



## **Imperial Tobacco Australia Limited**

**Submission to the**

**Senate Community Affairs  
Legislation Committee**

**for the inquiry into the**

***Plain Tobacco Packaging (Removing  
Branding from Cigarette Packs) Bill 2009***

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## 1 EXECUTIVE SUMMARY

Imperial Tobacco Australia Limited (“ITA”) welcomes this opportunity to contribute to the Inquiry being conducted by the Senate Community Affairs Legislation Committee (the “Committee”) into the *Plain Tobacco Packaging Bill (Removing Branding from Cigarette Packs) Bill 2009* (the “Bill”).

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.

ITA vigorously opposes the Bill and any proposal that recommends the removal of tobacco packaging branding, which would erode and devalue our valuable intellectual property without proper justification. ITA will robustly defend any expropriation of our valuable corporate assets as well as our commercial freedoms and the freedoms of our adult consumers.

No credible research evidence exists to suggest that young people start smoking or that adult smokers continue to smoke because of seeing tobacco branding on packaging. Supporters of plain packaging try to justify its introduction by relying on selective and questionable “made to order” research which often emerges all too conveniently directly prior to the introduction of draft tobacco legislation. 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 and real-world evidence which runs contra to their objective but which demonstrates that there are a number of social and other factors which indicate why young people purchase tobacco products, or why adult smokers continue to enjoy smoking.

There are five main reasons why ITA does not support the Bill.

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

Tobacco packaging is not identified as a reason why young people choose to purchase tobacco products, why adult smokers continue to enjoy smoking or are discouraged from quitting.

**ii. Fails to meet criteria for good and just regulation**

The Bill fails to meet the criteria for good and just regulation, as set out in the Australian Government *Best Practice Regulation Handbook* (November 2006), as no Regulatory Impact Statement has been undertaken.

**iii. Breach of law and international treaties**

Plain packaging raises significant legal questions concerning the expropriation of valuable legitimate corporate assets in which ITA and its shareholders have invested. It risks breaching Australian law and international legal and treaty obligations.

The introduction of plain packaging would seriously damage Australia's international reputation as a supporter of legitimate business and a defender of commercial rights and freedoms, particular in relation to intellectual property.

**iv. Increases 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 adult smokers.

The continued growth in the illicit tobacco market in Australia will undermine State and Federal Government efforts in the area of tobacco control by making it easier for children to access tobacco products and undermining and circumventing legislation on ingredients, emissions and reduced fire risk cigarettes amongst others.

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

**v. Has negative impacts on adult consumers and legitimate retailers**

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.

Put simply, there is no justification for supporting or implementing this Bill. Its objectives are unproven, untested, unnecessary, unreasonable and unjustified. The Bill is not based on sound public policy or on credible and compelling evidence, but on emotive speculation and pressure from the tobacco control lobby.

ITA believes that the Bill will not achieve its stated objectives: it will have no impact on public awareness of the risks associated with smoking; it will not provide enhanced information to smokers; it will not reduce the prevalence of smoking in Australia and it will lead to an increase in counterfeit and contraband tobacco products to the detriment of the legitimate retail sales channel.

## 2 INTRODUCTION

ITA supports sound, evidence-based, reasonable and practicable regulation of tobacco products. We are a responsible, legitimate business and will not accept, without challenge, regulation that is flawed, unreasonable or disproportionate, or regulation that is not based on sound legal or scientific foundations.

Tobacco is a legal product enjoyed by large numbers of Australian adults. ITA believes that the decision to enjoy tobacco products is a matter of informed adult choice and that youth access to tobacco and youth smoking are of concern to Government, tobacco companies and society at large.

It is the role of governments to provide tobacco consumers with clear and consistent messages about the health risks associated with their smoking. We do not challenge those messages. We agree that, in general matters of public health, some individuals may require support in their decision making, but this should be achieved in ways which are educative and enabling, rather than disproportionate, stigmatising, unproven and unnecessary.

Black and white text health warnings on tobacco packages in Australia were replaced in March 2006 by pictorial health warning messages<sup>1</sup>. 14 images and messages are now printed on tobacco packing and rotated every 12 months. These graphic health warnings now 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.

