

Submission No. 53

(Plain Packaging Bill)

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**BRITISH AMERICAN
TOBACCO
AUSTRALASIA**

**British American Tobacco Australia Limited
Submission on the Tobacco Plain Packaging Bill 2011 and the
Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011**

**Submissions to the House of Representatives Health and Ageing
Committee**

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PLAIN PACKAGING EXECUTIVE SUMMARY

British American Tobacco Australia Limited (BATA) welcomes the opportunity to submit to the House of Representatives Health & Ageing Committee's inquiry into the Tobacco Plain Packaging Bill 2011 (**TPP Bill**) and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (**TMA Bill**),

For the reasons outlined in our submission, BATA is opposed to the introduction of plain packaging. We believe there are significant legal obstacles to its implementation, the policy is not supported by real evidence and there are significant consequences and implications which may arise if the TPP Bill is passed.

Notwithstanding our views, which are shared by a number of unrelated independent third parties, should the Government introduce the TPP Bill and the TMA Bill, BATA has serious concerns about its ability to comply with the legislation within the short timeframes provided for in Clause 2 of the TPP Bill.

In fact, BATA believes that, given the lead times involved, it will be impossible to comply and respectfully requests that the Committee recommend the TPP Bill not come into force until at least 12 months after the final Regulations are released and TPP Bill receives Royal Assent. We further request a flush through period of at least 6 months to allow all non-compliant stock to be sold by retailers. Given that the penalties in the TPP Bill impose strict liability and onerous penalties, the need for sufficient time to comply is essential.

Following is a summary of BATA's objections to the TPP Bill, the TMA Bill, and to plain packaging more broadly.

Plain Packaging faces significant legal obstacles and issues

The Government's power to introduce plain packaging is constrained by law, not only by the general principles of public law, but also by international law, including the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Technical Barriers to Trade Agreement.

The introduction of plain packaging, including increasing the graphic health warnings from the current size by amending the Trade Practices (Consumer Product Information Standards) (tobacco) Regulations 2004, may result in significant costs to the Government and the taxpayer.

Simply citing 'public health' reasons, with little or no real evidence to support such claims, in our respectful submission is not a sufficient reason for the Government to disregard its obligations under the international treaties to which it is a party.

No real-world evidence that plain packaging will result in a reduction in smoking prevalence

There is no real world data to demonstrate that the plain packaging of tobacco products will be effective in discouraging youth initiation, encouraging cessation by existing

smokers, or increasing the salience of health warnings, a point acknowledged on a number of occasions by the Health Minister herself.

The Government has relied on a number of studies, research and data to purportedly support its claims that plain packaging will achieve its desired purpose. BATA does not consider that those studies, research, and data supports the proposition of plain packaging. A recent international report by Deloitte¹ found that packaging laws have not directly reduced smoking, and calls into question whether plain packaging will achieve government health objectives.

Plain Packaging should be properly considered

The TPP Bill is the result of a rushed policy, where due diligence and proper investigation – including a formal Regulatory Impact Statement (RIS) process - were not undertaken.

To this end, the Committee should fully consider all of the implications, and all of the submissions made by third parties over the past 12 months, before introducing the TPP Bill. The Government's own internal documents make it clear that plain packaging is being introduced despite the evidence, not because of it.

Concerns with Plain Packaging are shared globally by companies and business groups

To date there have been two recent legislative reviews in relation to plain packaging - in Australia and the UK. In both reviews, groups from Retailers, to Intellectual Property groups, to Think Tanks all raised their concerns around the unintended consequences around plain packaging.

The concern regarding the TPP Bill is evidenced by the fact that a large number of independent third parties, ranging from manufacturers, business associations, retailers, wholesalers, experts and intellectual property organisations throughout the world lodged submissions to the Department of Health in response to the Exposure Draft and previously in response to The Fielding Bill Inquiry 2010.

Indeed it is worth the Committee noting that of the 58 submissions to the Senate's aborted inquiry into the Fielding Bill into Plain Packaging, only 16 submissions were for the proposal with 40 against, 2 were indifferent.

More recently, of the 218 submissions to the Department of Health, as part of the consultation period on the Exposure Draft of the bill, 135 submissions were against the Bill, 79 were for it, with 4 indifferent.

¹ Deloitte Report, Tobacco Packaging Regulation, An international assessment of the intended and unintended impacts – May 2011

Plain Packaging could lead to an increase in Illegal Tobacco Trade

A range of commentators, including the Australian Government, recognise that plain packaging could lead to an increase in illicit trade.

Plain packaging could more easily facilitate counterfeiting and smuggling, and thus the distribution of products through unregulated, untaxed criminal networks which are more readily accessible to underage and vulnerable smokers, while at the same time making policing the illicit trade in tobacco significantly more difficult.

It would be far easier for counterfeiters to replicate a government mandated standard packet design than to copy the designs used on current tobacco packaging. Consumers will find it difficult to identify counterfeit products. This would also most likely result in a broader network of manufacturers of illegal tobacco and the sales of illegal tobacco to increase.

Plain Packaging will give rise to other significant unintended consequences

Not only will the intentions of the TPP Bill not be met, but the introduction of plain packaging will potentially give rise to numerous significant unintended consequences.

These include:

- lost tobacco tax revenues;
- costs for governments;
- significant legal obstacles;
- compensation costs for governments;
- cost burdens on small retailers;
- cheaper and more accessible tobacco; and
- increased youth smoking.

We attach, as Annexure 1, a Report prepared by Deloitte entitled “Tobacco Packaging Regulation – An international assessment of the intended and unintended impacts” which addresses some of these consequences.

The TPP Bill is unworkable as presently drafted and BATA cannot comply with the timelines

The TPP Bill and draft Regulations specify a number of mandatory elements, which BATA must comply with. A number of those matters have no regard to how tobacco products are manufactured and, as such, are unworkable.

Further, the implementation timings proposed by the TPP Bill are unable to be met by the legitimate tobacco manufacturing industry. There are a number of significant operational matters that the Government must take into account lest it causes massive disruption to the tobacco market in Australia.

Submissions to this effect were made to the Department of Health following release of the Exposure Draft but no consideration appears to have been given to those

submissions in the TPP Bill. Indeed we have heard nothing from the Department regarding our concerns on implementation timings since we tabled our submission.

We note that the final details of how the TPP Bill will operate, that is the regulations, will not be finalised until after 1 January 2012, meaning that legitimate tobacco manufacturers would have, at best, 120 days to develop print drums to print the artwork (including GHW), overhaul their manufacturing process, order and make relevant new machinery, train workers on new equipment and manufacture and package sufficient product to sell and replace existing product in stores. With respect, this is impossible.

At a minimum, a 12 month preparation period is required with a further 6 month flush through period to ensure the legitimate market can adapt to the new regulatory regime.

Recommendation

Given the legal and regulatory concerns outlined above, BATA believes that attention should be paid to proven policy areas which are likely to measurably contribute towards reducing the public health impacts of tobacco use and ensuring that youth do not have access to tobacco products.

BATA supports effective regulations that are based on research conducted both in Australia and internationally.

To this end we believe the Federal Government should focus on the following core areas:

- 1 More highly targeted education programmes especially aimed at preventing young people from taking up smoking;
- 2 Nationally consistent retail laws to assist with business certainty and to mitigate against the negative impacts and unintended consequences;
- 3 Closer engagement and cooperation amongst retailers, tobacco manufacturers, key regulatory decision maker and public health advocates through the establishment of a Federal Tobacco Consultative Forum;
- 4 A nationally consistent, integrated government approach to the pricing of products; and;
- 5 An increase in attention and resourcing and enforcement of the laws to prevent the trade of illegal tobacco by criminal syndicates.

We also believe that TPP Bill should not be put to the Parliament until a full Regulatory Impact Statement is conducted, so that the full implications of the TPP Bill are well understood.

1. INTRODUCTION

1.1 BATA and the Australian Tobacco Market

With approximately 45.6 percent of the legitimate cigarette market², BATA is the country's leading tobacco company. We manufacture and distribute cigarettes and roll-your-own tobacco and distribute pipe tobaccos and cigars. Our brands include Winfield, Benson & Hedges, Dunhill, Pall Mall and Holiday.

Our company currently employs over 1,100 people, with operations in every Australian state and territory, and our federal tax contribution alone is approximately \$4.5 billion annually.

There are approximately 35,000 retailers throughout Australia that sell tobacco products and indirectly, tobacco accounts for almost 50,000 jobs in the retail sector alone.

