



**Submission No. 51**  
(Plain Packaging Bill)  
A.O.C. Date: 26/07/2011

## **Imperial Tobacco Australia Limited**

**Submission to the**

**House Standing Committee on  
Health and Ageing**

**regarding the**

***Inquiry into Plain Tobacco Packaging***

**22 July 2011**

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## 1 EXECUTIVE SUMMARY

Imperial Tobacco Australia Limited (“**ITA**”) welcomes this opportunity to provide submissions to the House Standing Committee on Health and Ageing regarding its inquiry into the *Tobacco Plain Packaging Bill 2011* (the “**Bill**”), the draft *Tobacco Plain Packaging Regulations 2011* (“**draft Regulations**”) and the *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011* (together, the “**Government’s proposal**”).

ITA supports sound, evidence-based, reasonable and practicable regulation of tobacco products and encourages the Government to respect the principles of adult choice, freedom of competition and international law when doing so.

The Government’s proposal is anti-business, anti-competitive and anti-consumer. ITA opposes the Government’s proposal for the following reasons.

### **i. No credible research evidence to support the introduction of plain packaging**

There is no credible evidence that the public health objectives set out in the Bill will be achieved by the plain packaging proposals. The research which is relied upon is speculative and inconclusive. No other country has introduced plain packaging and those governments who have considered it have rejected the proposal stating that there is insufficient supporting evidence.

Even Australia’s Health Minister, Nicola Roxon, has admitted that there is no proof that the introduction of plain packaging will cut smoking rates.

There is no credible evidence to indicate that people take-up smoking or continue to smoke because they see tobacco branding on packaging. The materials relied on by the Government result from selective and questionable research. It is valid to question the independent nature and objectivity of such research and its underlying raw data. Proponents of plain packaging ignore the substantial body of research which runs contrary to their objective.

In circumstances where tobacco products cannot be seen, the plain packaging of tobacco products simply makes no sense. Australian state and territory governments have already legislated to ban the display of tobacco products. There is no credible research to suggest that the introduction of plain packaging, particularly in a display-ban environment, will have any impact on smoking rates.

**ii. Plain packaging will increase the trade in illicit tobacco**

Plain packaging will create a “Counterfeiters’ Charter”, aiding and accelerating the spread of counterfeit tobacco products and the trade in illicit tobacco to the detriment of the Australian economy, the Australian tax-payer and Australian consumers. This will also place Australia in breach of its obligations to *combat* illicit trade under Article 15 of the World Health Organisation’s *Framework Convention on Tobacco Control* (“**FCTC**” or the “**Convention**”).

The Government’s refusal to provide supporting anti-counterfeit infrastructure, for instance, licensed machines for the production of unique identification codes, consumer phone lines or websites to allow consumers, retailers and law enforcement officials to assess genuine product, is thoroughly inadequate and will leave the Australian community open to the high risk of counterfeit tobacco products.

The continued growth in the illicit tobacco market in Australia will undermine efforts by the tobacco industry, including ITA, and State and Federal Government, in the area of tobacco control by making it easier for children and adults to access illegal tobacco products, which do not bear any health warnings, and undermine and circumvent legislation on ingredients, emissions and reduced fire risk cigarettes.

A reduction in legitimate sales will further reduce future excise and GST payments to the Government.

**iii. Plain packaging is unconstitutional and will breach Australia’s obligations under international treaties**

Plain packaging raises significant legal questions concerning the acquisition and/or expropriation of valuable legitimate corporate assets in which ITA and its shareholders have invested hundreds of millions of dollars in Australia. The proposal is unconstitutional and breaches international treaty obligations.

Section 13 of the Bill and the Explanatory Memorandum ( the “**Explanatory Memorandum**”) state that the introduction of plain packaging for tobacco products is one of the means by which the Australian Government will give effect to Australia’s obligations under the FCTC. However, there is no obligation on Parties to the FCTC

to implement plain tobacco packaging. The Convention does not even mention plain or generic packaging.

The introduction of plain packaging will seriously damage Australia's international reputation as a supporter of legitimate trade and a defender of commercial rights and freedoms, particularly in relation to intellectual property and freedom of expression. It will also expose Australia to very significant compensation claims.

We note that in June 2011, Philip Morris Asia Limited initiated legal action against the Australian Government over plans to introduce plain packaging in Australia for tobacco products. This legal action has been commenced under Australia's Bilateral Investment Treaty with Hong Kong and seeks financial compensation from the Australian Government for damages caused by plain packaging. In other words, Australia is already exposed to this compensation claim for potentially billions of dollars.

**iv. Plain Packaging is anti-business, anti-competitive and anti-consumer**

As confirmed by the *Best Practice Regulation Preliminary Assessment* performed by the Department of Health and Ageing dated 7 April 2010, plain packaging will reduce competition, lengthen tobacco transaction times, confuse retailers and adult consumers, create store security problems and reduce legitimate retail sales and profits across the legitimate tobacco retailing sector.

The Government's proposal undermines the important role of branding, trade marks and other indicia which perform the important role of allowing retailers and consumers to distinguish between the goods of one trader and those of another. It is also the only way for retailers and consumers to know that they have received the product they have paid for. Smokers and stockists of tobacco products have the same rights as any other consumer or retailer to choose and to buy the legal product of their choice. It is not the role of government to take away those rights.

The Bill will not achieve its stated objectives: it will not reduce the appeal of tobacco products to consumers, increase the effectiveness of health warnings on the packaging of tobacco products, or reduce the ability of the packaging of tobacco products to 'mislead' consumers. Rather, it will lead to an increase in counterfeit and contraband tobacco products to the detriment of the legitimate retail sales channels. The

introduction of plain packaging of tobacco products will not further inform smokers. It will take away their rights as Australian adult consumers to choose between legal products that they wish to use.

The negative impact on Australia's reputation as a place to do business is well illustrated in the letter from the International Chamber of Commerce to The Hon Dr Craig Emerson, Minister for Trade, 20 April 2011<sup>1</sup>, which states that the proposal for plain packaging creates "*a dangerous precedent that could have far-reaching impacts on the use of trademarks and other intellectual property in Australia and globally.*" (a copy of which appears as Annexure A to this submission). As profiled in the television program *Lateline* on 25 May 2011, members of the US Congress have also written to the Australian Government, in order to express their concerns about plain packaging. In particular, Congressman Daniel Manzulo is quoted in that program as writing:

*"Australia's plain packaging proposal legally abrogates sanctioned trademark rights. Not only does it violate Australia's global trade obligations and undermine trademark protection, it also has the negative effect of emboldening governments less committed to intellectual property right protection to dismiss global trade rules."*

**v. Inadequate consultation**

The Bill's *Chapter 2 - Requirements for plain packaging and appearance of tobacco products* prescribes a general framework for the plain packaging of tobacco products. The Bill will operate in conjunction with the draft Regulations, under which many of the prescribed requirements remain incomplete. This creates an unacceptable degree of uncertainty for manufacturers of tobacco products. For example, the Bill and draft Regulations remain silent on the specific pantone colour to be used on retail packaging (now described as "drab dark brown", after earlier public statements mentioning "olive green" and "drab green"), the range of permitted dimensions for cigarette packs, and the colour of any brand, business, company or variant names to be used on retail packaging. As the Bill provides for such significant additional requirements to be prescribed by Regulations, substantial advance notice of the precise content of the Regulations in their final form is required to ensure that ITA will be able to comply with the plain packaging changes, assuming that they become law.

Further, no information at all has been released in relation any other form of tobacco products (other than cigarettes), including “roll your own” tobacco, pipe tobacco and cigars. Whilst the general requirements for “retail packaging” will apply to any container for retail sale in which the tobacco product is directly placed, other forms of tobacco products have not been specifically addressed by the Bill or the incomplete draft Regulations. As the Australian market leader in roll your own tobacco products, ITA has particular cause for concern since the proposed design features for the plain packaging of all tobacco products other than cigarettes are still to be released.

The Minister for Health has declined the industry’s repeated requests for a face to face, round-table consultation regarding the practical implementation of the Bill, including the inadequate time for compliance under the current proposal. To put it plainly, the Bill proposes a manufacturing compliance date of 20 May 2012 and a retail compliance date of 1 July 2012. There are less than 10 months and 12 months respectively for manufacturers and retailers to comply. Yet the Australian Government has not even told manufacturers the prescribed pantone colour of “drab dark brown” that is to be used on every single piece of tobacco packaging or released packaging details for any type of tobacco product, other than cigarettes. With such incomplete and unknown information, it is simply impossible for manufacturers to comply with the Bill’s proposed timetable.

ITA is prepared to work with the Australian and international authorities on any issue that affects the tobacco industry. We have specialist commercial and technical knowledge about our products and about international trade. Although regulators may wish to draw on other sources of information, the knowledge available from tobacco companies such as ITA is invaluable in supporting the development and implementation of practical, workable solutions for appropriate tobacco control and should not be ignored. ITA seeks to ensure that all national laws, codes of practice and voluntary agreements relating to tobacco products, to which Imperial Tobacco companies are signatories, are adhered to.

## 2 COMPANY BACKGROUND

ITA is the Australian-based wholly owned subsidiary of Imperial Tobacco Group PLC (“**Imperial Tobacco**”), the world’s fourth largest international tobacco company.

In Australia, ITA has a share of approximately 20.5% of the total tobacco market. Our leading brands include Horizon, Peter Stuyvesant, Escort, Brandon, JPS and Davidoff cigarettes; Drum, Champion and White Ox fine-cut (roll your own) tobacco. We also import and distribute Camel and More cigarettes in Australia on behalf of Japan Tobacco International.

ITA employs approximately 400 people in Australia as well as being a significant contributor to the Australian economy, delivering approximately \$1.4 billion annually to the Federal Treasury through excise duties on tobacco products and GST. In addition, ITA makes further contributions to government through corporate taxation, employment taxes and other revenues of approximately \$18mn annually.

ITA entered the Australian market in September 1999 with the approval of the Australian Competition and Consumer Commission (“**ACCC**”) to ensure that competition was maintained, following the global merger between British American Tobacco (“**BAT**”) and Rothmans International. At this time, Imperial Tobacco subsidiaries purchased a portfolio of brands in Australia, a portfolio that was specifically approved by the ACCC. This portfolio included tobacco brands, registered and unregistered trade marks and other intellectual property, including copyright and other common law rights, associated with packaging and the “get up”/pack livery that distinguishes between brands. As a result of the ACCC’s approval, Imperial Tobacco paid \$325 million to acquire various brands and intellectual property rights in Australia and New Zealand, and established itself as the third player in the Australian market.

ITA has spent the past 12 years investing heavily in its Australian business and brands, including introducing new brands, at great expense. ITA now faces the prospect that the value of its investment will be stripped away, after its entry into the Australian market and its portfolio of brands and trade marks that it acquired at that time was approved by the ACCC. Any investor would fight to protect its valuable assets, be they real property or intellectual property. Imperial Tobacco is no different, simply because it owns *tobacco* brands and trade marks.