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 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 message. 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 expropriation of intellectual property and would impact Australia’s reputation in the world as a place in which to do business and to invest.

The proposal to introduce plain packaging in Australia has been designed by the tobacco control lobby agenda to “denormalise” tobacco products, tobacco companies and adult consumers. It has nothing to do with reducing smoking prevalence or enhancing awareness of the risks associated with smoking

Denormalisation is not in itself an objective that is compatible with the principles of good regulation of a legal product. The concept is undefined and has no clear, measurable objective. It is, at best, a speculative proposition.

The tobacco control lobby has clearly stated its real intention behind advocating plain packaging: *“if the tobacco industry thinks plain packaging will kill its business, no stronger recommendation is available”*.<sup>2</sup> What they fail to mention or acknowledge is that there is a real and growing alternative to the legitimate tobacco business. The trade in illicit tobacco products continues to grow in Australia and world-wide, organised and coordinated by criminal gangs. Should these latest proposals be introduced they would effectively create a “Counterfeiters’ Charter”, shifting demand for and purchases of tobacco products away from legitimate businesses and into illegal and unregulated channels which have no interest in maintaining a regulated and compliant business.

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 tobacco. We support initiatives that deliver strong and consistent public health messages about the risks associated with smoking. The proposed Bill does not fit into any of these categories.

The decision to enjoy tobacco products is a choice for adults. We do not want children to smoke or use tobacco products. In the absence of legal or voluntary market restrictions, Imperial Tobacco's International Standard for the Marketing of Tobacco Products (the "**Standard**") sets out clear rules and principles to ensure that our activities are directed only to adult consumers of tobacco products in all circumstances.

We encourage governments and other relevant authorities in the markets in which we operate to incorporate the practices laid out in our Standard into national laws and agreements, respecting the principles of informed adult choice and commercial communication.

We endeavour 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. Furthermore, we hold ourselves to standards that either meet or exceed local laws.

We are prepared to work with the relevant authorities on any issue that affects our industry. The tobacco companies have specialist commercial and technical knowledge about their products and about international trade. Although regulators may wish to draw on other sources of information, the knowledge available from the tobacco companies is invaluable in supporting the development and implementation of practical, workable solutions for appropriate tobacco control.



### 3 COMPANY BACKGROUND

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

In Australia, ITA has a total tobacco market share of approximately 20.5%. Our leading brands include Horizon, Peter Stuyvesant, Escort, Brandon, JPS and Davidoff cigarettes; Drum, Champion and White Ox fine-cut (roll-your-own) tobacco; and Tally-Ho rolling papers. 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 \$1.35 billion annually to the Federal Treasury through excise duties and GST. In addition, ITA makes further contributions through corporate taxation, employment taxes and other revenues.

ITA entered the Australian market in 1999 at the specific request of the Australian Competition and Consumer Commission (“**ACCC**”) to ensure competition was maintained in the industry. The ACCC was concerned that the proposed global merger between British American Tobacco (“**BAT**”) and Rothmans International could substantially lessen competition in the Australian tobacco market. This request from the ACCC resulted in ITG establishing ITA and paying the merged company, BAT, a very significant amount of money for a portfolio of 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 our brands.

At the time of ITA’s entry into the Australian market, State and Federal Acts regulating tobacco had been in place for almost a decade which prohibited or restricted the advertising, marketing and sale of tobacco products to Australian consumers.

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

Tobacco packaging is not identified as a reason why people start smoking or why adult smokers continue to enjoy smoking. Our view is that the plain packaging of tobacco products will make no impact on smoking prevalence, quitter relapse or uptake.

It appears that the Bill is based on a philosophy contending that implementing plain packaging will directly cure young people's curiosity and experimentation with tobacco, will stop quitters from relapsing, and will stop people from starting smoking or adults from continuing to enjoy a legal product.

ITA does not accept that the mere sight of a tobacco product or its packaging encourages people to purchase tobacco products or prevents them from making the decision to quit.

### ***4.1 Information not persuasion***

The packaging of tobacco products informs adult 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. The evidence offered in support of these claims is extremely poor, consisting of studies that have serious defects in their design, their methodology and their execution<sup>4</sup>, let alone their interpretation.