1.2 BATA supports evidence-based and proportionate regulation

There is no question that smoking tobacco can cause serious and fatal disease, including lung cancer, emphysema, chronic bronchitis and heart disease.

While the only way to avoid the risks of smoking is not to smoke, a real world view suggests that a large number of people will continue to choose to smoke even though they are aware of the risks. As a result tobacco should be regulated and regulated sensibly.

Building on a reputation as a responsible tobacco manufacturer, BATA has participated in the development of some key regulatory initiatives in Australia, such as our active involvement in the drafting of a standard for the measurement of cigarette extinction propensity., our involvement in the butt littering campaign and our support of the National Packaging Covenant.

The Office of Best Practice Regulation (OBPR) advocates thorough consultation in the development of regulatory proposals and the review of existing regulations to ensure that both those affected by the regulation and the Regulator have a good understanding of the issues under consideration.

This ensures there is a clear understanding of all regulatory options to address a given problem, and possible administrative and compliance mechanisms, and associated benefits, costs and risks³. For this reason, good regulatory practice dictates that tobacco manufacturers should be included in the consultation process to develop effective tobacco regulation.

BATA is therefore surprised that the Government has sought to introduce the TPP Bill in the absence of any meaningful consultation with the tobacco industry in Australia nor

² BAT exchange of sales 2010 FY share source: PWC/AC Nielsen 2011)

³ OBPR website, "Effective Consultation and Effective Regulation" (on line)

has it conducted a thorough RIS process. Further, it appears that the Government has had no regard to the submissions to the Exposure Draft from a number of legitimate tobacco manufacturers, including BATA. It also appears to have had no regard to any submissions from any party who opposes the TPP Bill.

To ensure that any further regulation is workable, achievable and evidence based, it is important that tobacco manufacturers and retailers are part of the policy making process, otherwise such measures are likely to bring with them serious unintended consequences which may undermine public health objectives.

2. LEGAL BARRIERS TO MANDATING PLAIN PACKAGING

2.1 Introduction

BATA opposes the introduction of plain packaging as it is effectively a ban on using valuable intellectual property assets. It also amounts to a taking of business goodwill as reflected in the value of brands, some of which have been established for over 200 years.

There are significant domestic and international barriers to the introduction of plain packaging which demand serious consideration. Alan Bennett, adjunct professor of law at the University of Sydney and a specialist and practitioner in international trade laws, has warned that plain packaging may violate the TRIPS agreement, the US-Australia free trade agreement and the Paris Convention for the Protection of Industrial Property, the foundation stone of the international intellectual property regime for more than a century.⁴

The following is an outline of what BATA considers to be some of the significant barriers.

2.2 Plain packaging violates Australian domestic law

The legislative ability of the Government to introduce a mandatory plain packaging regime, which includes the substantial increase of graphic health warnings, is constrained by the limits of power imposed by the Constitution. Section 51 (xxxi) of the Constitution provides that property, which includes intellectual property, may only be acquired on “just terms”. By prohibiting the ownership and use of intellectual property on tobacco packaging without compensation, the TPP Bill falls foul of the Constitutional guarantee thereby violating domestic law.

The Government has recognised this, and they have therefore refused to include in the TPP Bill a provision for the payment of our valuable intellectual property. In other words, they would rather spend taxpayer’s dollars in legal fees and have the Court find that the TPP Bill cannot apply to the tobacco industry’s products because it constitutes an acquisition of property, then not proceed with a seriously flawed piece of legislation.

⁴ The Australian newspaper, 28 May 2011 in an article entitled “Cigarettes may be too hot to handle”

"The idea that you can be the first in the world to introduce such a measure and not face any risk is fanciful," said Tim Wilson, head of the intellectual property and free trade unit at the Institute of Public Affairs think tank.⁵

In 1995, the Department of Health, in answer to the Senate Committee set up to look into plain packaging for tobacco products, noted that the introduction of plain packaging "*was not consistent with current Commonwealth Government policy*" and that implementation of such a policy "*is shaped by major legal and Constitutional impediments to such action*"⁶.

Insofar as trade marks are concerned, IP Australia, in a brief to the Australian Government on 13 April 2010, noted that "*trade mark owners are given a broad exclusive right to use their mark. IP Australia considers that plain packaging of tobacco products, if implemented, would impinge on this right*"⁷.

Further, the Australian Institute of Patent and Trade Mark Attorneys in its submission in response to the Exposure Draft, stated that plain packaging would amount to a direct contravention of section 20 of the Trade Marks Act 1995 which affords a trade mark owner the exclusive right to use its registered mark. It would also have the effect of depriving a trade mark owner of its personal property (see section 21 of the Trade Marks Act)⁸.

2.3 Breaches of International Treaties — Paris Convention

Plain packaging is incompatible with the rules of the Paris Convention, to which Australia is a signatory.

Whilst the signatories to the Paris Convention are at liberty to prohibit or restrict the use of certain products, this cannot be done by restricting the use and registration of trade marks.

2.4 Breaches of International Treaties — TRIPS Agreement

Plain packaging requirements are also likely to place Australia in breach of the TRIPS Agreement. The TRIPS Agreement incorporates and expands upon, amongst other things, the minimum standards of trade mark protection provided for under the Paris Convention.

Under the TRIPS Agreement, all Member States are obliged to comply with the material provisions of the Paris Convention in its latest version. The introduction of the TPP Bill would be inconsistent with Australia's obligations under the TRIPS Agreement.

⁵ The Australian newspaper, 28 May 2011 in an article entitled "Cigarettes may be too hot to handle"

⁶ Department of Health response given to the Senate Inquiry into the Tobacco Industry and the Costs of Tobacco-Related Illness sent to Senator John Herron under cover of letter dated 23 October 1995

⁷ (Info brief B10-1473, prepared by IP Australia, to Parliamentary Secretary cc Minister 13 April 2010)

⁸ Australian Institute of Patent and Trade Mark Attorneys' submission to the Senate Inquiry into Plain Tobacco (Removing Branding from Cigarette Packs) Bill 2009, dated 23 February 2010

A 2009 email between two senior members of the commonwealth authority that administers Australia's trademarks and intellectual property regime, IP Australia, warns the move may fall foul of key articles in TRIPs⁹. "I'm not surprised that (was it Health?) are arguing that Article 20 is ambiguous ... it suits their purposes, for that. However: It is pretty clear from ... the negotiation documents that this is exactly the issue that A[rticle] 20 was targeted at"¹⁰

Further, an IP Australia briefing note stated that "Article 8(1) of TRIPs allows for members to adopt measures necessary to protect public health . but the final part of this Article stipulates that measures like this have to be consistent with the rest of the provisions of TRIPs. Therefore it seems unlikely that this Article could be used to avoid Article 20."¹¹

Notwithstanding the view expressed internally within the Government and various Government departments, the Government is now publicly attempting to use 'public health' reasons as a means to avoid its obligations under TRIPs. With respect, using the words of Mark Arblaster, Trade mark Technical Policy and Project, this "is a long bow I think."¹²

Given the importance that Australia places on intellectual property, and complying with its international obligations, we are surprised that that Government would proceed with the TPP Bill without strong empirical evidence to support its measures and without undergoing a RIS process.

2.5 Breaches of International Treaties — GATT

The proposed plain packaging scheme would be contrary to the General Agreement on Tariffs and Trade (GATT) as it would prohibit the import of branded tobacco products not conforming with the TPP Bill. While the TPP Bill has been amended to allow for the importation of non-compliant product if it is either re-packaged into compliant packaging or wholly for re-export, the substantive prohibition on the import of branded tobacco products remains.

2.6 Breaches of International Treaties — TBT Agreement

Australia is also a signatory to the WTO Agreement on Technical Barriers to Trade (TBT). As a result Australia must ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. Technical regulations include regulations about symbols, packaging, marking or labelling requirements of a product.

⁹ Email from Michael Arblaster, deputy registrar, Trade Marks Hearings and Legislation, to Karen Tipler, assistant director, Trademarks and Designs dated 18 February 2009

¹⁰ Email from Michael Arblaster, deputy registrar, Trade Marks Hearings and Legislation, to Karen Tipler, assistant director, Trademarks and Designs dated 18 February 2009

¹¹ IP Australia briefing note for Parliamentary Secretary for Information, Richard Marles dated 23 September 2009

¹² Email from Michael Arblaster, deputy registrar, Trade Marks Hearings and Legislation, to Karen Tipler, assistant director, Trademarks and Designs dated 18 February 2009

The ultimate effect of the TPP Bill would be to ban, not only the use, but ownership of intellectual property and would result in Australia acting inconsistently with its obligations under the TBT.