### 3 **NO CREDIBLE RESEARCH TO SUPPORT THE INTRODUCTION OF PLAIN PACKAGING**

There is no credible evidence to indicate that people take up smoking or continue to smoke because they see tobacco branding on packaging. The materials relied on by the Government result from selective and questionable research. It is valid to question the independent nature and objectivity of such research and its underlying raw data. Proponents of plain packaging ignore the substantial body of research which runs contrary to their objective.

As Nicola Roxon revealed to Sky News on 24 May 2011 regarding opposition by members of the Liberal Party on the grounds of a lack of credible evidence:

*“Well, this is a world first. The sort of proof they're looking for doesn't exist when this hasn't been introduced around the world. We do have research that tests the interest in particular measures, tests whether or not you can make a packet less attractive, whether it makes a person less likely to buy a product. We can't look around the world to see these successes because it hasn't been introduced around the world.”<sup>2</sup>*

Plain packaging will not reduce smoking prevalence in Australia. It is an unnecessary restriction on legitimate companies and businesses that manufacture, sell and distribute a legal product. Sound, reasonable and evidence-based regulation combined with well-thought-out voluntary agreements and regular engagement between interested parties and government is the most effective way to regulate any service or product, including tobacco. We support initiatives that deliver strong and consistent public health messages about the risks associated with smoking. The proposed Bill and draft Regulations do not fit into any of these categories.

Australia has one of the most restrictive tobacco markets in the world, which already prohibits tobacco advertising and sponsorship, mandates graphic health warnings and in most States already prohibits the display of tobacco products at retail, with full display bans to be implemented shortly. It is noteworthy that no research has been relied upon which has been undertaken in Australia, in the context of existing tobacco-related regulation, particularly display bans.

The packaging of tobacco products, including the presence of registered trade marks, informs consumers who have already made the decision to smoke about the different products and brands available to them. Packaging facilitates this consumer decision and the process of

selection by making it easier for both retailers and consumers to distinguish the brand of choice.

Plain packaging proponents, such as Professor Simon Chapman, allege that tobacco packs function as advertising and claim that plain packaging will eliminate this, thereby reducing smoking<sup>3</sup>, particularly by young people.

An expert Health Panel report to Health Canada on youth smoking initiation concluded that:

- Young people do not decide to smoke on the basis of tobacco packages;
- Packages do not lead to smoking;
- Changing the package will not “*have any major effect on the decision(s) to smoke or not to smoke*”.<sup>4</sup>

There is no credible evidence to support the claim that packaging either encourages people to start smoking or discourages existing smokers from quitting and there is credible evidence to suggest to the contrary.

Tobacco packaging has not been identified in recent Department of Health and Ageing literature<sup>5</sup> as being amongst the main reasons why people start to smoke, or why adult consumers continue to enjoy tobacco products.

Plain packaging is not supported or justified by international evidence, and the Bill does not meet the criteria for good and just regulation. Plain packaging has been considered but not implemented in several countries, having found the evidence for plain packaging to be insufficient and inconclusive. The UK Government deferred plain packaging stating in 2008 that “*the evidence base needs to be developed*”<sup>6</sup> and that there is a need to seek “*views on, and give weight to, the legal implications of restrictions on packaging for intellectual property rights and freedom of trade.*”<sup>7</sup> Recently, the UK Government has stated that it “*wants to understand whether there is evidence to demonstrate that plain packaging would have an additional public health benefit*”<sup>8</sup>. Similarly, the Canadian government has rejected plain packaging on the grounds that there is no supporting evidence and that the proposal will breach trade mark laws.

The issue of plain packaging was raised in the Australia Senate Community Affairs References Committee in the mid-1990s, which heard numerous views on plain packaging for

tobacco products. The Committee published its report in December 1995 in which it concluded that “*on the basis of the evidence received, there is not sufficient evidence to recommend that tobacco products be sold in generic packaging.*”<sup>9</sup> No evidence has arisen since that would further the case for plain packaging.

Plain packaging will not address the issues that the Bill seeks to combat. It will make no overall contribution to the public awareness of the risks associated with smoking; it will not provide more information to smokers; and it will not reduce the appeal of tobacco products, especially to young people. The introduction of plain packaging will make no contribution to addressing youth smoking initiation. In fact, certain evidence suggests the potential for the contrary.

#### 4 INCREASED TRADE IN ILLICIT TOBACCO

Plain packaging will exponentially increase the production and availability of counterfeit and other illicit tobacco products, increasing the illicit trade in tobacco and (amongst other things) reducing future tobacco excise and general sales tax payments to Government. It is also likely to increase rates of smoking prevalence and incidence, due to its low sale prices and increased availability.

Plain packaging will create a “Counterfeiters’ Charter” and potentially undermine the excellent and ongoing work by the industry and Australia’s Tobacco Industry Forum (“TIF”) together with government authorities to combat illicit trade. The TIF is cross-chaired by the Australian Tax Office and the Australian Customs Service.

Counterfeiting is an increasing problem throughout the world and tobacco products are very much a part of this criminal activity, supporting organised crime and international terrorism<sup>10,11,12,13,14,15</sup>. According to recent World Customs Organisation (“WCO”) estimates, approximately 5% of the 5,700 billion cigarettes consumed annually on a worldwide basis are now counterfeit and that number is rising daily<sup>16</sup>. The WHO also considers cigarettes to be the world’s most widely smuggled legal consumer product and estimates that **sales of smuggled cigarettes will overtake legal tobacco sales by 2020**<sup>17</sup>.

The February 2011 Deloitte report, *Illicit Trade of Tobacco in Australia*<sup>18</sup> (“**2011 Deloitte Report**”), estimates that the amount of illicit tobacco purchased in Australia in 2010 was **approximately 2.7 million kilograms**. The size of the illicit tobacco market, represented as a proportion of the genuine tobacco market, in Australia for 2010 was estimated to be equivalent to **15.9 per cent** of the genuine tobacco market. The estimated 2.7 million kilograms of illicit tobacco consumed represents foregone tobacco excise revenue of approximately **\$1.1 billion** in that year.

In the Deloitte report titled *Illicit trade of tobacco in Australia – June 2011 update*,<sup>19</sup> the size of the illicit market remained relatively stable at 15.6%. However, both contraband and counterfeit prevalence doubled during the 6-month period, highlighting a very worrying trend that will be accelerated by the introduction of plain packaging.

With its high excise regime for tobacco products, Australia is a prime target for criminals who are turning increasingly to counterfeit tobacco products as a source to supply the Australian market<sup>20,21,22,23,24,25,26</sup>. The February 2010 PricewaterhouseCoopers (“PWC”) report *Illegal*

*tobacco: counting the cost of Australia's black market*<sup>27</sup> has identified a shift in the black market from locally produced loose tobacco (chop chop) to an increase in counterfeit and contraband cigarettes.

The trade in illicit tobacco products has increased steadily in Australia over recent years. This is despite substantial endeavours by tobacco manufacturers, including ITA, working closely with the ATO, Australian Customs and Border Protection Service (TIF members), the Australian Federal Police and other regulatory authorities both in Australia and worldwide to combat the production and importation of illicit products, which fund organised crime and have wide-ranging, negative impacts on our society.

#### ***4.1 Combating counterfeit product***

Cigarettes themselves are relatively easy to counterfeit as, despite our own sustained efforts, counterfeiters have little difficulty in acquiring the non-tobacco materials used in the manufacture of cigarettes such as filter tow and cigarette paper. The 2011 Deloitte Report found that unbranded tobacco was the most consumed illicit tobacco product in Australia, constituting 91 per cent of the illicit tobacco market. Counterfeit cigarettes and contraband cigarettes also comprise this lucrative underground market.

The Tobacco Industry Forum<sup>28</sup> estimates that approximately 40 per cent of illicit cigarette imports into Australia during the 12 months to February 2010 were counterfeits of major known brands.<sup>29</sup> The remaining 60 per cent of illicit cigarette imports represent “exotic” brands which predominantly originate from China.<sup>30</sup> Our intelligence tells us that counterfeit tobacco products are often manufactured ‘to order’ and the operations are often conducted in countries where the regulatory authorities have great difficulty in eliminating this production (e.g., China, Eastern Europe and the Middle East).

The Australian Customs and Border Protection Service collects and records information on seizures of illicit tobacco at Australian ports. Such information, however, typically underestimates the illicit market size because of a failure to capture unbranded tobacco grown in Australia, but more significantly because of the Australian Customs and Border Protection Service only searching (and subsequently seizing) a proportion of containers that arrive in Australia.

However, if the Bill’s plain packaging requirements are implemented, it will make the counterfeiters’ job both cheaper and easier, by mandating standardized pack dimensions,

“drab dark brown” colour, single font and only one colour text. It will also make the task of recognising counterfeit product by the Australian Customs and Border Protection Service virtually impossible. The proposed prohibition on the use of brand names and trade marks on tobacco products, in particular on individual cigarettes, is truly a counterfeiters’ dream come true (see section 26 of the Bill and regulation 3.1 of the draft Regulations). There will be no way for a consumer to know whether the product inside the pack is the product that they have paid for or whether it contains counterfeit product, or even if there was a manufacturing error that has resulted in the wrong brand being inside the pack. Smokers have the same right as any consumer to know what they are buying. The fact that these consumers are purchasing tobacco is irrelevant.

There is a growing problem of counterfeit fine cut tobacco brands<sup>31,32</sup>, exacerbated because of the ease with which fine cut tobacco can be packed and the standard type of machinery required. The tobacco and packaging materials can be imported into Australia separately, making detection much more difficult.

The pack is a key component in the fight against counterfeit tobacco products by legitimate manufacturers such as ITA. This is the item that is presented to the consumer and it is the clearest overt method by which a legitimate manufacturer, the authorities and the consumer can identify genuine products. Tobacco companies introduce subtle packaging design changes including both overt and covert elements into the packaging specifically to frustrate the efforts of counterfeiters. While modern technology is of great assistance to counterfeiters in replicating complex packaging designs, counterfeiters still find difficulty in doing this consistently and with the quality of printing necessary to avoid detection.

Plain packaging may also confuse the Australian consumer, who may come to regard illicit products as of similar validity to genuine branded products, when they are all in the same “plain” packaging.

Worryingly, counterfeit products are not manufactured according to the regulatory requirements demanded of products from legitimate manufacturers, who are accountable for the products that they sell. Counterfeiters do not adhere to the same stringent production quality controls that apply to our brands, and counterfeit products often contain contaminants and fungi<sup>33,34</sup>. The manufacturers of counterfeit products are unaccountable for the manufacture of their products. Counterfeit products, by their nature, do not carry Australian excise, duty or GST, comply with ingredients or yield regulations, Reduced Fire Risk

regulations nor do those who sell them contribute to the Australian economy. All of this should be of considerable concern to the Department of Health and Ageing, the Ministry of Finance and the ACCC.