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>5</sup>

One of the objectives of the Bill is to remove the pack’s alleged ability to mislead and deceive consumers<sup>6</sup>. ITA strongly denies the allegation that our packaging is designed to mislead and deceive consumers.

We reject the claim that packaging either encourages young people to start smoking or discourages existing smokers from quitting.

Tobacco packaging has not been identified in recent Health Department literature<sup>7</sup> as being amongst the main reasons why young people start to smoke, or why adult consumers continue to enjoy tobacco products.

The main reasons young people start to smoke have long been identified and are clearly documented<sup>8,9,10,11</sup> as largely socio-economic and educational. They are primarily:

- Rebelliousness;
- Peer group pressure;
- Parental and older sibling example; and
- Self image, including low self-esteem and low coping skills.

Packaging of tobacco products is not one of these factors.

Plain packaging is not supported or justified by international evidence, and the Bill does not meet the criteria for good and just regulation. In fact the UK Government has deferred plain packaging stating “*the evidence base needs to be developed*”<sup>12</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>13</sup>

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<sup>14</sup> 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.” We believe that no evidence has arisen since or can be provided 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 would make no contribution to addressing youth smoking initiation. In fact, certain evidence suggests the potential for the contrary.

#### **4.2 Assertions to improved health warning recall not justified**

The Bill states that the effectiveness of package health warnings will be enhanced. This unsupported claim was recently iterated in the NPHT Technical Report. However, the assumption that *“Plain packaging would increase the salience of health warnings”*<sup>15</sup> is incorrect, and relies on flawed research papers. These are examined in detail over the next few pages.

The Beede and Lawson<sup>16</sup> study was used in supporting arguments in the NPHT Technical Report, but it fails to confirm the authors’ own claims that plain packages aid recall of health warnings, as there were no statistically significant differences in recall between plain packs and branded packages.

The Beede and Lawson study consisted of eighty focus group interviews with 568 New Zealand adolescents, with an average age of 13. Branded and plain packs from New Zealand and the US were shown to focus group subjects and, after being removed from sight, the subjects were asked to draw the packs they had observed. Students were then provided with a list of ten health warnings and asked to identify any health warnings that they remembered from the cigarette packages. The authors concluded that adolescents give limited attention to the health warnings on tobacco packages compared to the brand information. They also believed, without supporting evidence, that if tobacco was to be sold in plain packages, the awareness of health risks would be heightened and the promotional messages on the packages would be

inhibited. *“The practical implications of this finding suggest that presentation of cigarettes in plain packs would increase the probable retention and impact of health warning messages.”*

There are several problems with this study. First, though appearing to be a quantitative study, this report cannot warrant reliability, validity or generalisation.

Second, the results (when examined closely) fail to support the authors’ conclusions. For instance, the difference in recall of health warnings between New Zealand brand packs and New Zealand plain packs was not statistically significant.

Third, the researchers argue that plain packs ensure *“a greater proportion of available information can be retained, and consequently the health warnings achieved a greater impact.”* However, the study provides no evidence of this “greater impact” since impact was not measured. The researchers assume that greater recall of information leads to greater impact, but only a behavioural study which investigates the impact of higher recalled warnings on smoking would be able to validate this claim.

Moreover, the results of the Health Canada 1995 Report<sup>17</sup> contradict these findings. In that study, respondents reported that they were well aware of the current package warnings and that *“most people don’t care if there is a warning there, if they are going to smoke they are going to smoke”*. As the panel itself concluded, after examining the respondents’ replies, *“The evidence regarding recall, recognition, awareness and knowledge dimensions suggest that plain and generic packaging would lead to lowered recall, recognition and knowledge of brands, but may not have significant effects with respect to the recall and recognition of health warning messages.”*

It is not clear, based on the Canadian experience with graphic health warnings which fulfil a significant part of the plain packaging agenda by seeking to drastically reduce the branded space on the tobacco package, that such enhanced warnings change smoking behaviour. For instance, according to Health Canada’s Wave studies<sup>18</sup>, following the introduction of the graphic

warnings which were promoted in a belief that they would enhance recall and behavioural change:

- there was no statistically significant decline in the number of adolescents who believed that smoking was not a health risk;
- there was no statistically significant change in the number of adult smokers who believed that smoking is a major source of disease;
- there was a decrease in the number of adult smokers who looked at the warnings several times a day; and
- there was an increase in the number of both smokers and non-smokers who never looked at or read the warnings.