The fact that mandatory plain packaging legislation has the potential to breach Australia's obligations under the TBT has in fact been recognised by Australia, when it notified the WTO TBT Committee of the existence of the TPP Bill.¹³

2.7 Serious ramifications can flow from breaches of Australia's Treaty obligations

Breaches of international agreements are subject to international dispute procedures and also may have adverse consequences for Australia's international reputation. Equally, a breach of an international obligation would expose Australia to the risk of a WTO Panel which could not only diminish Australia's international stature and reduce its negotiating ability in other international fora but could also lead to retaliatory counter-measures by other WTO members.

Furthermore, the uncertainty created by any attempted extinguishment by the Government of valuable intellectual property may deter companies from investing in Australia. In this regard, Australia was identified in submissions to the United States Trade Representative (USTR) in relation to its "Special 301" report, which highlights countries that fail to protect companies' investments in intellectual property. Further, it should be noted that the United Kingdom Government recently stated that it must "carefully examine" the evidence base regarding plain packaging, and "give weight to the legal implications of restrictions on packaging for intellectual property rights and freedom of trade".

The Australian Government's proposal to introduce plain packaging of tobacco would be detrimental to Australia's international reputation on intellectual property matters. This point was made by the Chamber of Commerce of the United States, which wrote to Australian lawmakers and stated that in its view, "*the plain packaging proposal appears to disregard established international norms of intellectual property, particularly trademark law, which is a cornerstone of corporate identity and consumer information*" and that "*a move to mandate generic packaging would establish a bad precedent for companies from both of our countries*"¹⁴.

The international obligations referred to above are fundamental to the effective international protection of all trade marks (and related IP rights) and their commercial value. Accordingly, a breach of those principles will clearly call into doubt the commitment of Australia to an effective intellectual property regime which promotes and rewards innovation and value creation.

2.8 The Government has received legal advice regarding Plain Packaging and its impact on its international treaty obligations

In spite of the Government's reluctance to acknowledge the likely impact that the TPP Bill will have on Australia's compliance with TRIPS, the TBT and other international

¹³ <http://docsonline.wto.org/DDFDocuments/t/g/tbtn11/aus67.doc>

¹⁴ Tobacco Label Fight Heats Up, the Australian Financial Review, 21 January 2010

treaties, the Government is actually well aware of that impact, and has received advice in this respect from a number of bodies.

When plain packaging in Australia was initially proposed by contributors to a Report on the Tobacco Industry and the Costs of Tobacco-Related Illness (**December 1995 Report**) prepared by the Senate Community Affairs References Committee, that Committee clearly concluded that there was “not sufficient evidence to recommend that tobacco products be sold in generic packaging,” and suggested that the Government conduct additional research to determine its efficacy in preventing juvenile smoking.

In its September 1997 response to the December 1995 Report (**Response**), the Government acknowledged that there remained insufficient evidence to establish the efficacy of plain packaging in reducing youth smoking. More to the point, the Government also noted that it had obtained the advice of the Attorney General’s Department on the “legal and constitutional barriers to generic packaging” (**AG’s Legal Advice**, dated 8 December 1995). The Government eventually decided against proceeding with the proposal to introduce plain packaging legislation, at least partially on the basis that plain packaging risked violating Australia’s TRIPS obligations.

Crucially, the Government also noted in the Response that in the AG’s Legal Advice, it had been made clear that “further regulation needs to be considered in the context of Australia’s international obligations regarding free trade under the General Agreement on Tariff and Trade (GATT) ... and [Australia’s] obligations under international covenants such as the Paris Convention for the Protection of Industrial Property, and [TRIPS].”

BATA has requested a copy of the AG’s Legal Advice, asserting, amongst other things, that the Government has waived any legal professional privilege. The Government is strongly resisting production, maintaining that it is still privileged. A Court hearing is scheduled for 3 August 2011, unfortunately, after the deadline for submissions to this Committee on the TPP Bill has passed.

Nevertheless, we fully expect that this Committee, consisting of members of Parliament, cannot and must not be prevented from gaining access to the AG’s Legal Advice on this key issue. To this end, we encourage the Committee to obtain a copy of, and review, the AG’s Legal Advice.

2.9 FCTC does not impose any obligation to introduce plain packaging

One of the justifications given by the Government for proceeding with the TPP Bill is that it is a ‘necessary’ part of Australia’s international obligations under the Framework Convention on Tobacco Control (FCTC).

The WHO FCTC does NOT impose an obligation on national governments to introduce plain packaging.

FCTC obligations on packaging and labelling are set out in Article 11 of the treaty, which obliges Member States to implement certain measures within three years from the entry into force of the Convention, including to ensure that packaging and labelling are not misleading. Article 11 neither authorizes nor obliges Member States to restrict or prohibit the use of trade marks as is envisaged by the TPP Bill. Indeed the proposed

prohibition on use of intellectual property such as trade marks is not contemplated anywhere in the FCTC.

While the Guidelines for Elaborating Articles 11 and 13 of the FCTC may recommend plain packaging, these Guidelines propose recommendations which are non-binding on national governments. Further, it was emphasised that no Party was obligated to recommend plain packaging; all parties had to consider legal obstacles to plain packaging; and that there is a need for further research to establish an evidence base.

Also, whilst Article 2 of the FCTC provides that Member States may implement measures beyond those required by the Convention the Article states that any such measures should be “in accordance with international law”. The FCTC’s reach is fettered by the legal requirements of its signatories.

A basic tenet of international law is that countries shall comply with all of their international obligations. Australia’s proposed plain packaging requirements far exceed what is necessary for Australia to comply with any binding FCTC obligations. If enacted as currently drafted, the plain packaging requirements would clearly violate Australia’s WTO obligations, in particular under the TBT and TRIPS Agreements.

Australia cannot invoke the FCTC and its Guidelines to justify such violations of WTO rules.

2.10 Significant concerns in the international community

A number of countries have raised concerns about the plain packaging of tobacco products. This is subsequent to countries such as Canada¹⁵ and France¹⁶ investigating plain packaging and then rejecting it.

Via the World Trade Organisation, we learnt that questions about the Bill were raised by the European Union¹⁷, Indonesia¹⁸ and Mexico among others¹⁹. Several other governments, such as China and Brazil, requested further investigation into the Bill²⁰.

We’re also aware that the chair of the United States’ Congressional sub-Committee Asia and the Pacific, Donald Manzullo write to Craig Emerson stating; *‘Not only does it [plain packaging] violate Australia’s global trade obligations and undermine trademark protection, but it also has the negative effect of emboldening governments less committed to intellectual property right protection to dismiss global rules. Moreover, plain packaging legislation will likely lead to more counterfeit cigarettes, increase health risks for consumers, and contribute to the growth of illicit products.’*²¹

Some of the most influential business groups in the world have also come out in opposition to plain packaging, including:

¹⁵ http://www.plain-packaging.com/downloads/Health_Minister_David_Dingwall_6_Dec_96_-_excerpt.pdf

¹⁶ <http://questions.assemblee-nationale.fr/q13/13-99330QE.htm>

¹⁷ http://ec.europa.eu/enterprise/tbt/tbt_repository/AUS67_EN_6.pdf

¹⁸ http://www.wtocommerce.org.tw/SmartKMS/do/www/readDoc?document_id=115025

¹⁹ http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm

²⁰ http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm

²¹ <http://www.smh.com.au/national/pressure-builds-over-plainpack-cigarettes-20110527-1f8i4.html>

- The International Chamber of Commerce said *'it [plain packaging] would have negative consequences beyond the aims of the policy while also serving to undermine the very intent of the policy as a result of the unintended consequences.'*²²
- US-ASEAN Business Council as part of a group with the US Chamber of Commerce said *'we are strongly convinced that the plain/generic packaging proposal will have a detrimental effect on the integrity of the protection of intellectual property around the world, while its potential effects on public health are not encouraging either.'*²³
- The premier collection of businesses in Europe and North America, the Trans-Atlantic Business Dialogue, stated that plain packaging *'would abrogate trademark rights for an entire industry with significant consequences for all other intellectual property rights holders.'*²⁴

3. EVIDENCE

3.1 The TPP Bill is not supported by real evidence.

Despite calls from retailers and the industry, the Federal Government has not released any real or credible evidence to date to suggest that the TPP Bill will achieve the public health objectives of discouraging youth initiation, encouraging cessation by existing smokers or increasing the salience of health warnings.