#### ***4.2 Illicit trade impact from unproven regulations***

The Bill is another example of unjustified and unproven proposals for further tobacco regulation that, when implemented, have no impact on meeting public health objectives, but would increase the trade in illicit tobacco products. Many countries globally are now experiencing the effects of a vibrant trade in illicit tobacco which has grown as a result of unproven tobacco control policies, influenced by large, well-funded and embedded global tobacco control organizations, lobby groups and public health advocates. The tobacco control lobby is not held to account for recommending policies that are proven unsuccessful in achieving their stated aims and that are shown to have negative unintended consequences. They continue simply to demand even more misguided regulations, commonly claiming that more “comprehensive” regulations are needed if previous regulations have not had the claimed impact.

Ireland, Iceland and several provinces in Canada have implemented tobacco retail display policies that were purported to help reduce youth smoking, relapse and uptake. However, each of these jurisdictions has experienced no discernible impact as a result of these measures, while illicit trade is assuming epidemic proportions, particularly in Canada and Ireland.<sup>35,36</sup>

Data from Ireland indicates that illicit trade increased substantially after the implementation of the display ban. Initial figures indicate a month-on-month rise of approximately 12% in non-Irish duty paid cigarettes post display ban implementation, with over half of all August 2009 seizures being counterfeit products<sup>37</sup>. In Canada, an accelerated growth in illicit trade was reported in 2008 when display bans were first introduced in Ontario (up to 48.6 from 31.6 percent in 2007) and Quebec (up to 40.1 from 30.5 per cent in 2007)<sup>38</sup>.

In Australia, following a 25% increase in excise in April 2010 and the implementation of display bans across multiple states and territories, illicit trade is estimated to have grown by over 3% in only one year (from 12.3% of size of legal market in 2009 to 15.9% of size of legal market in 2010). By contrast, it has taken ITA 13 years to grow its market share by less than 3%, because it chooses to “play by the rules”. Organised crime and manufacturers of illicit products have no such concerns.

Any measures that have the effect of increasing the illicit trade in tobacco will undermine efforts to reduce smoking through other measures (including significant tax increases). An increase in illicit trade would have a detrimental impact on smoking prevention efforts by



increasingly providing consumers and, in particular, children with uncontrolled access to cheap tobacco (the price of illicit trade goods is typically less than half the cost of genuine, locally taxed goods). It will also increase their acceptance of criminal activity as the norm and expose them to criminal gangs and possibly to other illegal activities undertaken by such people.

### **4.3 Plain Packaging is not an FCTC obligation**

In November 2008, the third Conference of the Parties (“CoP”) to the FCTC adopted **Guidelines** to Article 11 and 13; each including a suggestion to consider plain packaging. During the debate on these guidelines, a significant number of Parties and the WHO Legal Counsel clearly stated the risk of infringing trade mark and other intellectual property rights when increasing the size of health warnings and – in particular – when considering plain packaging. These concerns were mitigated by strong reference to the **non-binding status of the FCTC Guidelines** and an emphasis in the formal decision that they are not intended to increase Parties’ obligations. Decision number FCTC/COP3(10), which adopted the Guidelines to Article 11 prefaced the decision by “*Emphasizing that the aim of these guidelines is to assist Parties to meet their obligations under Article 11 of the Convention and that they are not intended to increase Parties’ obligations under this Article*”<sup>39</sup>.

At the first CoP, the function of Guidelines was defined as follows: “*Guidelines constitute a non-binding instrument adopted by an international body to provide assistance to countries in addressing specific issues at the national or international level. This type of instrument is often used in the context of complex technical or legal matters. It is designed to provide a reference frame and detailed guidance to countries in adopting national measures on the issues in question. In the framework of international treaties, guidelines are often developed to assist parties in implementing treaty provisions on complex issues.*”<sup>40</sup>

In short, as reiterated during several CoPs, **FCTC Guidelines are not binding and do not create any additional legal obligations on Parties to the FCTC**, and this is the basis on which the Guidelines were adopted.

ITA does not believe that the implementation of non-binding FCTC Guidelines is a legitimate use of the Commonwealth’s external affairs power, particularly where the introduction of plain packaging would breach the Government’s international treaty obligations.

#### ***4.4 Plain Packaging will place Australia in breach of FCTC obligations***

ITA and other tobacco companies have expressed their concerns that plain packaging will lead to an exponential increase in counterfeit products.

By implementing plain packaging, Australia will breach its obligations under the FCTC

**Article 15** - Illicit Trade in Tobacco, which reads:

- 15(1). The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.
- 15(2). Each Party shall adopt and implement effective legislative, executive, administrative or other measures to ensure that all unit packets and packages of tobacco products and any outside packaging of such products are marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status. In addition, each Party shall:
  - (a) require that unit packets and packages of tobacco products for retail and wholesale use that are sold on its domestic market carry the statement: “Sales only allowed in (insert name of the country, subnational, regional or federal unit)” or carry any other effective marking indicating the final destination or which would assist authorities in determining whether the product is legally for sale on the domestic market; and
  - (b) consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.

As confirmed by the 2010 *Second (Five Year) Implementation Report*<sup>41</sup>, Australia already fails to adequately comply with certain obligations of the FCTC in respect of combating counterfeit products.

The statistics reported by the Australian Government to the WHO in 2010 show that plain packaging proposals have not been adequately considered against its current binding obligations. As recently as November 2010, Australia:

- Recorded a seizure of illicit tobacco products of 2008/2009 of ONLY **99.97 kg** of cut tobacco (at 2.6.1). Most recently, the Deloitte (*Illicit trade of tobacco in Australia*) report February 2011 revealed that the estimated amount of illicit tobacco products in circulation in Australia during 2010 was **2.7 million kgs**<sup>42</sup>. **99.97 kg** is a mere **0.0037%** of the total illicit tobacco product imported in 2010;
- Did not report any seizure of illicit tobacco products for 2009/10, despite **Article 15.5** (at 2.6.1);
- States that it has no information on the percentage of smuggled tobacco products on the national tobacco market, despite **Article 15.5** (at 2.6.2);
- Agrees that there is no tobacco-growing in Australia, meaning that all products come from overseas where there is lesser regulation of tobacco products (at 2.7.1);
- Stated that there was no regulation of the contents of tobacco products, despite **Article 9** (at 3.2.3); and
- Agreed that it had not developed a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade, despite **Article 15.2(b)** (at 3.3.1.4).

Despite Article 15.2(b) requiring that Parties consider such tracking and tracing regimes, and the requests of the tobacco industry that the government adopt measures such as “Codentify”, taggart ink and forensic-level differentiation, the government has specifically rejected adopting such a scheme (Consultation Paper, page 14-15) and has omitted to address these concerns in the Bill. Leaving anti-counterfeiting measures open to the industry on a voluntary basis will amount to inconsistent industry practices and leave Australia’s door open to counterfeit goods. Further, any anti-counterfeiting measures adopted by the industry will be countered by the introduction of plain packaging. The best defence against illicit trade is the presence of brands, trade marks and related intellectual property. By mandating plain packaging, so that all legitimate products are identical with each other *and* indistinguishable

from illegitimate products, the Government could not do more to make it easier for illicit product to be easily copied, imported, sold and consumed in Australia.

Plain packaging will also leave Customs authorities with the astronomical burden of tobacco control, in circumstances where “no frills” plain packaging without difficult-to-copy brands, fonts, crests and logos readily lends tobacco products to imitation and counterfeiting. If Australian enforcement authorities cannot control the illicit tobacco trade in Australia today, plain packaging will only exacerbate this criminal enterprise and expose more Australians to unanticipated health and safety risks, as such tobacco products are unregulated and their manufacturers unaccountable.

In addition, there is no reference to the use of the “tidy-man” logo or symbol in the Bill. Unless specifically permitted by the Regulations pursuant to section 20(3)(c), “Tidy-man” will be deemed a prohibited mark under the Bill. Indeed, the Department of Health Consultation Paper indicated that the tidy man symbol would not be able to be used on packaging. ITA is proud to voluntarily display the “tidy-man” symbol on its products and supports the responsible disposal of tobacco packaging and refuse such as used cigarette butts. How can the Australia Government continually seek to criticize tobacco companies for irresponsible littering of cigarette butts whilst removing our anti-littering message to our consumers?

## 5 PLAIN PACKAGING WILL BREACH THE LAW AND INTERNATIONAL TREATIES

The Bill and draft Regulations will breach Australia's obligations under international law and treaties. The Government's proposal impinges upon intellectual property rights, freedom of expression and restricts competition. The Government's proposals amount to an acquisition and/or expropriation of Imperial Tobacco's valuable intellectual property rights and company assets, which, amongst other things, are essential for consumers to distinguish our high quality products from those products of third parties, including illicit trade.

Plain packaging will damage valuable corporate assets in which Imperial Tobacco and its shareholders have substantially invested for many years, and places the Australian Government in breach of a range of Australian laws and treaty obligations that relate to intellectual property rights, international trade and other international laws.

This is reflected in the 1997 response by the Australian Government to the Senate Community Affairs References Committee in relation to the legal and constitutional barriers to plain packaging, notably 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 our obligations under international covenants such as the Paris Convention for the Protection of Industrial Property, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).”*<sup>43</sup>

The Bill would also deprive Imperial Tobacco of the use of its property, including trade marks, copyright and other common law rights, associated with packaging and the “get up”/pack livery that distinguishes our brands, and specifically contravenes the rights afforded to us and protected under the Australian Constitution, the *Trade Marks Act 1995*, the *Australian Competition and Consumer Law 2010* and Australian common law.

Furthermore, the plain packaging proposals are directly in breach of TRIPS and the Paris Convention for the Protection of Industrial Property (“**Paris Convention**”). The plain packaging measures do not satisfy the test of “necessity” proposed by the limited exemptions to the TRIPS Agreement.

### *5.1 Specific Breaches of the TRIPS Agreement*

Australia has been a member of the World Trade Organisation (“WTO”) since 1995, and is party to several treaties that were negotiated and signed under the WTO umbrella. The Government must be careful to avoid contravention of WTO treaties. The plain packaging tobacco reforms contemplated by the Australian Government affects Australia’s obligations under two such treaties: the Agreement on Trade Related Intellectual Property Rights (“TRIPS”) and the Agreement on Technical Barriers to Trade.

The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. It is administered by the WTO.

Article 2 of TRIPS specifically incorporates Articles 1 through 12, and Article 19 of the Paris Convention which is administered by the World Intellectual Property Organisation (“WIPO”). Australia became a signatory to the Paris Convention on 10 October 1925.

TRIPS establishes certain minimum standards for the protection of intellectual property rights, which include trade mark rights. In particular, Article 20 of TRIPS provides that use of a trade mark in the course of trade is **not to be unjustifiably encumbered by special requirements**, such as its use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

The Government’s proposal unjustifiably encumbers our trade marks by imposing special requirements in relation to their use (or non-use), namely that our brand, business or company names can only be used in a prescribed colour, size and font (Lucida sans 14 in upper-case and lower-case letters in a normal weighted, regular font) on single coloured matt “drab dark brown” packaging, with specified dimensions for cigarette packs. The variant name of a product will be restricted to only a 10 point size font (Lucida sans 10) under draft Regulation 2.8, which is so small as to be virtually unreadable. This means that a large number of our branding elements and associated trade marks, which include letters, words, names, signatures, numerals, devices, brands, headings, labels and aspects of packaging will be rendered useless and worthless.