Thus, by each of these indicators of warning enhancement and effectiveness, graphic health warnings were a substantial failure.

Beede and Lawson's claims about the necessity of plain packaging to enhance health warnings are misplaced since these warnings are already satisfactorily performing their public health information function in the current environment.

The second study cited in the NPHT Technical Report in support of the introduction of plain packaging is Goldberg et al<sup>19</sup>, which consists of just one page and provides no evidence that its key assumption – that greater recall of health warnings makes them more effective – is true, since it has no behavioural component that measures smoking. Moreover, its findings are contradicted by the results of the Health Canada Wave Studies<sup>20</sup> which were undertaken following the introduction of graphic warnings in Canada, which found that such warnings made no difference in either youth or adult smoking prevalence or consumption.

As with the other qualitative studies used in the NPHT Technical report to support plain packaging, this study cannot warrant its results as representative, reliable, or capable of generalisation. For example, there is no data provided on the numbers of smokers and non-smokers or of the differing

responses of smokers and non-smokers. Given that part of the claimed advantage of plain packaging is in discouraging smoking uptake or encouraging cessation, in our view this is a questionable and fundamental omission.

The NPHT findings are contradicted by the results of the Health Canada Report and Wave studies<sup>21</sup>. The findings are also contradicted by Rootman & Flay<sup>22</sup> who found that Ontario adolescents' recall of the health warning was not statistically different on plain packs from branded packs.

The implicit assumption about the relationship between health warnings and tobacco packages - unsupported by validated empirical evidence - that certain features (which are never properly specified) diminish the effectiveness of the warnings - rests on a further assumption that health warnings on tobacco packages change smoking behaviour. There is little evidence that this is in fact the case. There is also evidence which suggests why it is likely not to be the case.

For such warnings to change smoking behaviour they must increase adolescents' risk perceptions. Professor Kip Viscusi of Harvard University has shown in a number of studies<sup>23</sup> that adolescent smokers already over-estimate the risks of smoking substantially in terms of risk of premature death, years of life lost and risk of death from lung cancer. It is improbable to expect that these perceived risks of smoking will be increased, regardless of what types of warning or packaging adolescents are exposed to.

Expert evidence also contradicts the claim that adolescent perceptions of smoking risks can be changed because they are inaccurate. Fuller reports that *"Almost all pupils thought smoking causes lung cancer (98%) ... harms unborn babies (97%), can harm non-smokers' health (96%) and can cause heart disease (94%)."* These figures represent risk awareness levels that cannot be increased. As Fuller observes *"These proportions have remained at similar levels since the early 1990s."*

The Bill's aim to enhance the effectiveness of health warnings is not supported by the evidence. It is an unsupported claim that is used by an

overzealous group of anti-tobacco proponents, without foundation. ITA does not accept that plain packaging will have any effect on the salience or recall of health warnings.

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

We also believe that 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. In our view individual adults are the best judges of their own interests. 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.

We believe that, 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.

There is an increasing view by some that, on too many occasions, the tobacco control movement, including in Australia, is now more concerned with political correctness rather than protecting public health<sup>24</sup>. An Australian



survey commissioned by the Cancer Institute found that NSW smokers felt the government agenda on tobacco issues was potentially influenced by a range of other political factors<sup>25</sup>. These concerns even led Jeff Stier, an associate director of the American Council on Science and Health, to state about tobacco control: *“Overstating the case may help the advocates win this political battle but at significant cost to the overall public health war”*<sup>26</sup>. It is vital that the principles of good regulation are upheld throughout the inquiry process currently being undertaken here in Australia, as well as in any future decisions taken by the government on tobacco issues, regardless of any individual personal view or agenda in relation to tobacco.