The Government has relied on a number of studies, research and data to purportedly support its claims that plain packaging will achieve the desired effect of reducing smoking amongst young people and/or to promote cessation amongst existing smokers.

The body of literature relied upon by the Australian Government is largely irrelevant to the issue of plain packaging and its potential effect on consumer purchasing behaviour and smoking prevalence. Moreover, the publications suffer from pervasive methodological weaknesses that limit the conclusions that can be drawn from them. BATA strongly recommends that the Committee inquire into and examine carefully those studies, research, and data.

3.2 Concerns around lack of real evidence.

During the 1990's, certain governments considered plain packaging as a tool to reduce smoking prevalence. However, as noted in 1997 by the Australian Government, the evidence was limited, *"...there is no international experience of the effect of generic packaging on consumer behaviour. In addition, there is limited primary research on the*

²² <http://www.iccwbo.org/bascap/index.html?id=43586>

²³ http://www.nftc.org/default/Publications/Trade_Policy/1100011370_Joint%20Business%20Statement%20Plain%20Packaging%20Australia.pdf

²⁴ http://tabd.com/index.php?option=com_content&task=view&id=84&Itemid=9

potential effect of generic packaging or the factors underlined or relevant to the uptake and cessation of tobacco consumption.”²⁵

In June 2010 a Senate Estimates Committee question on notice asked the Department of Health “*What is the estimated reduction in smoking rates from the plain packaging measure?*”

The Department drafted a response that, “*This figure has not been calculated. As no other countries have implemented plain packaging for tobacco products, the actual impact on smoking behaviour is not able to be calculated at this stage.*”²⁶

Documents released under Freedom of Information laws show the Government’s plain packaging proposals are ill-thought through and not based on sound evidence.

Two days before the then Prime Minister and Federal Health Minister Roxon announced their plain packaging plans (29th April 2010) emails show that the Health Department had not provided Health Minister Roxon’s office with any real evidence proving that plain packaging would work. It states “*We are going to need actual figures from the research [on the effect of the measure on smoking levels] -- not just the claims.*”

Prior to the announcement of plain packaging, IP Australia stated that “*this is not the first time government has considered the issue of plain packaging. A Senate Report in 1995 concluded that there was insufficient evidence to demonstrate the efficacy of generic packaging in achieving health policy objectives and recommended further investigation. IP Australia is unaware of any subsequent evidence that establishes that the public interest would be better served by plain packaging*”²⁷

Six months later, the Department was still unable to quantify the reduction in smoking. Ms Harman from the Department was asked about modelling at Senate Estimates on Wednesday 20 October 2010. Senator Fierravanti-Wells asked Ms Harman “*your answer is it is not possible to quantify the reduction. Is that Health’s view, that you are not able to quantify the reduction that will be generated by the measure*” to which Ms Harman replied “*specifically from that plain packaging measure, yes.*”²⁸

As at the date of these Submissions, we do not believe the position has changed. For example, when faced with questions regarding the evidence base in support of plain packaging, Australian Health Minister Roxon stated that evidence regarding the potential efficacy of the plain packaging measure “*doesn’t exist*”.

A recent international report by Deloitte²⁹ found that packaging laws have not directly reduced smoking, and calls into question whether plain packaging will achieve stated government health objectives.

25 The Australian government response to the report of the Senate Committee Affairs Reference Committee September 1997 at 30

26 Answers to Estimates Questions on Notice Health and Ageing Portfolio Budget Estimates 2009-10, 2 or 3 June or 4 June 2010

27 Info brief B10-1473 prepared by IP Australia to parliamentary Secretary cc Minister, 13 April 2010)

28 Senate Hansard Community Affairs, 20 October 2010

29 Tobacco Packaging Regulation, An international assessment of the intended and unintended impacts – May 2011

The report assessed 27 countries covering a period of 14 years³⁰ and suggested that governments consider the extent to which plain packaging will deliver policy objectives in advance of any implementation.

The Deloitte Report casts doubt over the effectiveness of tobacco packaging laws and suggested that governments consider potential intended and unintended impacts of plain packaging.

Similarly, BATA notes that the Government has not sought comments on the proposed changes to, and increase in, size of the graphic health warnings (GHW's). It appears that these changes will be introduced by way of regulations under the Australian Consumer Law. As with the plain packaging proposal itself, the Government has not provided evidence supporting an increase in the size of GHW's currently on pack. The fact is, in our view, there is no credible evidence that increasing the size of health warnings on packs will be effective.

There is ample real world evidence to test predictions regarding smoking prevalence rates in relation to GHW's. In addition to the Deloitte study, a UK Department of Health study in 2010 reviewed the effects of the UK Government's implementation of GHW's and made a number of significant findings that the establishment of GHW's on cigarette packaging in England had not had any impact on smoking prevalence, on aggregate cigarette consumption or salience of health warnings³¹.

In Canada, the empirical evidence shows that the change in health warnings in 2001 (from a 25% text health warning to 50% GHW's front and back) has not altered the smoking behaviour of Canadians³².

After a lengthy consultation process, NZ introduced regulations requiring that 30% of the front and 90% of the back of cigarette packages be covered in GHW's from February 2008. The Ministry of Health for New Zealand, relying on several surveys, placed its official estimate of current smoking prevalence amongst those aged 16-64 in 2008 at 21%³³. A 2009 survey found that the prevalence of smoking for the same group remained unchanged – ie. it was 21%³⁴.

4. POOR POLICY-MAKING PROCESS

4.1 Robust review of plain tobacco packaging needed

Given this is the first time anywhere in the world that a draft bill for plain packaging has been released, it is more than concerning that a full scale RIS has not and will not be conducted on this particular piece of legislation prior to its drafting or passage.

30 IBID

31 UK Department of Health's Study from 2010 "Evaluating the Impact of Picture Health Warnings on Cigarette Packets"

32 Environics Research Group "The Health Effects of Tobacco and Health Warning Messages of Cigarette Package" Wave 1 to Wave 13, Surveys of Adults and Adults Smokers and Surveys of Youth 2001-2007)

33 New Zealand Ministry of Social Development, the Social Report (2010) at 30

34 New Zealand Ministry of Health Tobacco Use in New Zealand: Key Findings from the 2009 New Zealand Tobacco Use Survey (2010) at 15

Instead, it is BATA's understanding that only a draft RIS was prepared by the Health Department, but prepared with no consultation with the Industry, retailers and possibly other relevant Departments. Perhaps not surprisingly, then, this draft RIS was subsequently rejected by the OBPR.

The OBPR reviewed the draft RIS and responded by informing the Health Department that *"as discussed, the RIS does not satisfy the Australian Government's best practice regulation requirements."* The letter went on to say *"the OBPR is required to report this matter as non-compliant in the Best Practice Regulation Report"*³⁵.

Plain packaging is currently under review in the United Kingdom where the Health Minister recently stated that *"we must review the evidence and draw up an impact assessment on the costs and additional public health benefits of policy options. We will, as well, explore the competition, trade and legal implications, and the likely impact on the illicit tobacco market of options around tobacco packaging."*³⁶

Failure to prepare a full-scale RIS with the involvement of all impacted players is a significant omission; the true impact of this measure cannot be fully thought through or debated without it. Further, it will not allow the assumptions on which the TPP Bill is made to be tested or exposed to scrutiny. In light of this, the unintended consequences of the TPP Bill, or potential consequences well-known to the industry, retailers and other impacted parties, but not considered by the Health Department due to a lack of consultation, including consequences to Australian taxpayers, will most likely be significant.

5. PLAIN PACKAGING NOT IMPLEMENTED BY OTHER GOVERNMENTS

5.1 General

Although mooted as a world first, plain packaging has been considered but not adopted by many governments.