For this reason, the Government’s proposal is clearly in breach of Article 20 of TRIPS. Indeed, the extent of the plain packaging reforms goes beyond a mere “encumbrance” and extends to a virtual extinguishment of trade mark rights and use of those marks. Australia

would be in breach of its international trade obligations under TRIPS, effectively eradicating Australia's support of internationally accepted minimum standards for the protection of intellectual property rights.

In addition, Article 2 of TRIPS specifically incorporates Articles 1 through 12, and Article 19 of the Paris Convention. Plain packaging would also violate several Articles of the Paris Convention, including:

- (a) Article 1(3), which indicates that broad protection should be provided to forms of industrial property, which specifically includes “agricultural and extractive industries and to all manufactured or natural products” including “tobacco leaf”; and
- (b) Article 10, which provides protection against measures of “unfair competition” and prohibits “all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor”.

The restricted form of use and non-use required by the Government's proposal will be clearly detrimental to Imperial Tobacco's ability to use its trade marks to distinguish its goods from those of our competitors. The removal of all branding on tobacco products, such as cigarette sticks, and the removal of distinctive branding elements of our packaging such as logos, fonts, colours, shape and other brand livery which consumers use to distinguish our brands, will have an adverse and serious impact on the ability of our trade marks to distinguish our goods from those of our competitors in the Australian marketplace. In breach of Paris Convention Article 10, plain packaging will clearly create confusion between tobacco products for both retailers and consumers.

***Plain Packaging fails to satisfy test of “necessity”***

The test of “necessity” proposed by the exceptions under TRIPS is not satisfied by the Government's proposal. In a context where Australian law already mandates significantly sized graphic health warnings on packaging, the additional measures proposed are unreasonable and unnecessary.

The Government tries to justify the plain packaging reforms based on the protection of public health and the limited available exceptions relevant to TRIPS: TRIPS Article 17

(Exceptions), TRIPS Articles 7 & 8 (Objectives & Principles) and the Doha Declaration on the TRIPS Agreement and Public Health.

**TRIPS Article 17** provides ‘limited exceptions’ to rights conferred by a trade mark, as long as the exception accounts for the **legitimate interests of the trade mark owner** and third parties.

Mandating plain packaging is clearly inconsistent with the legitimate interests of trade mark owners and with the minimum protections provided for the recognition and protection of trade mark rights. In a dispute between the EC and the US, the WTO dispute settlement panel has clearly set out the legitimate interests of a trade mark owner as follows:

*“Every trade mark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trade mark so that it can perform that function. This includes its interest in using its own trade mark in connection with the relevant goods and services of its own and authorised undertakings. Taking account of that interest will take account of the trade mark owner’s interest in the economic value of its mark arising from the reputation that it enjoys and the quality that it denotes.”<sup>44</sup>*

In one of Australia’s disputes with the European Community, the Australian Government argued that the “limited” exceptions in TRIPS Article 17, must be interpreted to allow only “a small diminution of rights.”<sup>45</sup> The Panel agreed with Australia and held that the “*addition of the word “limited” emphasises that the exception must be narrow and permit only a small diminution of rights. The issue is whether the exception to the rights conferred by a trade mark is narrow.*”<sup>46</sup>

The proposed plain packaging legislation would not, by any stretch of the imagination, constitute “a small diminution of rights”. It would operate to all but extinguish the use of the owner’s tobacco trade mark rights, including all colours, logos, crests, fonts and other indicia which give distinctiveness to a brand. It follows that, on its own interpretation, as supported by WTO’s dispute settlement jurisprudence, the Australian Government should not be able to rely on the “limited” exceptions for which Article 17 provides.

**TRIPS Article 8** allows members to “*adopt measures necessary to protect public health ... provided that such measures are consistent with the provisions of this Agreement*”. On its face, the exception conferred by Article 8.1 is a narrow one. The laws adopted must be both necessary, **and** consistent with the provisions of the TRIPS Agreement.



Several statements have been made by the WTO as to the scope and purpose of Article 8.1. These should be taken into account when considering its impact upon Articles 17 and 20. There is a very substantial body of literature which indicates that the public health exception was included in Article 8 because of concerns about patents over essential medicines, especially in the developing world. The problem which Article 8.1 was intended to address is the existence of patents which restrict the availability of pharmaceuticals. This position was reflected in the November 2001 WTO Ministerial Declaration (the “**Doha Declaration**”) which stated in part,

*“We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines”.*

A separate declaration was then made specifically on the issue of TRIPS and public health<sup>47</sup>.

The Doha Declaration on TRIPS and Public Health makes it clear that the types of circumstances in which Article 8.1 is intended to apply—that is, when it becomes “necessary” to pass laws relating to public health that may interfere with intellectual property rights—are circumstances of “national emergency” or “extreme urgency”. The sort of event which is contemplated is an epidemic, in response to which a government might justifiably order the generic production of a patented drug.

The Doha Declaration on TRIPS and Public Health strongly suggests that Article 8.1 should be invoked only in extreme cases and was not intended to apply to anything analogous to the plain packaging proposal.

It is not enough for the Commonwealth to say that the legislation is a desirable step to promote human health by reducing smoking - it must show that it is a *necessary* measure to meet a grave and imminent danger. For these reasons, we do not think that the Commonwealth of Australia will be able to justify the plain packaging legislation as “necessary” under international law. As such, it would be in breach of TRIPS.

### ***Concerns raised by IP Australia***

Documents released under the *Freedom of Information* request submitted to IP Australia revealed that IP Australia was only advised of the Government’s plain packaging proposal days before it was made public. In particular, one briefing note showed that IP Australia has

identified around 3,000 trade marks for tobacco and tobacco products of which “*a short study shows approximately 1/3 include logos*”<sup>48</sup>.

A further briefing note states “*IP Australia considers that plain packaging may not be consistent with Australia’s intellectual property obligations ... [and whether it] would constitute an acquisition of property is debatable*”.<sup>49</sup> Referring to Article 20 of TRIPS, IP Australia is of the view that “*requiring plain packaging would be regarded as encumbering the ability of an entity to distinguish its goods through its trade from of other entities. IP Australia’s understanding is that this Article [20] was drafted with the intention of restricting mechanisms like plain packaging*”.<sup>50</sup> Emails between IP Australia trade mark officials also state that arguing Australia’s international IP obligations would not be violated by plain packaging “*is a long bow*”<sup>51</sup> and that “*requiring plain packaging would make it easier for counterfeit products to be produced*”.<sup>52</sup>

ITG has approximately 300 registered trade marks in Australia which cover letters, words, names, signatures, numerals, devices, brands, headings, labels and aspects of packaging. In addition to our registered trade marks, our product “get-up” comprises pack shapes, colours, fonts and brand livery, which are protected by the law of copyright and by common law rights, as recognised by the Australian Federal Court in the “Horizon” case: *W.D. & H.O. Wills (Australia) Ltd v Philip Morris Australia* [1997] 39 IPR 356, where Davies J stated:

*“It is clear that a large and valuable reputation has been established by the applicants in Australia in their Horizon range of cigarettes and in their get-up such that the get-up signifies the applicant’s cigarettes...The applicant’s reputation in its Horizon brand cigarettes resides in the features of its packaging, as well as in the name”.*

Use of a significant number of our trade marks and “get up” will become prohibited by the plain packaging reforms. As noted by IP Australia, preventing the use of a trade mark may not be consistent with Australia’s international property obligations under TRIPS.

Furthermore, it would essentially deprive the registered proprietor of the benefit of the registered trade marks, in circumstances where Imperial Tobacco paid a significant amount of money in 1999 for these brands, and has paid considerable registration and renewal fees to the Australian Government since this time.

## 5.2 *Plain Packaging will breach the Agreement on Technical Barriers to Trade*

The Agreement on Technical Barriers to Trade (“**TBT**”) also contains obligations that are likely to be impacted by the plain packaging reforms. The TBT attempts to safeguard against protectionist measures masquerading as technical regulations or product standards.

The plain packaging reforms will breach two provisions of the TBT. Firstly, Article 2.2 of the TBT prohibits member countries from imposing technical regulations<sup>53</sup> that have the effect of creating *unnecessary* obstacles to international trade. The provision clarifies that in the pursuance of legitimate objectives (such as the protection of human health or safety) member states should only adopt technical regulations that are *not any more trade-restrictive than necessary*. Further, Article 2.8 of the TBT goes on to provide that ‘whenever appropriate’ member countries shall apply technical regulations based only on product requirements in terms of performance rather than design or descriptive characteristics.

Further, Article 2.5 creates a *rebuttable* presumption that technical regulations that are applied for a legitimate objective, such as the protection of human health or safety, do not create an unnecessary obstacle to international trade. In the absence of dispute settlement guidance on the operation of Articles 2.2, 2.5 and 2.8, the concept of ‘necessity’ will take centre-stage.

In this regard, the failure of the Government to identify practical evidence against the necessity or indispensability of plain packaging in efforts to reduce tobacco consumption is significant. The lack of necessity, as per the wording of Article 2.2, will go, firstly, to the grave obstacles to international trade posed by the proposals, and, secondly, to the availability of several other options that are less trade-restrictive and arguably equally effective. In light of significant anti-tobacco messaging on each cigarette pack, it is simply not ‘necessary’ to place further onerous regulations in the form of plain packaging.

There is evidence at the WTO indicating that members envisage the TBT being violated by anti-tobacco reforms or reforms similar to the plain packaging reforms. At the November 2009, March 2010 and June 2010 meetings of the WTO Technical Barriers to Trade Committee, a group of twenty WTO member countries<sup>54</sup> raised the possibility of TBT contraventions by Canada’s *Cracking Down on Tobacco Marketing Aimed at Youth Act*, which prohibits cigarettes that contain any of the flavourings and additives listed in a Schedule appended to the law. Malawi, Kenya and Uganda have submitted a formal communications to the Committee in 2010 with concerns about the Canadian measure.<sup>55</sup>

Further, at the March 2010 meeting and June 2010 meetings, seven member countries **including Australia** expressed concern about Thailand's measure requiring the display of specific health advisory statements and pictures on the packaging of alcoholic beverages. Australia and the other countries argued that the labelling requirements created unnecessary obstacles to trade and that Thailand could instead use less restrictive methods such as public information campaigns to achieve the same objective.<sup>56</sup> Given that the TBT does not create any distinctions between tobacco and alcohol, there are strong parallels between the proposed plain packaging reforms in Australia and Thailand's alcohol labelling proposals. Given these parallels, it is very difficult to reconcile how Australia could credibly object to one proposal concerning alcohol while advocating a more draconian one for tobacco.

