Tobacco plain packaging: Opportunities for policy transfer

The Commonwealth Charter affirms that the strength of the organisation ‘lies in the combination of our diversity and our shared inheritance in language, culture and the rule of law; and bound together … by shared values and principles and by concern for the vulnerable’. Moreover, the charter affirms ‘the role of the Commonwealth as a recognised intergovernmental champion of small states, advocating for their special needs; providing policy advice … and delivering technical assistance’. These elements are pertinent to the concern of this article: strengthening tobacco control through adapting Australian legislation that mandates plain wrapping for tobacco products.

The trade and cultural linkages established during the time of the British Empire, and subsequently continued through the Commonwealth network, facilitated both the global spread of transnational tobacco corporations and the use of tobacco, particularly cigarettes. The names of several of the most popular cigarette brands in Commonwealth countries are redolent of London and the British imperial past: Pall Mall, Dunhill, Benson and Hedges. Until the practice was abolished in 1999, the packaging of some cigarette brands displayed the coat of arms of Her Majesty the Queen, the head of the Commonwealth, since their purveyors had received a royal warrant.

While a shared language and culture undoubtedly played a role in the spread of the tobacco epidemic in the Commonwealth, other elements of the organisation’s shared heritage hold promise that the Commonwealth may serve as an effective vehicle to strengthen tobacco control. As the charter affirms, the Commonwealth is ‘bound together by shared values and principles and by concern for the vulnerable’. There can be little doubt that smokers and potential smokers are highly vulnerable to tobacco product promotion, largely achieved through brand identity, which is based upon the creation of a desirable image for the product. According to the World Health Organization (WHO), tobacco use is the world’s ‘single most preventable cause of death’ (WHO, 2014). Tobacco control has been recognised both by the states and a number of affiliated organisations of the Commonwealth as a major health issue.

Strengthening tobacco control

In terms of further strengthening tobacco control and in the spirit of WHO’s Framework Convention on Tobacco Control (FCTC), the shared Commonwealth heritage of language and the rule of law holds considerable promise. In this article, we propose that Australian pioneering legislation, tested against challenges from the tobacco industry in the High Court of Australia, is readily transferable to Commonwealth countries. While adaptation of legislation to local conditions would be necessary, the essentials of the legislation can be used as the basis for legislation in each country. Since the laws of many Commonwealth countries are still in the English language, the Australian law can be used as a template. Such adaptation would save time and money and simplify the regulation of packaging, while the High Court precedent is likely to lessen the likelihood of legal challenges.

The application of an existing policy and legislative template is likely to be particularly attractive to small states, which often lack the expertise and resources to develop their own policies. Article 22 of the FCTC provides for assistance for developing countries that are party to the convention, including the transfer of legal expertise. Under Article 24, the convention Secretariat is also authorised to promote close co-ordination with intergovernmental organisations, providing an opportunity for co-operating with its Commonwealth counterpart.

The case for plain packaging legislation

All Commonwealth countries, apart from Malawi and Mozambique, have ratified the FCTC, which includes minimum provisions for regulating tobacco packaging. False or misleading claims and descriptors such as ‘low tar’ and ‘mild’ are prohibited, health warnings (and discretionary health messages) should be displayed prominently, and information on the constituents and emissions of the product must be provided.

Variations in practice are permitted. Article 11(b) stipulates that warnings and messages ‘should be 50 per cent or more of the principal display areas but shall be no less than 30 per cent’. With the exception of Australia, which has gone well beyond the minimum requirements of the FCTC, all Commonwealth countries permit ‘hybrid’ packaging. Health warnings, information about the toxic qualities of the product and graphic illustrations of the health risks of tobacco-use co-exist with the logos, colours and patterns designed to appeal to the smoker. In many jurisdictions the regulations do not prevent the use of wallet and slide-in packs, both of which provide more surface areas for brand-related design features and are themselves part of innovative packaging strategies.

There is a risk that a condition of stasis will be accepted in packaging policy. According to this logic, no further controls are necessary since the interests of both the tobacco corporations and control advocates have been accommodated through packaging.
which simultaneously seeks to promote and to prevent the use of the product. Such a modus vivendi must be rejected since it perpetuates shortcomings in tobacco control measures.