Previously Canada and the UK considered plain packaging and decided not to pursue this measure due to the lack of evidence and legal hurdles. The UK Government recently said. *"we must review the evidence and draw up an impact assessment on the costs and additional public health benefits of policy options. We will, as well, explore the competition, trade and legal implications, and the likely impact on the illicit tobacco market of options around tobacco packaging. While similar measures are currently being considered actively by a number of Governments around the world, we must be sure about the impacts of policy options in the legal and trading circumstances of tobacco control in this country. Only after this work, and gathering views and evidence from public consultation, will we be in a position to know whether, or how, to proceed."*³⁷

³⁵ Letter from Radmila Ristic of the OBPR to Penny Marshall of the Health Department, 4 May 2010

³⁶ Secretary of State for Health Mr Andrew Lansley written Ministerial statement to House of Commons 9 March 2011

³⁷ Secretary of State for Health Mr Andrew Lansley written Ministerial statement to House of Commons 9 March 2011

We have also seen a number of countries raise concerns about the plain packaging of tobacco products. This is subsequent to countries such as Canada³⁸ and France³⁹ investigating plain packaging and then not implementing it.

Via the World Trade Organisation, we learnt that questions about the Bill were raised by the European Union⁴⁰, Indonesia⁴¹ and Mexico among others⁴².

Several other governments, such as China and Brazil, requested further investigation into the Bill⁴³.

Not only countries, but international business organisations also have genuine and serious concerns about moves towards plain packaging.

In its submission to the Senate's inquiry into the Fielding Bill on Plain Packaging the US Chamber of Commerce stated that such moves could have significant economic consequences for Australia as *"...trademarks are such a critical asset of multinational businesses today that companies may decide to forego opportunities and investments in Australia if they do not have confidence that their trademarks and dress will be protected. Indeed, such commercial opportunities as now exist in Australia could be substantially diminished if companies are forced to commoditize their products and compete solely on the basis of price rather than on the quality and reputation their trademarks represent."*⁴⁴

The National Foreign Trade Council also warned that *"by preventing the use of trademarks (apart from the name in plain typeface), the Bill would actually deprive consumers of important information about the product such as whether the product is filtered, and the taste, flavour and quality of the product"*⁴⁵.

From the international field The Washington Legal Foundation warned decision makers that *"if adult consumers are seeking out cigarettes that are not stale or otherwise substandard, it ill behoves public officials to seek to deceive consumers into believing that such cigarettes are not available. So long as cigarettes remain a legal product, consumers who choose to use them ought to be permitted to receive information that allows them to differentiate among available products based on quality."*⁴⁶

Further as recently as 20 April 2011, the International Chamber of Commerce in a letter to the Australian Minister for Trade observed that plain packaging *"by eroding the means of asserting intellectual property rights (IP), the measure proposed would restrain trade, hamper consumer choice and safety, subvert trademark and IP laws and increase*

³⁸ http://www.plain-packaging.com/downloads/Health_Minister_David_Dingwall_6_Dec_96_-_excerpt.pdf

³⁹ <http://questions.assemblee-nationale.fr/q13/13-99330QE.htm>

⁴⁰ http://ec.europa.eu/enterprise/tbt/tbt_repository/AUS67_EN_6.pdf

⁴¹ http://www.wtocommerce.org.tw/SmartKMS/do/www/readDoc?document_id=115025

⁴² http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm

⁴³ http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm

⁴⁴ Chamber of Commerce of the United States of America Submission to Senate Inquiry into Fielding Bill February 26, 2010

⁴⁵ National Foreign Trade Council to Submission to Senate Inquiry into Fielding Bill February 23, 2010

⁴⁶ The Washington Legal Foundation Submission to Senate Inquiry into Fielding Bill February 26, 2010

counterfeiting and illicit trade while encouraging lower priced legal and illegal commerce in tobacco products”.

6. UNINTENDED CONSEQUENCES

6.1 Waste of taxpayers’ money in legal fees

There is a significant risk that given the ill thought through nature of the Government’s plain packaging proposal and subsequent TPP Bill, taxpayers’ dollars could be wasted on legal fees.

A confidential briefing note, obtained through FOI, indicates the Government is prepared to spend millions of taxpayer dollars defending their experimental policy in the face of lawsuits brought by the tobacco industry.

A note, from 18 February 2010 from the Department of Health, suggests that the Government has budgeted \$4.8 million to implement the legislation and that this figure “*does not include legal costs, estimated to be \$10+ million*”⁴⁷.

6.2 Possible compensation

As previously stated, the idea of plain packaging is not new and was considered – and rejected – by the Australian Government in the mid 1990s. One of the reasons given for not proceeding with the policy was concern that plain packaging could lead to significant compensation for tobacco companies.

A spokesperson for the then Health Minister, Carmen Lawrence, said that “*Unfortunately it is just not feasible*” the spokeswoman said. “*We would have to buy the tobacco companies trademarks and that would cost us hundreds of millions of dollars*”⁴⁸.

Whilst the amount of any compensation would ultimately be a question for the Courts, commentators have put a compensation figure, for the TPP Bill and the proposed increase in graphic health warnings, could be in the vicinity of \$3 billion.

6.3 What will the impact of plain packaging be on the price of cigarettes?

There is a real danger that a result of the TPP Bill may be cheaper cigarettes which in turn is likely to lead to increased sales and consumption of cigarettes.

In their Draft Regulatory Impact Statement, the Health Department warned that plain packaging could result in lower cigarette prices, stating that “*smokers could face lower costs of purchasing cigarettes – and higher health impacts and costs associated with higher rates of consumption – if plain packaging leads manufacturers to disinvest in branding and compete solely on price, driving tobacco prices down.*”⁴⁹

⁴⁷ Health Reform Briefing note sent under cover of email dated 18 February, 2010 from Georgie Harman to Jake Matthews

⁴⁸ The Sydney Morning Herald, Monday 24th July 1995

⁴⁹ Department of Health and Ageing Regulation Impact Statement Plain packaging of Tobacco Products April 2010

Such warnings are consistent with those from industry groups who made submissions during the Senate Inquiry into the Fielding Bill.

The Property Rights Alliance warned *that “by denying companies to compete on the basis of logo/trademark differentiation, consumers will be unable to differentiate products in any meaningful manner other than on price. As such, the Bill will result in some cigarette manufacturers choosing to compete on the basis of price, leading to a fall in tobacco prices. As such, it is submitted that the bill might have the counter-intuitive effect of potentially increasing tobacco consumption⁵⁰.”*

The impact that such a measure could then subsequently have on consumption was raised by the American Legislative Exchange Council who said that plain packaging *“could lead to an increase in tobacco use. The brown matte packaging and standard typeface mandated in this bill, would likely occasion an uptake in counterfeit cigarettes, as it is easier to manufacture “plain-packaged” products. The competition from contraband cigarette companies as well as an inability to differentiate their products from others on the market will force legitimate tobacco companies to lower their prices’.*

The Council went onto say that *“while there is no established correlation between plain packaging and a reduction in cigarette use, there is a correlation between low cigarette prices and increased tobacco consumption. As noted above, plain packaging will likely lead to more counterfeit cigarettes, and while there is no evidence that trademarks “mislead and deceive consumers,” there is much evidence that contraband products often do. Plain packaging legislation will undoubtedly result in larger numbers of counterfeit cigarettes being distributed putting consumers at greater risk from entirely unregulated illicit products⁵¹.”*

6.4 Significant impact on illegal tobacco trade

Tobacco products are “the most illegally trafficked legal product in the world”⁵². Removing the trade marks and artwork on packaging, together with the pack complexity as proposed by the TPP Bill will make counterfeiting easier and will frustrate the ability of consumers, retailers and regulatory authorities to detect illegal product. Acknowledging this fact, IP Australia has said “plain packaging would make it easier for counterfeit goods to be produced and would make it difficult to readily identify those counterfeit goods.”⁵³

There is strong agreement that there is an illicit trade problem in Australia. According to media reports, *“Rod Moodie, chairman of the Preventative Health Taskforce, which recommended the increased excise and plain packaging labeling, says it [illegal tobacco] accounts for about 12 per cent of tobacco use in Australia”⁵⁴.*

50 The Property Rights Alliance Submission to Senate Inquiry into Fielding Bill February 22, 2010

51 The American Legislative Exchange Council Submission to Senate Inquiry into Fielding Bill February 23, 2010

52 Campaign for Tobacco-Free Kids, Fact Sheet, “Illicit tobacco: illegal profits and public peril, dated October 2008

53 IP Australia briefing note for Parliamentary Secretary for Information, Richard Marles and Minister for Industry and Innovation, Kim Carr, dated 23 September 2009

54 The Age, April 30th 2010

Since that time, the quantity, availability and impact of illegal tobacco on the market has increased in Australia, with a recent Deloitte report finding that taxpayers are losing out on almost \$1.1 billion in excise revenue⁵⁵.