On 11 June 2010, Indonesia, a large producer of clove cigarettes, requested that a WTO Panel be established to settle a dispute over Section 907 of the United States' *Family Smoking Prevention and Tobacco Control Act*, which prohibits the production or sale in the US of all cigarettes with a characterising flavour other than menthol or tobacco. Indonesia argues that the US measure creates an "unnecessary obstacle to trade" in breach of Article 2.2 of the TBT, in that the US has available to it less trade-restrictive means to accomplish its policy objectives. A Panel was established on 9 September 2010 to examine the legality of the US action and is anticipated by the end of June 2011.<sup>57</sup> Several countries have shown particular interest in the dispute and reserved their third party rights before the Panel<sup>58</sup>.

Given the strong similarities between the plain packaging proposals and the concerns raised by member states above, it is highly likely that the plain packaging reforms will result in member states issuing formal communications to the WTO and, furthermore, initiating dispute resolution proceedings in the Dispute Settlement Body. Any such interpretations made by the DSB may be adopted by members as "rulings" and recommendations as to future conduct needed for those Members to bring their measures into conformity with any WTO agreements.

An example of the binding nature of DSB determinations on Member States is the Australia/New Zealand apples dispute (DS367). Recently, at its meeting on 17 December 2010, the Dispute Settlement Body adopted the Panel and Appellate Body reports, confirming that Australia's quarantine measures applied to New Zealand apples were neither based on an appropriate risk assessment nor supported by sufficient scientific evidence since all 16 of Australia's measures at issue were found to be inconsistent with its obligations under Articles

5.1, 5.2, and 2.2 of the Sanitary and Phytosanitary Measures Agreement.<sup>59</sup> The Government is therefore on notice that it will have to accept the verdict of the global umpire and implement any WTO rulings on tobacco, as it did with the importation of New Zealand apples.

### ***5.3 Breaches of Free Trade Agreements and Bilateral Investment Treaties***

The plain packaging proposals may also expose the Government to very significant compensation claims on the grounds of “expropriation” of intellectual property investments in Australia. The Government has failed to consider that other international instruments - bilateral or multilateral treaties and free trade agreements, confer rights of action upon a person from one contracting State when an action of another contracting State damages that person’s investment in that State. Australia has 21 bilateral investment treaties, has entered into 4 free trade agreements and the multi-lateral ASEAN-Australia-New Zealand Free Trade Agreement.

Under bilateral investment treaties (“**BITs**”), an “investor” is protected if it is a physical person residing in the territory of a contracting State or a company incorporated in a contracting State. BITs offer a wide range of protections for investments, including:

- (a) protection against expropriation (protecting against deprivation or “measures having effect equivalent to such deprivation”); and
- (b) the promise of “fair and equitable” treatment.

The Australian Government’s proposals will have an effect at least equivalent to the expropriation of Imperial Tobacco’s intellectual property rights. Relevant investors will, therefore, be entitled to compensation equivalent to the fair market value of the expropriated investment against Australia through international arbitration.

As noted in the Executive Summary, such a claim has already been initiated against the Australian Government by Philip Morris Asia Limited. This international legal action may well result in a successful claim against the Australian Government for billions of dollars over its plain packaging legislation.

#### **5.4 Threat to Australia's reputation**

The Bill over-reaches in both a legislative and political sense to such a degree that it threatens to damage Australia's international reputation and standing in the areas of intellectual property, world trade and as a place to invest and to do business on a just and fair footing.

If enacted, the Bill would be subject to domestic challenges on Constitutional and administrative law grounds, as well as any related international arbitration proceedings brought by investors, aggrieved WTO or WIPO Member States.

In addition, the international business community has serious concerns about the Australian developments, including the International Chamber of Commerce and the United States Chamber of Commerce. The former, in a letter to Australian Trade Minister Craig Emerson dated 20 April 2011<sup>60</sup>, states that the proposal for plain packaging creates "*a dangerous precedent that could have far-reaching impacts on the use of trademarks and other intellectual property in Australia and globally.*" It urges the Australian Government to consider policy alternatives to the 'plain packaging' proposal, that would further the government's health policy goals "*without creating a dangerous precedent with negative consequences that go far beyond the aims of the new rules.*"

Similarly, the Chamber of Commerce of the United States expressed concerns about the economic implications of the proposed legislation requiring plain packaging of tobacco products in a letter to members of the Australian Government dated 28 August 2009. In their view, plain packaging appears to disregard established international norms of intellectual property, particularly trade mark law, which "*is the cornerstone of corporate identity and consumer information.*" The Chamber of Commerce stated that "*plain packaging would constitute an unequivocal violation of international trade and intellectual property agreements.*"

We agree.

## 6 THE BILL IS UNCONSTITUTIONAL

The Bill will result in the acquisition of our intellectual property other than on just terms contrary to section 51(xxxi) of the Australian Constitution. The Bill effects an unconstitutional acquisition of our private property by effectively removing brand elements, trade marks, insignia and other intellectual property from our packaging and replacing them with Government messaging.

As shown in the drafting of section 15 of the Bill, the Government recognises that the restrictions imposed by the Bill affects an acquisition of property by preventing the use of a trade mark on tobacco products and attempts to overcome this by section 15(2). ITA believes that section 15(1) and section 15(2) are unconstitutional and breach the separation of powers doctrine.

The High Court of Australia has recognised that intellectual property, including trade marks and copyright are “property” for the purposes of this section 51(xxxi) of the Australian Constitution. The *Trade Marks Act 1995* also clearly states that a trade mark is “personal property” (section 21) which are capable of being assigned.

The Australian Constitution provides under section 51 that “*The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*

*(xxxi.) The acquisition of property **on just terms** from any State or person for any purpose in respect of which the Parliament has power to make laws.*

Accordingly, such power is limited by the inclusion of the words “on just terms”. The Bill does not provide for compensation on “just terms” in the event that an acquisition of property is effected. It fails to provide for a “safety net” acquisition of property clause which provides a mechanism whereby affected rights-holders can make a claim for just terms compensation in a court of competent jurisdiction.

Such “safety net” clauses are provided for both under section 28 *Tobacco Advertising Prohibition Act 1992* and section 139F *Competition and Consumer Act 2010*, which both materially affect the rights of tobacco trade mark owners. In contrast, the Bill proposes to strip away a fundamental Constitutional protection. If the Government is confident that no acquisition of property is affected, then it should provide for just terms compensation in the

ordinary manner and not discriminate against persons who hold legitimate intellectual property interests on the basis of the type of product which is acquired, namely tobacco trade marks. Without providing for such a “safety net”, the legislative oversteps its role into the judicial sphere, despite the Constitutionally enshrined separation of powers.

Over half a century ago, Dixon J stated in *Grace Bros Pty Ltd and the Commonwealth* (1946) 72 CLR 269 at [290], that:

*“The legislative power given by s 51 (xxxi) is to make laws with respect to a compound conception, namely "acquisition-upon-just-terms." "Just terms" doubtless forms a part of the definition of the subject-matter, and in that sense amounts to a condition which the law must satisfy. But the question for the court when validity is in issue is whether the legislation answers the description of a law with respect to acquisition upon just terms. ... The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country...*

*...The condition "upon just terms" was included to prevent arbitrary exercises of the power at the expense of a State or the subject. In deciding whether any given law is within the power the court must, of course, examine the justice of the terms provided...”*

As the Government has clearly voiced that it believes it is under no obligation to pay compensation, the only alternative for rights-holders will be to institute proceedings in the High Court and obtain a declaration that there has been an acquisition.

Section 15 creates significant procedural unfairness, particularly in circumstances where the final Regulations which could effect such an acquisition have not yet been released. For example, if the Act comes into force on 1 January 2012 with the Regulations to follow on a date to be determined, it may be procedurally difficult for rights-holders who are of the view that their property has been acquired to seek a declaration or other redress from a court of competent jurisdiction, before their property is acquired. This creates a “lacuna” in which property may be acquired, without just terms compensation being paid, before the validity of the legislation can be tested.



In the event that the prohibition on the use of trade mark amounts to an “acquisition”, the Government proposes that further Regulations may restrict the size and positioning of the trade marks on the tobacco product and its packaging. This effectively gives the Government a “second bite at the cherry” and creates further uncertainty for manufacturers and retailers whilst the validity of the legislation is tested.

The Explanatory Memorandum specifically states that the Government does not agree that preventing use of a trade mark amounts to an “acquisition” of property and describes section 15 as a precautionary measure only. If so, the Government must be called to account and respect the Constitutional limitations to its powers and provide a clause for just terms compensation to intellectual property holders who the Courts of Australia may determine have had their property acquired by the terms of the Bill.

Alternatively, the Government should at least delay the implementation dates of the plain packaging proposal until after it has been judicially determined whether the proposal would result in a breach of the Constitution or other relevant law.

## 7 NEGATIVE IMPACT ON COMPETITION, CONSUMERS AND RETAILERS

Plain packaging will reduce competition, lengthen tobacco transaction times, confuse consumers, create store security problems and reduce legitimate retail sales and independent shop owners' hard-won profits.

### 7.1 *Adverse effects on consumers and retailers*

Plain packaging will have a negative effect on competition and consequently on consumers. There will be little incentive for retailers to stock new brands and it will be very difficult for a new competitor to enter the market with any chance of real success, or for an existing competitor to launch a new brand. Consequently, consumers will have reduced choice.

Retailers will be one of the stakeholders hardest hit if the Bill is introduced, as security, legitimate sales and resources will be impacted.

If all packs look the same in colour, shape and size and are only distinguishable by brand and variant name, it will take considerably longer for the retailer to identify and retrieve the requested product as colour is an effective differential of product choice. This will inevitably lead to delays at the point of sale, which will have an adverse impact on customer service and transaction times, and will add to retailers' costs by either requiring them to employ more staff or through lost trade. Retailers rely on this distinctive packaging to identify brands and variants and price tickets or screening alone are insufficient to remedy the 'generic' pack proposals in most states. For example, in NSW, price tickets must not contain lettering that is more than 2cm in height or 1.5cm in width (*Public Health (Tobacco) Regulation 2009*, r 15(2)(e)) and the area of the price ticket itself must not exceed 35 cm squared (r 15(2)(d)).

The proposed font and size for brand names and variants to be used on retail packaging for tobacco products (namely, Lucida Sans at 14 point size and Lucida Sans 10 point size respectively) is likely to cause significant difficulties for retailers, particularly where the brand name and variant on the face of the pack must be placed below the graphic health warning (as proposed by section 21(3)), as opposed to above the graphic health warning where it would be easier to read. Furthermore, the only distinguishing feature between products will be the text stating the brand (Lucida sans 14) and variant (Lucida sans 10). This will make it extremely difficult for retailers to read quickly and to serve waiting customers. It is also worth noting that retailers with poorer eyesight or who do not read English well will experience even greater difficulty in reading the brand and variant names. The chances of

customers being served the wrong product will clearly correspondingly increase with the lack of ability to distinguish adequately between brands and brand variants.