According to the Australian Government, an efficient regulatory system is essential to a well functioning society and economy and depends on having effective processes and institutions for making and administering regulation in all its forms.

As a result of the *Report of the Taskforce on Reducing Regulatory Burdens on Business*<sup>27</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 carefully consider, 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>28</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>29</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>30</sup>. We believe that the Committee should ensure the government stands by this commitment and rejects 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.

ITA believes that the Bill and the actions proposed should be held up to the same scrutiny as those Bills introduced by the Government.

#### **4.4 Individual responsibility**

It is Imperial Tobacco's view that the decision to use tobacco products is a matter of informed adult choice. Our 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>31</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>32</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. As

Senator Fielding stated in the Second Reading of the Bill *“We live in a democracy and I support the right of people to smoke if they wish.”*<sup>33</sup>

ITA believes that 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.

We agree that, in general matters of public health, some individuals may require support in their decision making, but this should be achieved in ways which are educative and enabling, rather than disproportionate, coercive or discriminatory.

#### ***4.5 The real reason why tobacco control groups promote plain packaging***

Comments like those recently made by Professor Chapman provide the real reason why anti-smoking tobacco control advocates want to see the introduction of plain packaging. It appears to have absolutely nothing to do with improving the salience of graphic health warnings or protecting children; it is simply about trying to put tobacco manufacturers out of business: *“that’s the whole idea.”*<sup>34</sup>

The recent statement in the 2008 National Preventative Health Taskforce (“NPHT”) Technical Report that *“if we act quickly, Australia can overtake the British Government and become the first country in the world to mandate that cigarettes be sold in plain packaging”*<sup>35</sup> confirms that plain packaging proposals are based on attempts to try and claim the higher ground in some sort of public health competition that exists between various anti-tobacco advocates and their organisations. This approach is entirely invalid for good government and appears to reflect a self-serving and careerist approach amongst tobacco control advocates, many of whom travel to taxpayer-funded international conferences to promote their work and win further funding for their efforts.

## 5 BREACH OF LEGAL AND INTERNATIONAL TREATIES

Plain packaging poses significant legal questions around brand expropriation and risks breaching Australia's obligations under international law and treaties. The Bill would impinge upon intellectual property rights and freedom of expression and restrict fair competition. We believe that there is no credible evidence to establish that plain packaging could be a fair measure.

ITA is extremely concerned about the erosion of our valuable intellectual property rights and company assets. We believe and our shareholders expect that those valuable corporate assets are used to enable adult consumers to distinguish our high quality products from those products of our competitors.

Regulation that requires plain packaging will damage valuable corporate assets in which Imperial Tobacco and its shareholders have invested for many years and risks placing 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>36</sup>

The Bill would also deprive ITA of the use of its trade mark property, including 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 *Trade Practices Act 1974* (“**TPA**”) and Australian common law.

### **5.1 Breach of Australian Constitution, Trade Marks Act 1995**

ITA believes that 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 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.

Under the *Trade Marks Act 1995*, a “trade mark” is defined as a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided from any other person. A “sign” is defined as including the following or any combination of the following, namely, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent.

Accordingly, words, devices, labels, aspect of packaging, shape and colours are protected by Australian trade mark law. ITA has a number of 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”.

The *Trade Marks Act 1995* imposes a positive obligation to use our trade marks, or they can be struck off the Register of Trade Marks for non-use after

a period of 3 years. Our trade mark portfolio comprises letters, words, names, signatures, numerals, devices, brands, headings, labels and aspects of packaging. The Bill will mean that they will not be able to be used, essentially depriving the registered proprietor of the benefit of the registered trade mark and making the trade marks vulnerable for expungement due to non-use after 3 years. The Bill would effectively force tobacco companies/trade mark owners into a position where our registered trade marks (for which Imperial Tobacco paid a significant amount of money in 1999) become vulnerable to applications for their removal on the basis of non-use and they may not be eligible for renewal.

ITA pays application, registration and renewal fees to the Australian government in order to protect our trade marks. Since the Bill would have the consequence of facilitating applications for non-use of a registered tobacco product's trade mark, at the bequest of a third party, then it will be seen to operate as to an acquisition of our property that is not done on just terms. The sole reason for the non-renewal or non-use of our trade marks would be the operation of the Bill.