The Report estimated that 2.68 million kilograms of illegal tobacco products were sold in Australia during 2010, equivalent to 15.9% of the total legal tobacco market and further found that the illegal tobacco market has grown nearly 150% in just three years, from 6.4% of the total market in 2007 to 15.9% in 2010⁵⁶.

The statistics should come as no surprise: pricing is what attracts people to the illegal tobacco market; the Deloitte Report revealed that lower price was a key reason 60% of people bought illegal tobacco products. Illegal tobacco is sold cheaper because sellers of illicit tobacco pay no excise duty to the Government. Further, illicit products are wholly unregulated and often carry no health warnings.

The illicit trade in tobacco products should give rise to another concern for Government: organised crime gangs – who are importing loose leaf tobacco, counterfeit and contraband cigarettes – are now the fourth largest tobacco player in Australia just behind Imperial Tobacco which holds 17% of the legal market⁵⁷.

The link between organised crime and illicit tobacco was recently made by the the Australia Crime Commission who highlighted in its 2011 report on organised crime that “*Organised crime networks have been linked to the importation of counterfeit cigarettes and loose tobacco.*”⁵⁸

6.5 Cigarettes – not just packs – subject to counterfeit

Deloitte also found a significant shift in the tobacco black market from packaging to cigarettes, with nearly 60% of illegal cigarettes now sold in unbranded boxes, up from only 25% the previous year.

What is concerning is that the TPP Bill proposes that no branding will be allowed on cigarettes. Not only does this present significant manufacturing issues, which are explored later in this document, as well as depriving consumers from being able to satisfy themselves of what they are smoking, but such a policy could result in a potential windfall for counterfeiters as cheap unbranded cigarettes become more popular.

6.6 Tobacco counterfeiting – a serious world wide problem

The problem of illegal tobacco is well known in Australia. In a media release on 10 March 2011, Minister for Home Affairs, Brendan O'Connor stated that:

55 Deloitte, *Illicit Trade of Tobacco In Australia*, February 2011

56 Ibid

57 Ibid

58 Australian Crime Commission *Organised Crime in Australia* 2011

“Tobacco smuggling and counterfeit cigarette production are problems worldwide.

Over the past four years, Customs and Border Protection has seized 977 tonnes of tobacco and 286 million cigarette sticks in sea cargo. This has prevented potential revenue evasion of approximately \$397 million.

Customs and Border Protection continues to work with international partners, law enforcement agencies and industry to combat illegal importation of tobacco and counterfeit cigarette production.”

Indeed, this is such a significant international problem that would be made worse if legislation like the TPP Bill is passed.

The Business Action to Stop Counterfeiting and Piracy (BASCP) and the International Chamber of Commerce wrote in a submission to the Senate Fielding Bill inquiry that plain packaging *“would increase the prevalence of counterfeit goods in the market because counterfeit products will become easier to make, distribute and sell. Further, plain packaging enables the counterfeit industry to ‘adopt’ brand imagery: both counterfeiters and contraband operators would assume, correctly, that plain packaging would result in a significant increase in demand for illicit products in particular amongst sections of society that many regulatory measures seek to protect most. It would further reduce brand owners' ability to take action against such activity⁵⁹.”*

The Institute of Patent and Trade Mark Attorneys of Australia stated that *“efforts to combat counterfeit trade hinge upon the maintenance of a principled, balanced and coherently articulated system of national and international treaties, laws and regulations, particularly in regards to trademarks and related intellectual property rights. Plain packaging would make both counterfeiting and smuggling more attractive. This presents the risk of an uncontrolled market for illegal products, potentially undermining the intention of plain packaging legislation to reduce smoking by instead leading to a prevalence of cheaper counterfeited or smuggled items⁶⁰.”*

The National Foreign Trade Council Inc believe that *“... the requirement to use simple brown matte packaging and standard typeface will make it easier to manufacture and distribute counterfeit and contraband products, thereby increasing consumer confusion.” “In addition, plain packaging likely will cause an increase in the production and distribution of counterfeit products by making it easier to copy the packaging in a manner that is not discernible to the typical consumer⁶¹.”*

Finally, The Washington Legal Foundation stated in a submission that *“there is every reason to believe that adoption of plain packaging would cause the counterfeiting problem to sky-rocket; the existence of elaborate trademarks is one of the best controls on counterfeiting currently in place⁶².”*

59 ICC and BASCAP Submission to Senate Inquiry into Fielding Bill (no date provided)

60 Institute of Patent and Trademark of Australia Submission to Senate Inquiry into Fielding Bill February 23, 2010

61 The National Foreign Trade Council Inc. Submission to Senate Inquiry into Fielding Bill February 23, 2010

62 The Washington Legal Foundation Submission to Senate Inquiry into Fielding Bill February 26, 2010

Concerns about the impact plain packaging could have on illicit trade is shared, it would appear, by the Federal Department of Health. In the Department's draft RIS it stated that:

“Manufacturers, importers, distributors and retailers of tobacco products, as well as the Australian Taxation Office, Australian Customs and Boarder Protection Service, the Australian Government more broadly, taxpayers and smokers would all be affected by any changes to the trade in illicit tobacco products generated by the move to plain packaging.

- *Manufacturers, importers, distributors and retailers could lose business to the illicit trade if plain packaging made counterfeit easier.*
- *The efforts of the Australian Taxation Office and the Australian Customs and Border Protection Service to collect tobacco excise and customs duty could be affected by the design of plain packaging*
- *Government revenue could be put at risk if the design of plain packaging made counterfeiting of tobacco easier and enforcement efforts less effective.*
- *Smokers health could potentially be put at greater risk if they consume counterfeit products.⁶³”*

7. UNWORKABLE NATURE OF THE TPP BILL AS PRESENTLY DRAFTED

7.1 Introduction

BATA is opposed to the introduction of plain packaging for the reasons outlined in sections 1-6 above. However, in the event that the Government disregards BATA's position and proceeds with the TPP Bill, there are a number of operational matters that it must take into account lest it causes massive disruption to the cigarette market in Australia.

These are broken into a number of elements – namely:

- the commencement provisions for manufacturing are unrealistic and BATA cannot comply;
- the commencement provisions for sale of compliant product are unrealistic and do not appreciate the size of the legitimate tobacco retailer market in Australia;
- the provisions of the TPP Bill have no regard to how tobacco products are manufactured and the elements that are required;
- Amendments to the TPP, which BATA considers are important for consumers;
- Amendments to the TPP Bill, which BATA considers are important in relation to its duty of care requirements;
- there are still a number of uncertainties, which prevent BATA from preparing for possible implementation of the TPP Bill; and
- costs of compliance are extensive and go beyond compliance costs

63 Department of Health and Ageing Regulation Impact Statement Plain packaging of Tobacco Products April 2010

7.2 Commencement provisions for manufacturing are unrealistic – BATA cannot comply

The implementation timings proposed by the TPP Bill are unable to be met by the legitimate tobacco manufacturing industry.

The most likely outcome of mandating the specific requirements for tobacco packaging, as the TPP Bill seeks to do, is that tobacco manufacturers will have to rework or replace their production facilities in order to comply with the new requirements.

The timeframes do not take into account the realities of having to re-design all of our products, develop artwork, create machinery to make those products, manufacture and distribute those products to approximately 35,000 retailers throughout Australia.

All businesses, regardless of the products they make, need certainty to plan. The TPP Bill in its current form does not provide sufficient detail for BATA to commence preparing for implementation of the TPP Bill, when enacted.

The draft Regulations provide no additional clarity. BATA, like all other legitimate tobacco manufacturers, needs clear guidelines, directions and instructions in order to begin developing and manufacturing new packets.

The TPP Bill foreshadows that the commencement dates of the various parts of the TPP Bill as follows:

- *On 1 January 2012, the preliminary provisions of the legislation; the power to make regulations specifying plain packaging requirements; and the provisions that allow the authorised investigative and enforcement officer roles to be established will commence.*
- *On 20 May 2012, the offences relating to importing, packaging and manufacturing non-compliant tobacco products, and tobacco products in non-compliant packaging will commence, along with investigation and enforcement powers of authorised officers.*
- *On 1 July 2012, the offences relating to selling and purchasing non-compliant tobacco products and tobacco products in non-compliant packaging commence.*

In circumstances where the power to make regulations is not scheduled to commence until 1 January 2012, it is not possible for BATA to fully prepare for the transition (including making all of the necessary business arrangements) until some time after 1 January 2012.