Tobacco product packaging represents both a substantial and symbolic compromise between the freedom to sell the product and the state’s ostensible commitment to deter usage. Since the advertisement and promotion of tobacco products have been prohibited in most jurisdictions, the packaging represents the last remaining legally-sanctioned vehicle for projecting brand identity through the use of overall design, texture, colours, logos and calligraphy. In some cases, packaging also provides the company’s telephone information line to obtain promotional information about the product. Unsurprisingly, tobacco corporations spend considerable sums to frequently re-design packaging to refresh their brands. Some years ago, a senior vice-president of Philip Morris summed up the centrality of packaging to brand promotion, observing:

‘What we’re saying here isn’t new. We’ve found that the most effective way to reach our consumers is through the pack, because that is what they buy and hold and use.’

(Davies, 2006)

People attach meanings and emotional attributes to colour. Blue, green and white are often associated with gentleness and calm, black and red with masculinity, and pink with femininity. Colours have been widely used by tobacco companies to promote brand identification and to mislead the consumers about perceived risks in using the product (Cancer Research, 2012).

The Australian policy model and industry opposition

Standard plain packaging is supported by a growing body of research evidence. Systematic reviews have identified that, in comparison to branded cigarettes, plain standard packaging is less attractive to young people, improves the effectiveness of health warnings, reduces recruitment of new users and eliminates the mistaken notion that some brands are ‘safer’ than others (Moodie, C. et al., 2012; Cancer Council Victoria, 2011).

The example set by Australia in legislating for plain packaging for tobacco products presents an opportunity for other jurisdictions to take the next logical step in regulation, thereby both symbolically and substantially intensifying control policies. The Australian policy is radical and offers a practical legislative model for other nations. Moreover, the failure of the challenge by tobacco corporations in the High Court of Australia (JT International SA v Commonwealth of Australia and British American Tobacco Australasia Ltd v The Commonwealth), based on demands for compensation for loss of intellectual property, has established a legal precedent for plain packaging legislation which may be persuasive in other countries (High Court of Australia, 2012).

The Plain Packaging Act (Parliament of Australia, 2011) prohibits branding other than the product name in a standard font, size and colour, and prohibits all other trademarks, logos, colour schemes and graphics. Large pictorial health warnings are to be displayed on both sides of what the legislation described as a ‘drab dark brown’ pack in matt finish. Qualitative, rather than quantitative, information on the constituents and the emissions are provided. In addition to health messages and health warnings, the Quitline number and its web address must also be displayed.

In response to the Australian plain packaging regulation, Cuba, Honduras, Dominican Republic and Ukraine have instituted action through the World Trade Organization (WTO) for breach of international trade rules and intellectual property rights. Philip Morris Asia has initiated an investor-state dispute settlement claim against Australia regarding plain packaging under the Hong Kong Australia Bilateral Investment Treaty of 1993.

Although these disputes are yet to be adjudicated, there is legal opinion that the Australian legislation falls within the scope of the permissible limits of WTO agreements (Mitchell, 2010; Davison, 2012; Alemanno and Bonadio, 2011). The WTO has accommodated general exemptions for necessary action to protect human health under Article XX (b) of the General Agreement on Tariffs and Trade (GATT) and Article 8(1) of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, which states:

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.

– Article 8(1), TRIPS agreement

Box 1 Country examples

The importance of cigarette packaging

Examples from Sri Lanka and Malaysia provide clear evidence of packaging innovation being used to project brand identity. An analysis of recent reports from the Ceylon Tobacco Company (CTC) reveals several themes in its discourse on packaging. These include modernity, youthfulness, energy, dynamism, quality and passion (Ceylon Tobacco Company, 2008, 2009, 2010).