## ***5.2 The Bill falls outside the scope of the Trade Practices Act***

ITA believes that the proposed section 65DA (which is subject to section 65D in its present form) is *ultra vires* beyond the scope permitted by section 65D of the TPA and therefore invalid.

The Bill contains an implicit acknowledgement that, in its present form, the TPA does not contain the necessary power to enact the proposed changes. The Bill proposes to amend the TPA to expand the type of regulations that may be made in relation to product information standards (Schedule 1). In turn, the Bill contains those regulations that are proposed under the expanded power (Schedule 2), by way of an amendment to the existing *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*.

Section 65D(2) of the TPA states that the regulations may, in respect of goods of a particular kind, prescribe a consumer product information standard

consisting of such requirements as to the disclosure of information relating to performance, composition, contents etc.

The proposed regulations are not “reasonably necessary” within the meaning of section 65D, the purpose of which is to supply consumers with information about a product. The proposed regulations do not “supply consumers with information about a product”, the contrary is true - they take the information away.

The Bill is not providing consumers with consumer product information. In fact, the Bill appears to remove valuable information relating to tobacco products such as identification of brand variant (e.g., Peter Stuyvesant **Filter**, Peter Stuyvesant **Classic** and Peter Stuyvesant **Fine**), country of origin statement, tidy-man logo, Trade Measurement compliance, manufacturing production numbers and date stamps. We believe the regulations proposed by the Bill are not reasonable or proportionate as they are not *“reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods”* under section 65D (2).

Although the “reasonableness” may raise issues of public policy such as health, it is not reasonable or proportionate to do so by taking away the use of registered trade marks and related common law rights.

The proposed Bill adds nothing to the dissemination of consumer information. Information directed to those using the goods (i.e., adults who choose to smoke) is already provided by way of graphic health warnings and other mandatory information. Taking into account all of the circumstances, the plain packaging adds nothing and does not “give” any information to this audience at all.

The information already provided is for “persons using the goods” as prescribed under the TPA. It is not directed to non-users of the goods (for example, non-smokers or children). It is information directed at persons using the goods, i.e. adults who choose to smoke. It appears from the Bill itself, and Senator Fielding’s Second Reading Speech of 20 August 2009 (“**Second Reading Speech**”)<sup>37</sup>, that the purpose of plain packaging is apparently to



deter non-users by making the packs less attractive to them. However, that is not a purpose for which the making of regulations designed to “*give persons using the goods information*” is prescribed, being neither informative nor directed at persons using the goods.

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 adult consumers are aware of the health risks 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.

### **5.3 *Suppression of free speech***

While freedom of speech is not conferred in 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 individuals 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>38</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>39</sup>

Australia is a signatory to the 1966 United Nations International Covenant on Civil and Political Rights<sup>40</sup>, which states that “*Everyone shall have the right to freedom of expression ...*”<sup>41</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.

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.

We expect that the Committee will share this view, acknowledging Australians' right to freedom of speech, which is threatened by the Bill.

#### ***5.4 Infringement of TRIPS Agreement and Paris Convention***

The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994 ("**TRIPS**"). It is administered by the World Trade Organisation ("**WTO**"), of which Australia became a member on 1 January 1995.

Article 2 of TRIPS specifically incorporates Articles 1 through 12, and Article 19 of The Paris Convention for the Protection of Industrial Property 1888 ("**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.

To "encumber" is defined by the Oxford English Dictionary as to hamper, impede or burden. In our submission, the Bill unjustifiably encumbers our trade marks by imposing special requirements in relation to their use (or non-use), namely that our trade marks only be used in a single colour black in a single font (Helvetica, 12 point) on single coloured matt brown (PMS 154) packaging with specified dimensions. This means that a large number of our

trade marks, which include letters, words, names, signatures, numerals, devices, brands, headings, labels and aspects of packaging will be rendered useless and worthless.

The form of use and non-use required by the Bill will be clearly detrimental to our ability to use our trade marks to distinguish our goods from those of our competitors. The removal of distinctive 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.

