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 of 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 of 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 products:

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.’
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 deaths 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 typefaces or 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 shown 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.’ She commented: ‘Quitting smoking or, even better, never smoking is the key to enjoying a longer and healthier life with loved ones.’

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 vowed 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 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 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 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, 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. Some will ask: well, who cares? But do we want to gut the intellectual property rights of KFC or Red Bull sugar drinks? 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 to the names and brandings of their products from tobacco companies 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 the health effects of their still lawful business. It is still a 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 held that plain packaging did not constitute an acquisition of property. Rejecting ‘slippery slope’ arguments by the tobacco industry, the High Court of Australia also observed that its decision was focused upon tobacco control, rather than any other field of regulation – 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 fulfill 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 guarantee 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.

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Dr Matthew Rimmer is an Australian Research Council Future Fellow. He is an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He has undertaken research on trade mark law and the plain
packaging of tobacco products, given evidence to an Australian parliamentary inquiry on the topic, and participated in the New Zealand debate on tobacco control as well.

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