Other considerations are the loss of hard-earned profits that legitimate sellers of tobacco would suffer, as counterfeiting increases. In February 2011, Deloitte issued a report to the Alliance of Australian retailers titled “ Potential impact on retailers from the introduction of plain tobacco packaging”, which presented indicative costs to small business of up to \$34,000 p.a. from the introduction of plain packaging. This loss of revenue is comparable to the payroll costs of the small business owner employing 2 part-time equivalents, illustrating that the significant unintended consequences of the proposed legislation could include job cuts as well as threats to the survival of small businesses.

Recently, the United Kingdom Department of Health concluded that:

*"If plain packaging was to be introduced it could be more difficult for retailers to conduct inventory checks and customer service could be made more difficult at the point of sale<sup>61</sup>."*

Store security will also be an issue for small to medium size tobacco retailers. Keeping an eye on the store against shoplifting and other criminal activity, i.e. aggravated robbery, is an essential part of their day-to-day operations. Shop owners need to be vigilant in today's society, and the extra time taken to search through potentially hundreds of identical packages to locate a customer's preference may be all the time needed for shoplifters to take advantage of the situation or for a robbery to occur.

Retailers already experience significant difficulties in selecting the product due to current Point of Sale (“POS”) restrictions and display bans across the various Australian States and Territories, and reading fine print on up to 150 different cigarette products to obtain the correct tobacco brand and variant could lead to consumers being given the wrong product. This could be particularly prevalent in busy high street metropolitan and regional areas.

According to the Master Grocers' Association<sup>62</sup>:

*“the introduction of Plain Tobacco Packaging will cause retailers considerable additional resource and expense in the areas of staff productivity, staff/store security and the high risk of loss of profits – it make retailers' jobs more difficult to perform and will hurt retail margins”.*

Retailers will be confronted with mass confusion on an ongoing basis from all industry stakeholders including store staff, customers, wholesalers, transport companies and so on. Confusion and subsequent loss of profit will occur throughout the supply chain – store ordering, warehouse storage, picking and packing, delivery, checking loads at delivery point, filling fixtures and finally serving customers. Retailers are at risk of margin losses from the beginning of the supply chain to the end user, the customer.

Service to the customer will take longer owing to inadequate brand recognition, creating inefficient and costly customer service practices. Staff will also be put at a security risk as their backs are turned looking for the correct tobacco product requested by the consumer.

ACT, New South Wales, Northern Territory, Tasmanian, Victorian, Western Australian and South Australian State Governments have already legislated to remove tobacco from display, which is already a financial imposition on independent retailers. To introduce plain packaging will make selling a legal product even more precarious and costly because of the resulting increase in counterfeit product.

The Bill suggests a lack of knowledge about the tobacco sector, supply chain, packaging and legislation, which is a reflection of the complete disregard for any informed consultation with ITA and other legitimate stakeholders, and the absence of a detailed Regulatory Impact Statement (“**RIS**”).

## ***7.2 Known effects on businesses and retailers***

The “*Best Practice Regulation Preliminary Assessment*,” performed by the Department of Health and Ageing dated 7 April 2010, evidences that plain packaging will present severe practical and financial difficulties for business. The assessment of compliance costs and other impacts of their proposals clearly states that plain packaging will have a broad impact on businesses and individuals and the economy and that further analysis is required. In accordance with good regulatory practice, a preliminary assessment of this nature requires that a further, in-depth analysis be undertaken in a complete RIS.

### ***The Government Agrees there will be significant Business Compliance Costs***

In section 1, “Business Compliance Costs” the Department of Health and Ageing states business will incur extra costs in keeping abreast of regulatory requirements. It provides a clear admission that businesses will need to purchase materials, equipment or external

services and will incur costs when cooperating with audits and inspections and from other changes to their procedures or practices. In addition, there are other compliance costs including indirect costs or impacts on intermediaries such as accountants, lawyers, banks or financial advisers. Thus the assessment declares that plain packaging will have high compliance costs on businesses.

The assessment states the proposal will have a “broad impact,” that is, it will affect a large number of businesses, and that in such cases “departments and agencies should contact the Office of Best Practice Regulation which will determine the level of regulatory impact analysis required.” Such information has not been provided to the public or the relevant stakeholders.

***The Government Agrees there will be other significant Impacts on Business, Individuals and the Economy***

In Section 2, “Other Impacts on Business and Individuals or the Economy” the assessment confirms plain packaging will affect a number and range of businesses in the industry through changing the ability of businesses to provide a good or service and through significantly altering costs of entry to or exit from an industry. Further, it acknowledges that plain packaging will potentially change the ability of businesses to compete. This is evident through the fact that plain packaging will significantly alter the competitiveness of the tobacco sector. This is obvious given packaging and branding will be the same across all industry participants.

The assessment confirms that plain packaging will potentially impact consumers through altering the choices available to consumers, affect the quality of products to consumers (e.g. with increase of counterfeit products in the market), and add to the complexity of consumer products and services. This is evident through small retailers protesting against the move to plain packaging on the grounds it will make identifying brands more difficult, adding time to shelf stocking and customer service, driving customers to supermarkets and depriving small stores of other sales such as milk and bread.<sup>63</sup> The assessment finally concludes that plain packaging will potentially have other impacts on business and individuals or the economy through transferring risk between business, individuals and government, or impose other financial costs.

## 8 INADEQUATE TIME FOR COMPLIANCE

In circumstances where the complete Regulations and the artwork for the new Graphic Health Warnings have not yet been released, it will be **impossible for ITA to comply with the deadlines** currently proposed. Regulations in their final form, containing the outstanding details not yet addressed by the draft Regulations, may not be released to the public until after 1 January 2012 when the Regulation making power is in place.

Notably, the draft Regulations contain significant omissions, as indicated by the use of “X” set out below:

- Reg 2.1 Physical features of retail packaging - (1) The dimensions of a cigarette pack must not be smaller than [x by x by x] or larger than [x by x by x];
- Reg 2.2 Colour and finish of retail packaging - ... 1(a) all outer surfaces and inner surfaces of the retail packaging of tobacco products, ... retail packaging ... and (b) both sides of any lining of any cigarette pack... must be the colour known as [XXX];
- Reg 2.4 Origin mark - ... (1) An origin mark must ... (c) be printed in the colour known as [XXX];
- Reg 2.5 Measurement mark - ... (1) A measurement mark or trade description must be printed...(d) in the colour known as [XXX];
- Reg 2.7 Tear strips on wrappers - (1) A tear strip on a plastic or other wrapper ... must be (b) not wider than [xmmm];
- Reg 2.8 Brand, business, company, and variant, names - ... must be printed ...(e) in the colour known as [XXX]; and
- Reg 2.9 Fire risk statement - (a) the text of the statement must be in the colour known as [XXX]; (b) the background to the statement must be in the colour known as [XXX].

The implementation of changes to non-tobacco materials for plain packaging would be a colossal exercise. Extensive planning is required, legal review to ensure regulatory compliance, materials supply, printing cylinders for all product and product variants in varying pack sizes (which are known as stock keeping units (“SKUs”)) and production scheduling, logistics, stock management and market supply issues. In addition, ITA is at a

competitive disadvantage in comparison to British American Tobacco Australia (“**BATA**”) and Philip Morris Limited (“**PML**”), with ITA having only 20.5% of the market-share and the majority of ITA’s product (approximately 60% of SKUs) being imported from overseas.

The operative parts of the Bill are scheduled to commence on three different dates:

- On 1 January 2012: the preliminary provisions of the legislation; the power to make Regulations specifying plain packaging requirements; and the provisions that allow authorised investigative and enforcement officer roles to be established commence.
- On 20 May 2012: (**when a lead in time of 11-17 months is required**), the offences relating to packaging and manufacturing non-compliant tobacco products as well as manufacturing non-compliant retail packaging, will commence, along with investigation and enforcement powers of authorised officers.
- On 1 July 2012: (**when at least a further 3 months is required**), the offences relating to selling and purchasing non-compliant tobacco products and tobacco products in non-compliant packaging commence.

It is physically impossible for ITA to comply with such a deadline, in circumstances where there is already less than 12 months for compliance and the final Regulations with complete specifications and artwork for the new Graphic Health Warnings have not yet been released to the industry. The proposed timeline is completely inadequate for the practical implementation of plain packaging and has no regard to practical or commercial realities of the industry, suppliers and retailers.

This is particularly so for those manufacturers, such as ITA, who manufacture a majority of their product overseas. As a result, overseas manufacturers are placed at a competitive disadvantage, attributable to forecasting shipping and import times. For instance, there is a shipping time of eight weeks for imported products from Europe, such as Ireland and the Netherlands, as well as an additional time of up to four weeks required for customs clearance and distribution.

Whilst the Bill no longer prohibits the **importation** of non-compliant retail packaging/tobacco products, the unreasonable timeline for compliance continues to place importers of tobacco products at a competitive disadvantage. Importers of tobacco products

would incur additional costs associated with re-packaging product locally, or alternatively, additional shipping and transport costs by directing non-compliant product overseas.

It is unreasonable to assume that importers of tobacco products, who do not have manufacturing facilities within Australia, can readily re-package non-compliant product for sale without incurring unacceptable write-off costs. Whilst the above timetable gives the appearance of offering additional time for compliance for importers of tobacco products, it will be practically impossible to sell through imported stock within the limited window from 20 May 2012 to 30 June 2012.

The most practical solution to the above is to adopt an extended time for compliance.

Under the current proposal, from the time the final Regulations are promulgated (assuming that they are gazetted on 1 January 2012) to the time of enforcement there is a leeway time of less than 5 months. Even working to the strictest timeframes, a period of at least **11-17 months** is needed for manufacturers to comply, and **a further 3 months** for retailers to sell out stock.

### ***8.1 Uncertainty created by incomplete draft Regulations***

ITA is extremely concerned that the Government has released only incomplete, draft Regulations for consultation and debate. This is a fundamental flaw in the consultation process and fails to take into account material practical concerns faced by manufacturers in preparing for plain packaging reforms. With the exemption of the general requirements for “retail packaging”, the Bill and draft Regulations are silent in relation to the specifications for other forms of tobacco products such as “roll your own” and pipe tobacco. This is of significant concern to ITA, who is the market leader with a substantial number of brands and SKUs in loose tobacco/roll your own and pipe tobacco. At the outset, the most striking omission is the exact *Pantone* colour proposed for the remaining packaging area (described only as “drab dark brown”) and the prescribed colour for the printing of brand, variant, business, company and variant names on retail packaging.