Senator Fielding's Second Reading Speech is explicit that the Bill proposes to ban the logos and trade marks on cigarette packaging:

"Under the provisions of this Bill, tobacco companies will be **banned from advertising their logos or trade marks on their products**. Instead, all cigarette and other tobacco packets will have plain labelling."<sup>42</sup>

The Bill is clearly contrary to Article 20 of TRIPS. Australia would be in breach of its international trade obligations under the TRIPS Agreement, effectively eradicating Australia's support of internationally accepted minimum standards for the protection of intellectual property rights.

In a context where Australian law already mandates significantly sized graphic health warnings on packaging, the additional measures proposed by the Bill are unreasonable and unnecessary.

### ***5.5 Plain packaging is not a WHO FCTC requirement***

Despite continual misleading suggestions and statements to the contrary, the introduction of plain packaging is NOT an obligated requirement under Article 11 of the World Health Organisation's ("**WHO**") Framework Convention on Tobacco Control ("**FCTC**").

In November 2008, the third Conference of the Parties (CoP) to the WHO FCTC discussed two sets of non-binding guidelines; each included 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.

The Committee should be aware that Australia already fully complies with **all** its treaty obligations in the area of packaging and labelling<sup>43</sup>, as confirmed in the 2007 Australian Government (Department of Health and Ageing) *First Two-Year Report on the implementation of the WHO FCTC*<sup>44</sup>. No further steps are required.

#### **5.6 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 standing in the areas of intellectual property, freedom of trade and as a place to invest in brand development and to do business on a just and fair footing.

If enacted, the Bill would be subject to challenges at both Constitutional and administrative law level, as well as any related proceedings brought by aggrieved WIPO Member States.

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

## 6 INCREASED TRADE IN ILLICIT TOBACCO

Plain packaging would exponentially increase the production and availability of counterfeit tobacco products, increasing the illicit trade in tobacco and (amongst other things) reducing future tobacco excise and general sales tax payments to Federal Government, whilst doing nothing to reduce smoking prevalence and incidence.

Plain packaging would 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 (“**ATO**”) and the Australian Customs Service (“**ACS**”).

### 6.1 *An increasing problem*

Counterfeiting is an increasing problem throughout the world<sup>45</sup> and tobacco products are very much a part of this criminal activity, supporting organised crime and international terrorism<sup>46,47,48,49</sup>. According to recent World Customs Organisation (WCO) estimates, approximately 5% of the 5,700 billion cigarettes<sup>50</sup> consumed annually on a worldwide basis are now counterfeit and that number is rising daily. More than 12% of all tobacco consumed in Australia is now illegal, equating to over \$600 million a year of lost Government revenue in unpaid excise<sup>51</sup> and the circumvention of all tobacco-related regulatory efforts.

With its high excise regime for tobacco products, Australia is a prime target for smugglers who are turning increasingly to counterfeit tobacco products as a source to supply the Australian market<sup>52,53,54</sup>. The February 2010 PricewaterhouseCoopers (“**PWC**”) report *Illegal tobacco: counting the cost of Australia’s black market*<sup>55</sup> has identified a shift in the black market from locally produced loose tobacco (chop chop) to an increase in smuggled counterfeit and contraband cigarettes.

The trade in counterfeit 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 counterfeit products, which fund organised crime and have a wide impact on our society.

## **6.2 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. 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 European and the Middle East).

However, if the Bill’s plain packaging requirements are implemented, it will make the counterfeiters’ job both cheaper and easier. The Bill proposes only one standardized pack size (25s), only one set of dimensions, only one colour, only one font and only one text colour.

There is a growing problem of counterfeit fine cut tobacco brands<sup>56,57,58</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 counterfeit products. Tobacco companies introduce subtle packaging design changes and 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 adds to the delegitimisation of the product and consequently will serve to confuse the Australian consumer, who will come to regard illicit products as of similar validity to genuine branded products.

Worryingly, counterfeit products are not manufactured according to the regulatory requirements demanded of products from legitimate manufacturers. Nor do they adhere to stringent production quality controls that apply to our brands, and often contain contaminants and fungi that pose an immediate risk to smokers' health<sup>59,60</sup>. Counterfeit products, by their nature, do not carry Australian excise, duty or GST, nor do those who sell them contribute to the Australian economy. All of this should be of considerable concern to the Committee.

