plain packaging initiative.

Rather than ask whether the tobacco industry should be compensated for the plain packaging of tobacco products, the better question is whether the tobacco industry should provide full and comprehensive compensation for the untold damage it has caused to the health and well-being of people around the world.

*This is the fifth part of our non-communicable diseases epidemic series. To read the other instalments, follow the links here:*

**Part One:** Sir George Alleyne discusses why we need a new paradigm to tackle NCDs

**Part Two:** Regulating alcohol to control NCDs

**Part Three:** Stopping the obesity epidemic will require action on the population-level
Part Four: The results of the UN High-Level Meeting on Non-Communicable Diseases on New York September 19-20

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