ITA is also concerned that the exact specifications for shape, opening and size are to be mandated in the new Regulations, but that such specifications have still not been released. The draft Regulations do not specify the permitted range of cigarette pack sizes and whether the proposed dimensions will be in the form of a prescribed measurement, or alternatively, standard pack sizes. For instance, whether the range will span from 20s to 50s. We assume



that the full range of standard packs, from 20s to 50s, will be permitted under the plain packaging reforms and also the full range of loose tobacco, from 25g to 50g. However, ITA reiterates that any limitation on pack sizes will significantly reduce consumer choice and impact pricing and competition. Many adults choose to purchase their tobacco products in smaller or larger packs, as they do with other fast moving consumer goods. Different pack sizes help consumers to manage their expenditure and consumption, and have been commonly available around the world for many years. Similar concerns apply to pack sizes for tobacco and pipe tobacco pouches and tins.

In order to maintain competition within the tobacco sector, such specifications should allow some variation in standard pack sizes to account for differences in cigarette heights (for example, Imperial Tobacco's *JPS Superkings* and *Davidoff* variants are a longer cigarette, as are JTI's *More*) and cigarette width (for example, *Superslims*). As many of Imperial Tobacco's brands are manufactured overseas and imported into Australia, it will simply not be economically feasible to manufacture an Australia-specific size and shape and there is a strong risk that the plain packaging reforms will result in imported brands or their variants exiting the market and thereby reducing competition and consumer choice.

The mandating of a rectangular cigarette pack shape, as proposed by section 18(2) of the Bill, could result in the elimination of certain brands, such as the *Davidoff* brand with its octagonal pack design, or *Peter Stuyvesant* and *Camel* "soft" packaging, or other products sold in tins such as *Dr Pat* and *Log Cabin* loose and pipe tobacco. Soft packs allow for a greater consumer choice and have been a form of tobacco packaging in Australia for decades. Accordingly, they should be allowed under the Bill albeit in a prescribed format.

Furthermore, the proposed specification for "matt" foil used for the lining of cigarette packs is contradictory in terms. Foil is used to maintain freshness and quality of tobacco products and inherently contains a degree of "shine". It is also proposed that there be a broad prohibition on the use of "embossing". In the manufacturing process, the term "embossing" can simply mean the pressing of materials to facilitate their running through the machine. Accordingly, a suitable definition of "embossing" should be included in the Regulations to reflect the intention of the Bill.

From a product management perspective, ITA has strong concerns that the removal of brand names and variants from cigarettes will significantly and negatively impact the ability of consumers to give feedback or engage with ITA on other quality control related issues.

Draft Regulation 2.7 also proposes to prescribe the colour of the “tear strip” on a cigarette packet or carton to be either “black or not coloured”. Given that the pack and/or carton itself will be almost entirely covered by dark-coloured health warnings, it is impractical to prescribe a “black or not coloured” tear strip. Tear strip should be in a contrasting colour, so that it is easy to locate and the proposed Regulations should take account of this practical need.

## **8.2 Previous timelines at introduction of Graphic Health Warnings 2005/6**

When compared with the timeline for the introduction of Graphic Health Warnings (“GHW”) in 2005/2006, the timeline proposed by the Bill is unreasonable. Prior to the implementation of GHW, the ACCC consulted and worked with the industry to arrive at a manageable time for compliance, set out as follows:

- September 2004 - *Trade Practices (Consumer Product Information Standards)(Tobacco) Regulations 2004* commenced;
- May 2005 – hard-copy artwork for prescribed GHW released by Department of Health & Ageing;
- 1 March 2006 - date for compliance for manufacturing and importing retail packages in or into Australia products with GHW (Regulation 7(2)), with no restrictions on retail packages being sold through.

ITA significantly extended its resources to comply with this timeline, which allowed over 9-10 months for compliance for manufacturers and importers following the release of the new GHW artworks.

In addition, when regulations for Reduced Fire Risk cigarettes were introduced by the *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008*, a 6 month timeframe was provided for and retailers were allowed to sell through stock.

Due to the extensive nature of the proposed changes, including the increase in the GHW on the front of the pack to 75%, the proposed introduction of entirely new health warnings (details of which have not been provided) and significant changes to the remainder of the pack, past experience indicates that an extended time for compliance is required, and accordingly:

- **Manufacturers and Importers require a lead in time of 11-17 months** from the time full details are released;
- **Retailers require an additional lead in time of at least a further 3 months.**

The Government should release further draft Regulations with full details of the proposals and/or give a longer period for compliance.

An alternative to providing for a strict sell-through date could be to introduce a quota on the manufacture of tobacco products (a method which is comparable to excise quota) which would be more efficient for manufacturers and retailers and would save the limited resources of small businesses owners who will have to organise for the return and replacement of old stock across their whole range by the proposed sell-through date of 1 July 2012.

### **8.3 *The Bill and draft Regulations omit important consumer information***

The Bill and Explanatory Memorandum indicate that the Government’s intention is that the Bill will operate together with, and that there is no intention that the Bill will override, the various forms of regulation of tobacco products that already in force. Furthermore, section 10 of the Bill proposes that other Commonwealth legislation will prevail to the extent of any inconsistency with the Bill (for instance, the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*).

However, owing to the broad prohibition of “marks” on retail packaging other than as permitted by the Regulations (where “marks” is defined to include (without limitation) any line, letters, numbers, symbol, graphic or image), the Bill prohibits important consumer information/devices that are inherently necessary to appear on cigarette packages, including:

- the Tidy-man logo which encourages consumers to carefully dispose of cigarette packaging;
- consumer hotline numbers of manufacturers for consumer information and safety; and
- production numbers and date stamps which facilitate consumer complaint investigation and potential recalls.

The “origin mark” under reg 2.4 of the draft Regulations is restricted to an alphanumeric code. The definition of “origin mark” under reg 1.3 of the draft Regulations specifically

excludes “*a date by which it is recommended that the product be used*”. In addition, the “*measure mark or trade description*” under reg 2.5 of the draft Regulations is restricted to the name and address of the manufacturer as required by Division 4.3 of the *National Trade Measurement Regulations 2009*. Accordingly, there is no provision for the display of consumer hotline numbers of manufacturers by which consumers can obtain information regarding the product, or report potential manufacturing or product quality-related concerns or suspected counterfeit goods.

#### **8.4 Strict Liability and Criminal Penalties**

Given that the penalties in the Bill impose strict liability and criminal offences, the need for sufficient time to comply is made even more acute. Alternatively, if there is not sufficient time for compliance, then as a consequence there may potentially be a gap in the market place for a period of time as manufacturers, importers and retailers will certainly seek to avoid criminal penalties. Such a gap is detrimental to all stakeholders and the benefits of competition in the market place. It would open the door further for illicit tobacco product to flood the Australian market.

Given that ITA does not have specific certain information on plain packaging and that the final Regulations and GHW artwork may not be available until after 1 January 2012, ITA is not in a position to begin implementing packaging changes. Any changes can only be approved and ‘given the green light’ once the form of the Act and Regulations are final. It is from such a point in time, a further **11-17 months** will then be needed to comply with requirements for the manufacture and importation of plain packaging products, and an **additional 3 months** from the expiry of such time for retailers. In summary, either ITA needs the specific information in Regulations or more time to comply once the final Regulations with complete specifications are released.

## 9 AUSTRALIA the “NANNY STATE”

The Bill is unconstitutional and marks the “overregulation” of a free and democratic society and curbs significant freedoms on commercial speech. It overrides the principles of good regulation and respect for individual consumer choice.

### *9.1 Over regulation*

The regulation making power is extremely broad and allows the Government unlimited power to prescribe requirements in relation to the packaging and appearance of tobacco products. Section 27 of the Bill provides that Regulations may prescribe requirements for the retail packaging and appearance of tobacco products, to further the objects of the Act. The Bill sends a warning message to other members of the Fast Moving Consumer Goods sector - which consumer goods will be targeted next? This product-specific regulation for legal goods sets an unwelcome precedent for others, whether it be alcohol, fast food or other consumer goods. Governments have a role to play in disseminating public health messages, but not in making decisions for consumers.

Tobacco is a legal product enjoyed by approximately one in five adults in Australia. For many decades the Australian Government has benefited and continues to benefit from enormous tax and excise payments from smokers and the tobacco industry. It is hypocritical of the Australian Government to continue to allow a legal product to continue to be sold, exploit the excise tax and GST benefits (approximately \$8 billion from smokers in the current year) and simultaneously seek to be the only country in the world to take away the brands, trade marks and intellectual property of the owners of those legal products from which the government derives significant revenue. If it is legal to conduct trade in a certain product, then it should also be legal to use legally-protected trade marks on that product.

As a free and democratic society, Australians do not welcome or require the Government to make choices on behalf of adult consumers in relation to products that are freely available to adults. The prohibition on use of trade marks, logos and branding imposes a greater degree of restraint than the reasonable protection of the public requires, in circumstances where consumers are aware of the health risks that are associated with tobacco use and tobacco products already bear mandatory graphic health warnings occupying 30% of the front and 90% of the back of the packs.

Regulations of the kind proposed by the Bill mark a new level of intrusion of corporate regulation. Information is already provided by way of graphic health warnings and other mandatory information. The Bill adds nothing to the dissemination of consumer information, nor is it proportionate or reasonably necessary. The contrary is true - the Government's proposal would take information away from consumers and, in doing so, take away the use of registered trade marks and related common law rights associated with a legal product. There is no legitimate reason for this level of unprecedented government regulation.

Put simply, those adults who have made the decision to smoke are already sufficiently well-informed of the health risks that are associated with smoking. This is due to the presence of large text and pictorial health warnings, and previously text-only health warnings, which have been present on tobacco packaging in Australia since 1973.

Black and white text health warnings on tobacco packages in Australia were replaced in March 2006 by graphic health warning messages<sup>64</sup>. 14 images (7 Set A images and 7 Set B images) and associated messages are currently printed on tobacco packing and rotated every 12 months. These graphic health warnings currently occupy 60% of the two main surface areas of cigarette packs (30% front and 90% back). In addition, an explanatory message occupies nearly one complete side of the pack.

In their place, the Government proposes that approximately 83% of the main surface of the pack (90% of the back and 75% of the front of the pack) display Government health warnings and that the balance of the pack also be controlled by the Government. The Government cannot have it both ways. The product is legal. It is, therefore, entitled to legal protections and rights that accompany all legal products.

Since 23 March 2010, all cigarettes manufactured and imported into Australia are required to comply with the *Trade Practices (Consumer Product Safety Standard)(Reduced Fire Risk Cigarettes) Regulations 2008*. Compliance with this legislation requires each retail package of cigarettes to carry the additional statement “*Australian fire risk standard compliant. Use care in disposal*”.

Further to these warnings and statements, additional consumer and commercial information is printed on tobacco packaging, including the name and address of the manufacturer or importer together with a consumer number and a barcode. ITA also prints a “Tidyman” logo on all packs as part of our anti-littering and responsibility message to our consumers. The

“Tidyman logo” is present on virtually all fast-moving consumer goods sold in Australia. As a result of all of these requirements the amount of surface area of packs currently available to tobacco companies in Australia for branding purposes is already extremely limited.