When GHWs were introduced, the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* allowed manufacturers 18 months to adapt their equipment and convert their stocks to compliant packaging. The Regulations further allowed a 4 month period to allow for sell through of stock with the retailers.

Further, when the Federal Labor Government proceeded with the Reduced Fire Risk (FR) regulations, it also allowed for a similar timeframe. To quote from the ACCC “on

the information available to it, the ACCC is satisfied that 18 months is a reasonable lead-in time for commencement of the proposal. While a shorter period would not cause problems for some manufacturers/importers, it clearly does for others. An 18 month lead in period was provided for compliance with the Trade Practices (Consumer product Information Standards) (Tobacco) Regulations 2004 and has been widely accepted as reasonable by many overseas jurisdictions”⁶⁴

The TPP Bill proposes significantly more complex changes to tobacco products than both the introduction of graphic health warnings and the introduction of RFR combined.

Because of the lack of clarity around the TPP Bill and associated Regulations, it is extremely difficult for BATA to provide the Committee with any exact estimates of how long it will take to comply with the Regulations. BATA’s best estimate, at present, is that if changes were made only to the printing on the outside of the pack and outer (carton) of cigarettes and pouch and outer (carton) of RYO, BATA would require close to 12 months to conduct this transition, as outlined in the timeline found at **Appendix A**. Delay in obtaining final clarity of the specifications for packaging only serves to delay our ability to commence the process detailed below. In this regard BATA notes that presently, it is contemplated that the Government will not even get the power to release the final form of the Regulations until after 1 January 2012.

A summarised breakdown of the activities identified in the timeline is set out below:

- Development of Blue Box (Key Lines) and GHW Template
 - i. Redevelop 22 + different packaging type key lines for pack architecture.
 - ii. Fit the GHW according to regulation.
 - iii. Legal approval of all artwork pieces (GHW Artwork)
- Development of Artwork
 - i. Fit the Bar codes to specification
 - ii. Fit Product name to specification
 - iii. Fit the EAN Codes to specification
 - iv. Fit other regulatory material to specification
 - v. Pre press to prepare files for printing
- Legal Approval of Artwork
 - i. Each piece to be subject to marketing and legal review individually
- Tooling (engraving cylinders)
 - i. Procure Cylinders.
 - ii. Engrave Cylinders (for each of the 300 SKU's)
- Printing of materials
 - i. Schedule print runs for 300 SKU's
- Freight of materials to source factories in Sydney, Malaysia, Singapore and Netherlands.

64 Page 26 Regulatory Impact Statement, Reduced Fire Risk Cigarettes.

- i. Materials for 200+ SKU's printed in Australia but shipped to Malaysia or Singapore for Production.
- Production of Cigarettes and RYO and shipment to Sydney from source factories
 - i. Manufacture & Shipment of RYO from Netherlands to Australia is 12 weeks.
 - ii. Manufacture & Shipment of TMC from Asia to Australia is 8 weeks.
- Distribution across state warehouses and retail outlets
 - i. Distribution of product across Australia is approx 3 weeks Capital City retailers and 4 weeks nationally.

BATA accepts that a number of the above matters could be done concurrently and therefore believes that it could comply with the TPP Bill, as currently drafted, within 12 months of receiving the finalised TPP Bill and detailed final form Regulations . However, the 12 month estimate could change depending on the eventual content of the Regulations. For example, should it be necessary to change the dimensions of either our existing packaging or tobacco products, and it becomes necessary to purchase new machinery for the production of those tobacco products, we estimate that it will take longer to comply, possibly around at least 18 months.

The reasons for some of the long lead times is because either new machinery, or where possible, change parts (ie. new parts which can be fitted in existing machinery), will need to be purchased. In order to buy a change part, BATA must place an order with a third party cigarette machine supplier. This process includes the following steps:

- those parts need to be designed to the specification;
- the parts then need to be manufactured,
- they then need to be delivered, generally by ship because of their size and weight, to the specific factory that manufactures our products,
- Upon receipt of the part at the factory, the change part then needs to be assembled and extensively tested over a period of time and at high speed; and
- Employees need to be trained on how to operate machinery prior to machine being fully operational.

Purchasing new machinery is even more complex, more time consuming and more costly. It should be noted that there are only an extremely limited number of machine suppliers who have the capability to do this sort of work.

7.3 The commencement provisions for sale of compliant product are unrealistic and do not appreciate the size of the legitimate tobacco retailer market in Australia;

There are approximately 35,000 retailers throughout Australia that sell tobacco products. It can take up to 3 hours to remove all tobacco products from a merchandising unit in a retail outlet (which is the sales unit, which generally sits on the back wall in a retail outlet) and replace it with new stock. In circumstances where retailers are busy making their living and/or selling goods, we believe it is unreasonable to expect that they can

comply within the short timeframe proposed in the TPP Bill. It is also unrealistic to expect that BATA could visit all 35,000 retailers and replace all non-compliant tobacco products within the time provided for in the TPP Bill.

The TPP Bill provides for a 6 week 'flush through' period – being the period for all non-compliant tobacco packaging to be out of the market and be replaced by compliant packaging. It is BATA's experience that just single brand pack changes can take many months to flush through the entire market. With respect, we do not believe that 6 weeks is sufficient time to comply with the TPP Bill. It is for this reason that we ask for a 6 month 'flush through' period for retailers to sell non-compliant products.

To provide the Committee with further detail of how tobacco products move from the manufacturing process to a retailer, we note the following:

- Once production has been completed, product is loaded onto pallets to ship/transport stock from the factory. For product manufactured in Australia, this is a relatively straightforward process. For product that is imported into Australia from other countries, tobacco products will be manufactured in that overseas country and then shipped to Australia. The shipping takes approximately 4-8 weeks, depending on where the product is coming from.
- Tobacco products are then put on pallets. In the event of mandated specifications that exceed BATA's current variance ranges, then palletisation stacking will need to be reviewed to ensure that OH&S requirements continue to be met at logistics suppliers / customer dock delivery points.
- Logistic suppliers must then select, or pick, product to fulfil orders. In a 'plain packaging world', logistic suppliers will need to review their business order picking processes as different coloured packaging will no longer be available in a plain packaging environment. When every pack looks the same, just consider how much more time will be needed to ensure the correct product has been picked for each delivery.
- Products are then delivered to stores or retail outlets. Increased time will be required to manage order drop offs, verify products and deal with product returns as it will be more difficult for retailers, and the logistic service provider, to quickly identify products. More care and attention and therefore more time will be spent on ensuring what has been ordered is what has been delivered.
- Under the TPP Bill, new barcodes will be needed on all packaging. This will require back office modifications (to I.T. systems) as well as create administrative requirements flowing onto suppliers and customers. The reason being that once new barcodes are obtained, application and testing protocols amongst all our customers that use product scanning systems will be needed.

In light of the above, we reiterate our request that the Committee recommend a 6 month flush through period for all non-compliant products.

7.4 The provisions of the TPP Bill have no regard to how tobacco products are manufactured and the elements that are required in the manufacturing process

The manufacture of tobacco products is a complex process. It is principally done by extremely high speed machinery that is automated and controlled using specialised computer programs. The machinery used is large, extremely expensive and contains many different parts and components.

BATA has a number of concerns with the TPP Bill as presently drafted. By way of example and to give the Committee a flavour of the complexity involved, we focus below on just three areas of concern:

(a) Requirement for cigarette cartons to be made of rigid cardboard

The majority of BATA's cigarettes are packaged in outers (cartons) constructed of clear (with a black strip on the side to cover the packet barcode) or fully printed (including all required GHWs) film. Use of film in this way ensures that the required GHWs are always visible. The majority of BATA's machinery cannot package cartons in cardboard and would need to have an entire component of each machine replaced by new machinery that has this capability. To make such a change will have a substantial impact on our ability to meet the timelines specified in the TPP Bill as detailed below:

- | | |
|---|----------------------|
| ▪ Delivery of new carton machinery | - 2 to 3 months; and |
| ▪ Installation and testing of machinery parts | - 6 to 8 months |
| Total Time to Implement | - 8 to 11 months |

(b) Requirement for the 'lining' to be devoid of embossing

BATA's current machinery requires a level of non-decorative embossing on the lining in order for the packing machinery to get traction with the lining material. Elimination of BATA's ability to emboss in this way would result in our inability to produce products as use of alternative materials is not permitted. If an alternative solution is required to be developed to address this, it will have a substantial impact on our ability to meet the timelines specified in the TPP Bill as follows:

- | | |
|--|-------------|
| ▪ Manufacturer to develop and build new machinery | - 24 months |
| ▪ Installation and testing of machinery parts | - 3 months |
| ▪ Training and production trials of new capability | - 3 months |
| Total Time to Implement | - 30 months |

(c) Mandating that the inner lip of the tobacco packaging have straight edges

The process for the construction of the pack across the majority of BATA's machinery requires a curve with a minimum curvature of 4mm radius with a specific profile in each corner of the "lip" to ensure the separation of the individual pack's lip from the material roll. Having a straight edge will require BATA to replace a major component on 90% of its packaging machinery with different technology which will have an impact on our ability to meet the timelines specified in the TPP Bill as follows:

- | | |
|--|-------------|
| ▪ Manufacturer to develop and build new machinery | - 24 months |
| ▪ Installation and testing of machinery parts | - 3 months |
| ▪ Training and production trials of new capability | - 3 months |
| Total Time to Implement | - 30 months |

7.5 Amendments to the TPP, which BATA considers are important for consumers

Because of the health risks of smoking we support the provision of meaningful and accurate consumer information about our products. Similarly adult tobacco consumers need to be able to have access to information that allows them to satisfy themselves that they are purchasing legitimate product and to choose their taste and fullness of flavour they prefer.

A significant concern about plain packaging is that it restricts consumers' rights to have information regarding their product, and to be able to satisfy themselves that their product is legitimate.

Consumers should have a right to information about their product especially when all other lines of communication have been outlawed. Similarly, manufacturers need to be able to publish key product facts (such as provenance, taste characteristic and product change). To this end, BATA believes that it should be able to print:

On tobacco packaging:

- (a) Country of origin (eg. Manufactured/Made in Australia) for products that are manufactured in Australia so that consumers who choose to support products that are manufactured in Australia, can do so;
- (b) Call centre telephone number on its tobacco packaging. Under the TPP Bill BATA will only be permitted to print on its packaging the manufacturer name and address. By preventing BATA from printing a telephone number on its packaging, it will hamper the ability of consumers to lodge complaints related to any issues regarding their purchase, including the possibility of alerting BATA to a potential product recall scenario;
- (c) more than one origin code. The TPP Bill, through the Regulations, specifies that a manufacturer may only print an alphanumeric code OR a covert mark that is

not visible to the naked eye. BATA uses a number of traceability business practices. It currently prints 2 codes on its tobacco packaging and one covert mark. The 2 codes are the 'Julian date code' and a best before dates. Julian date codes appear on the bottom of our packaging thereby allowing the identification of date of manufacture, time and shift or production. The 'best before' date is applied on packaging either through printing on packaging or lasering or through the application of some other means also supports the traceability requirements. The covert mark is used by BATA to assist in identifying counterfeit product.

On tobacco products:

- (d) The TPP Bill bans any printing on a tobacco product, notwithstanding that the brand and variant may be printed on the tobacco packaging. Upon purchasing a packet of cigarettes, consumers have no way of being certain that the cigarettes inside the pack are their brand, or are in fact legitimate cigarettes.

Further, this also brings with it significant manufacturing complexity as the issue of mixing brands is a very serious concern. Cigarettes sticks are manufactured at a speed of 10,000 sticks per minute. When every stick is identical, the task of readily determining when the production of one product line stops and the other starts becomes increasingly more difficult and increases the chance that different brands and variants will become mixed. Having unmarked cigarettes being produced in a factory will require BATA to invest in technology to ensure that the correct cigarettes are going into the correct packets which is a capability that is not in place today and will have an impact on our ability to meet the timelines specified in the TPP Bill.

We respectfully request that the Committee recommend a change to the TPP Bill to allow manufacturers to print the brand name and variant name (eg. Winfield Blue) on the tobacco products. We submit that this does not take away from the Government's intention of plain packaging because the brand and variant name are permitted on tobacco packaging, therefore it follows that both should be allowed to be printed on the stick.

7.6 Amendments to the TPP Bill, that BATA considers are important

BATA is of the opinion that under its duty of care obligations to its consumers, it needs to be permitted to continue to use/print all of the matters raised in 7.5(a) to (d) above. In addition to these, BATA respectfully requests that the Committee consider and recommend the following changes:

(a) Requirement for cigarette cartons to made of rigid cardboard

For the reasons set out in paragraph 7.5 above, BATA requests that the Committee recommend a change to the TPP Bill to allow manufacturers to make cartons (as that term is defined in the TPP Bill) in either cardboard OR clear plastic (with a black strip to cover the packet barcode);

(b) Requirement for the 'lining' to be devoid of embossing

For the reasons set out in paragraph 7.5 above, BATA requests that the Committee recommend a change to the TPP Bill to allow manufacturers to use non-decorative embossing on the lining in order for the packing machinery to get traction with the lining material; and

(c) Mandating that the inner lip of the tobacco packaging have straight edges

For the reasons set out in paragraph 7.5 above, BATA requests that the Committee recommend a change to the TPP Bill to allow a curve with a minimum curvature of 4mm radius with a specific profile in each corner of the "lip" to ensure the separation of the individual pack's lip from the material roll.

7.7 Clarification still required on a number of provisions – BATA can't prepare

In its present form, the TPP Bill, and draft Regulations, do not provide sufficient detail to enable BATA to execute any planning. As significant costs are involved in any change, BATA needs clear guidance and certainty on what will be required in the TPP Bill, as passed, before it can execute any planning. As referred to above, this significantly affects BATA's ability to comply with the timings set out in the TPP Bill.

We have sought to engage the Government to obtain clarification or discuss the plain packaging policy, but our concerns have not been addressed.

Lack of clarity around the specifics in the regulation also adds to BATA's inability to comply with the new regulation. Although there are a number of these, merely by way of example, the difficulty this uncertainty creates can be demonstrated by considering the lack of clarity around the RYO pouch and outer dimensions.

Currently individual RYO packages are packaged in a polypropylene pouch which would not comply with the regulations requiring packs to be made of rigid cardboard. Individual pouches of RYO are then bundled in groups of 5 into a clear polypropylene outer for shipment, which again would not comply with the regulations requiring cartons to be made of rigid cardboard.

The nature of the RYO product being loose tobacco requires it to be sold in this packaging to ensure product integrity and usability. Changing the packaging of RYO to any form of cardboard would severely compromise the product.

Further, by its very nature, polypropylene cannot be produced that is in a matt finish, and an alternative material is not available. Further Information on this can be provided if required.

Given that the TPP Bill and associated Regulations will impact upon the product design, manufacture and distribution to retail, BATA respectfully requests the Committee to recommend that the Government enter into detailed consultation with the legitimate tobacco manufacturers to work through the myriad of issues associated with the TPP Bill and to establish realistic timelines for the implementation and clarify the requirements under the TPP Bill.

Ongoing consultation will help to minimise the impact of unintended consequences associated with the introduction of the TPP Bill.

7.8 Costs are extensive and go beyond compliance requirements

It should be understood that the costs of complying with the TPP Bill cannot be limited to the physical requirements needed to meet compliance.

In the event that a company could not meet the timelines and therefore found itself, either in breach of the TPP or in an out of stock situation until such a time when it was able to comply and produce product into the market, then these lost sales should also be factored into the cost of compliance.

Any period where the market cannot be supplied with legitimate product only serves to facilitate the already rapid expansion of the illegal tobacco market in Australia. The sales of these illicit products are not generally through retailers, but at market stalls and 'from the back of a truck'. As a result, retailers will be substantially affected by this situation, many of whom rely substantially on tobacco sales for their livelihood.

8. CONCLUSION

We would welcome the opportunity to appear at the House of Representatives Committee to discuss our Submissions in more detail. We also extend an offer to the Committee to tour our factory in Sydney to obtain an understanding of the manufacturing process for tobacco products.

Appendix A

Activity	No of Weeks																																																				
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45							
Development of Blue Box Health Warning Templates	7	█	█	█	█	█	█																																														
Development of Artwork	6					█	█	█	█	█	█																																										
Legal Approval of Artwork	5									█	█	█	█	█																																							
Tooling (Engraving Cylinders & Plate Making)	9												█	█	█	█	█	█	█	█	█																																
Printing of Materials	9																																																				
Freight of Materials to Source Factories	4																																																				
Production of Cigarettes & RYO & Shipment to Sydney from Source Factories	13																																																				
Distribution across state warehouses and retail outlets	4																																																				