CTC’s reaction to declining sales of its best-selling cigarette, John Players Gold Leaf (JGPL), shows how vital the pack is to brand image and suggests an appeal to younger smokers:

‘In 2010 CTC recognised the need to rejuvenate the aging brand by adding vigour and modernity to its brand identity. So was instituted a plan to rejuvenate the brand JGPL to match the perceptual imagery of the modern day consumer … The main component of the re-launch was pack redesign …’

(Ceylon Tobacco Company, 2010)

Malaysian corporate reports reveal a similar dependence upon packaging innovation to symbolise the identity of brands. JTI International attributed the success of its Mild Seven brand to ‘a redesign of the packaging’ which ‘focused on its innovative and modern image’ (JTI International Berhad, 2012: p. 17). Its competitor, BAT Malaysia, reported the ‘launching’ of various new pack designs in 2011 (British American Tobacco Malaysia, 2011: pp. 24–24), continuing a longstanding policy of regular packaging innovation. The following year, the company reported favourably on its Dunhill Switc capsule cigarette, which offered what was described as ‘an improved pack design and product proposition’ (British American Tobacco Malaysia, 2012: p. 11).
Adapting Australian policy and legislation to Commonwealth countries

Zweigert and Kotz (1998) maintain that any consideration of translating legislation between jurisdictions to deal with a specific problem should ask if the solution is feasible in the country to which it is being transferred. Kahn-Freund (1978) alerts the policymaker to the need to recognise the significance of the societal and political differences between donor and recipient countries when considering legislative transplantation. Watson (1977, p. 130) is less concerned about understanding differences between jurisdictions, although he admits that this is useful. Rather, he argues that transplantation is a positive action if it is a ‘good idea’ and ‘socially easy’. We contend that legislative transfer is both a good idea and feasible.

Successful advocacy of plain packaging in Commonwealth countries will require effective advocacy and evidence-based demands for policies that are sensitive to local cultural considerations. For example, colours considered unattractive by Australians may not be the same in other countries. Intersectoral co-operation will be required between governmental bodies and civil society organisations. Strong opposition from the tobacco industry is likely to occur in any country considering plain packaging legislation. As the example of the United Kingdom has shown, governments may be hesitant about altering the status quo.

Tobacco products in a number of Commonwealth countries include not only cigarettes but also cigars, bidis, pipe tobacco, leaf tobacco for making ‘roll-your-own’ cigarettes and chewing tobacco. Cigarettes are still sold in some Commonwealth countries in packs of ten sticks. Packaging regulation must be standardised and extended to include all tobacco products, to end the use of small ‘kiddie packs’ and to prohibit wallet and slide-in packs. Regulation should also mandate the provision of ‘quit’ information and support on all packaging.

Several Commonwealth countries have ratified bilateral and multilateral trade agreements (e.g. Sri Lanka is party to the Indo-Sri Lanka Free Trade Agreement and South Asian Preferential Trade Agreement) and therefore risk being taken before grievance tribunals by other states that have accused them of failing to protect intellectual property rights. They must therefore be willing to assert their sovereign rights to protect their people’s health in the face of such challenges.

The Australian experience – using research evidence, mobilising civil society and mass media support to counter opposition, and successfully contesting domestic legal challenges from the tobacco industry – provides a model for adaptation throughout the Commonwealth. The FCTC also encourages Australian tobacco control policy and legal expertise to be shared with other countries. A Commonwealth-wide approach may also provide an element of solidarity and strengthen the resolve of individual member states which might wish to emulate the Australian example but which lack the confidence to do so. Embracing Australia’s radical policy initiative will intensify control policy in Commonwealth countries and counter policy stasis. It will also demonstrate the capacity of the Commonwealth to draw upon the potential identified in the Commonwealth Charter by sharing public health policy initiatives through its formidable network of states. The web-based programme Commonwealth Connects could provide a cost-effective vehicle for promulgating an initiative on packaging regulation.

Acknowledgements

Some sections of this article draw upon material in a manuscript accepted for future publication in the Galile Medical journal. The authors are indebted to Dr Nor Fadzilina Nawi for introducing them to sources about legal transplantation.

References


SIMON BARRACLOUGH, PADMAL DE SILVA and RICK HAYES are at the School of Public Health and Human Biosciences, La Trobe University, Australia, as associate professor, visiting fellow and head of department, respectively. Barracough teaches health policy and international health relations. De Silva is a public health specialist working in Sri Lanka’s Ministry of Health and heads the research department at the National Institute of Health Sciences, Kalutara, Sri Lanka. Hayes has a longstanding involvement with men’s health research and programmes, and has worked on indigenous male health projects in Australia.


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