Branding allows companies to distinguish their brands from those of their competitors. Brands, trade marks and intellectual property rights play an important role in distinguishing products in the global economy where free trade and competition is encouraged. Brand assets are particularly important to all Fast Moving Consumer Goods (“FMCG”) companies where competition is intense; this is as true of the tobacco sector as of any other sector. This Bill, if passed, would set an extremely unwelcome precedent for the acquisition or expropriation of intellectual property rights in the FMCG industry. Bad laws will adversely impact Australia’s reputation as a destination place for international companies to conduct business in and to invest.

It also sets an unwelcome precedent for other products that come with health concerns. The Government’s own National Preventative Health Taskforce<sup>65</sup> has reported that:

- the total financial cost in Australia of obesity alone, not including overweight, was estimated at \$8.3 billion in 2008<sup>66</sup>;
- based on current trends, there will be six million obese Australians by 2020 and 6.9 million by 2025<sup>67</sup>; and
- the percentage of the Australian population who will be overweight or obese will have grown to a record 73% in 2025. This includes one-third of our children and three-quarters of our adult population<sup>68</sup>.

Will the Government adopt plain packaging for alcohol and unhealthy foods on the basis that youth drinking and obesity levels in Australia are high? This level of regulation is an unwelcome intrusion for any product that is legally available in Australia.

## **9.2 *Suppression of free speech***

While freedom of speech is not expressly conferred under the Australian Constitution (as it is in the United States), or in a Bill of Human Rights (as in the European Union), there is an implied and inherent right to freedom of speech which is recognised by all Australians and groups in Australia.

In 1948 the United Nations' General Assembly adopted the Universal Declaration of Human Rights ("UDHR"). Article 19 affirms the right to free speech:

Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>69</sup>

Members of the Commonwealth Parliament reaffirmed the principles of the Declaration during a sitting on 10 December 1998 to mark the 50th anniversary of the UDHR and pledged to give wholehearted support to the principles enshrined in the Declaration.<sup>70</sup>

Australia is a signatory to the 1966 United Nations International Covenant on Civil and Political Rights<sup>71</sup>, which states that "*Everyone shall have the right to freedom of expression* ..."<sup>72</sup>

The Australian Constitution recognises an implied right of free speech, which has generally been associated with communications in relation to government or political matter, both for individuals and corporations.

Australians consider free speech to be a valued cornerstone of our way of life, consistent with the ideals set out in the Australian Constitution and other treaties/conventions. Freedom of our commercial speech is threatened by the Bill.

Similarly, MPs who voted against the introduction of display bans for tobacco products in New Zealand cited a "basic right to freedom of expression"<sup>73</sup>.

In the absence of any compelling evidence of a public health benefit, the Bill is entirely disproportionate, lacks an evidence base and will erode, rather than enhance, Australia's hitherto commendable international reputation for fairness, free speech and competition.

### ***9.3 Maintaining the principles and obligations of good regulation***

A proper and legitimate function of Government is to safeguard the autonomy of the individual and his or her ability to be self-determining. Key to this is the ability to make informed decisions, whether or not those are "popular" with others, with an awareness of the individual's responsibility as a member of a greater society. It is the role of Government to protect such freedoms, not to remove them or to make such decisions on an individual's



behalf. Such freedoms should be protected by Government and should, in particular, be protected from simple majority rule, political aspirations, or vested interests.

While complex, justification for any restrictions on personal authority, on the basis that the restriction is to prevent harm to others, must be based on solid, factual evidence, rather than emotive speculation. It should be treated consistently with other potential risks, which are either accepted or legislated against by the lawmaker.

When removing any such freedom, a burden of the highest order must be placed on the regulator to examine such risks from a factual point of view so as to be satisfied that the risk is real, is of a quality which has led to similar restrictions for other risks and is incapable of being managed in any other way which does not restrict personal authority.

Convenience or ease of application or enforcement is not enough to justify any restriction where other options are possible. This must be a minimum expectation for any country that attaches value to the freedom of the individual.

As a result of the *Report of the Taskforce on Reducing Regulatory Burdens on Business*<sup>74</sup>, the Government enhanced the regulatory framework to improve the analysis applied to regulatory proposals and, hence, the quality of the regulation. Implicit in the enhanced framework was a commitment by all ministers and their departments and portfolios to consider carefully, at an early stage, the case for acting in response to a perceived policy problem, including addressing the fundamental question of whether regulatory action is required<sup>75</sup>.

This Taskforce found that governments are often attracted to regulatory solutions as a tangible demonstration of government concern because the costs are difficult to measure. It noted that regulation has come to be seen as a panacea for many of society's ills and as a means of protecting people from inherent risks of daily life. The pressure on government to 'do something' becomes heightened by intense, if short-lived, media attention on specific issues. As a result, regulatory solutions tend to be "quick fixes", devised within individual government agency 'silos' and without sufficient rigorous examination. The cumulative impact of the regulation across the government is then poorly understood and is rarely taken into account or reviewed with a view to repeal should unintended consequences occur. In this climate, a 'regulate first, don't ask questions later' culture appears to develop<sup>76</sup>. The Australian Government has made a commitment to improve the quality of its regulation and

to reduce the burden of regulation on the community<sup>77</sup>. The Government must stand by this commitment and reject this proposal for plain packaging.

Additionally, in 2006 the Australian Government, like most member governments of the Organisation for Economic Cooperation and Development (OECD), adopted specific principles for good regulatory processes identified by the Taskforce on Reducing Regulatory Burdens on Business:

- Governments should not act to address ‘problems’ until a case for action has been clearly established. This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all ‘problems’ will justify (additional) Government action.
- A range of feasible policy options (including self-regulatory and co-regulatory approaches) needs to be identified and their benefits and costs (including compliance costs) assessed within an appropriate framework.
- Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.
- Effective guidance should be provided to regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements.
- Mechanisms are needed to ensure that regulation remains relevant and effective over time and capable of repeal or review.
- There needs to be effective consultation with regulated parties at all stages of the regulatory cycle, including post-implementation.

The Bill and the actions proposed should be held up to the same scrutiny as other Bills introduced by the Government.

#### **9.4 Individual responsibility**

The decision to use tobacco products is a matter of informed adult choice. This view is echoed in the 2004 Wanless Report in the UK “*Securing Good Health for the Whole Population*”, which asserted:

*“Individuals are, and must remain, primarily responsible for decisions about their and their children’s personal health and lifestyle. Individuals must be free to make their own choices about their own lifestyles. They are generally the best judges of their own health and happiness; people differ significantly in their preferences and their situations in life. But this does not remove the duties on government and many organisations in society, including businesses, to help individuals make better decisions about their health and welfare. Significant failures in how decisions are made can lead to individuals inadvertently making choices that are bad both for themselves and society. Therefore, to promote improved health outcomes and to reduce health inequalities, the government and other bodies need to act to reduce these failures and assist individuals to make better decisions.”<sup>78</sup>*

*“...for good decisions to be made both for the individual and society as a whole, it is important that:*

- The individual is fully informed about all possible options, and their consequences;*
- The individual is forced to take all the consequences of a decision (including those that affect others) into account;*
- The social context within which individuals make decisions is conducive to making good choices; and*
- Opportunities exist for individuals to engage fully in the management of their health and general welfare; regardless of their background and circumstances.”<sup>79</sup>*

While this is a UK example, it serves to highlight how democratic societies are based on the right of the individual to make choices for themselves.<sup>80</sup>

The health risks associated with smoking are already well known, and have been for decades. We conduct our business on the premise that there is no safe cigarette.

## 10 CONCLUSION

1. There is no credible evidence that the plain packaging of tobacco products will decrease smoking. The Bill will not achieve its stated objectives of reducing the appeal of tobacco products to consumers or increase the effectiveness of health warnings on the packaging of tobacco products. It is an example of over-regulation.
2. The imposition of plain packaging will create a “Counterfeiters’ Charter” by removing the need for complex processes to copy current packaging and will place Australia in breach of its anti-illicit trade obligations under FCTC Article 15. It will also be significantly harder for tobacco companies and the Australian and international authorities to track and trace packaging in order to frustrate and disrupt the illicit market. This could only lead to an increase in the share of the market occupied by the illicit trade in tobacco products and further substantial losses in government revenues.
3. The proposal will place Australia in breach of its own Constitution and its obligations under international law, exposing the Government to significant compensation claims for acquisition or expropriation of the industry’s billion dollar trade mark portfolio. It is a threat to Australia’s international reputation as a place to do business and invest, as evidenced by the legal action initiated by Philip Morris against the Australian Government and expressed in correspondence by multiple international business and commerce bodies.
4. The Bill is anti-business, anti-competitive and anti-consumer and will have significant negative impact on retailers and small business. The diminution of brand competition caused by the prohibition of branded packaging will be detrimental to the retail sector and will restrict the market to current brands currently occupying positions of market prominence.
5. The Government has failed to consult adequately with members of the tobacco industry on the reforms and the proposed timelines before the Bill was prepared and has ignored the practical, commercial realities faced by the industry.

## ENDNOTES

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- <sup>15</sup> "EU targets cigarette smugglers and organized crime, but who's winning?", *NewEurope*, issue. 862, 29 November 2009.
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- <sup>19</sup> Deloitte, "Illicit Trade of Tobacco in Australia – June 2011 update, a report prepared for British American Tobacco Australia Limited, Philip Morris Limited and Imperial Tobacco Australia Limited" June 2011
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- <sup>53</sup> Annex 1(1) TBT defines a Technical Regulation as a “Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”.
- <sup>54</sup> Including Mexico, Argentina, Colombia, Malawi, Brazil, Switzerland, the Dominican Republic, Philippines, Turkey, the EU, the Former Yugoslav Republic of Macedonia, the US, Japan and Zimbabwe.
- <sup>55</sup> The Effects Of Canada's Tobacco Act On Malawi, Communication from Malawi, G/TBT/W/329, 24 March 2010; The Effects Of Canada's Tobacco Act On Kenya, Communication from Kenya, G/TBT/W/330, 16 June 2010; and The Effects Of Canada's Tobacco Act On Uganda, Communication from Uganda, G/TBT/W/331, 23 June 2010.
- <sup>56</sup> [http://www.wto.org/english/news\\_e/news10\\_e/tbt\\_24mar10\\_e.htm](http://www.wto.org/english/news_e/news10_e/tbt_24mar10_e.htm) ; see also comments from the European Union on Notification G/TBT/N/THA/332 at: [http://ec.europa.eu/enterprise/tbt/tbt\\_repository/THA332\\_EN\\_4.pdf](http://ec.europa.eu/enterprise/tbt/tbt_repository/THA332_EN_4.pdf) (accessed 16 May 2011)
- <sup>57</sup> [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds406\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm) (accessed 16 May 2011)
- <sup>58</sup> The EU, Brazil, Guatemala, Turkey, Norway, Colombia, the Dominican Republic and Mexico have reserved their third-party rights.
- <sup>59</sup> See WTO Appellate Body report WT/DS367/AB/R of 29 November 2010 on “Australia — Measures Affecting the Importation of Apples from New Zealand” (DS367); and [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds367\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds367_e.htm) (accessed 16 May 2011)

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