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

The Bill is just another example of unjustified and unproven proposals for further tobacco regulations that has no impact on meeting public health objectives, but would increase the illicit trade in tobacco products. Many countries globally are now experiencing the effects of a vibrant illicit tobacco trade as a result of unproven tobacco control policies, influenced by large, well-funded and embedded global tobacco control organisations and lobby groups. The tobacco control lobby is never held to account for recommending policies that are unsuccessful in achieving their stated aims and that are shown to have negative unintended consequences. They continue simply to demand even more misguided regulations.

Ireland, Iceland and several provinces in Canada have implemented tobacco retail display policies that were promised 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>6162</sup>

New 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>63</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>64</sup>.

Any measures that have the effect of increasing the illicit trade in tobacco will undermine efforts to reduce smoking through other measures (including tax increases). An increase in illicit trade would have a detrimental impact on youth smoking prevention efforts by providing children with uncontrolled access to cheap tobacco. It will also increase their acceptance of criminal activity as the norm and expose them to criminal gangs and probably to other illegal activities undertaken by these people.



## **7 NEGATIVE IMPACT ON TOBACCO 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***

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.

The proposed mandatory pack size (25s) would significantly reduce consumer choice, impact pricing and eliminate available pack size options.

Many adults choose to purchase their tobacco products in smaller or larger packs, as they do with many 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.

The Bill appears to omit important consumer information/devices that are legally required or inherently necessary to appear on cigarette packages, e.g.:

- country of origin statements which are required by federal legislation.
- the Tidy-man logo which encourages consumers to carefully dispose of cigarette packaging.
- bar codes which provide scanning convenience and assistance to retailers.
- Trade Measurements which are required by State legislation to appear on the front of retail packages.
- solid tear tape on transparent packaging which assists retailers and consumers in opening cigarette cartons/packets.
- production numbers and date stamps which facilitate consumer complaint investigation and potential recalls.

- Reduced Fire Risk (“**RFR**”) cigarette statement which is required by Federal regulation.

## **7.2 Adverse effects at retail**

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

If all packs look the same in colour, shape and size and are only distinguishable by brand name, it will take considerably longer for the retailer to identify and retrieve the requested product. 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 lose trade.

Other considerations are the loss of hard-earned profits that legitimate sellers of tobacco would suffer, as counterfeiting increases.

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>65</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 a criminal to take advantage of the situation.

Retailers already have a hard enough time 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:

“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.

It will be a glaring mistake of very large proportions should Senator Fielding's Plain Tobacco Packaging Bill be adopted. 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 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.

Tasmania, Victoria, ACT and New South Wales State Governments have already legislated to remove tobacco from display which is already a financial impost on independent retailers. To introduce plain packaging will make selling a legal drug even more precarious and costly.”<sup>66</sup>

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 informed consultation with ITA and other legitimate stakeholders, and a lack of a Regulatory Impact Statement (RIS).

## 8 CONCLUSION

1. The balance of the available research and evidence does not provide any compelling basis on which to suggest that the plain packaging of tobacco products would have the effect of deterring young people from smoking. In fact, certain evidence suggests the potential for the contrary.
2. There is clear evidence that plain packaging will not enhance the effectiveness of health warnings on tobacco packaging.
3. The imposition of plain packaging will create a "Counterfeiters' Charter" by removing the need for complex processes to copy current packaging. 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 a further loss in government revenues.
4. The diminution of brand competition caused by the prohibition of branded packaging would be detrimental to the retail sector and would restrict the market to current brands currently occupying positions of market prominence.
5. The erosion of intellectual property rights risks compromising legal and treaty obligations to which the Australian Government is accountable. It would set a dangerous legal precedent for other companies and sectors outside of the tobacco sector and potentially damage Australia's international reputation and standing as defender and protector of international intellectual property rights.

## ENDNOTES

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- <sup>59</sup> R Bittoun, *The Medical Consequences of Smoking "Chop-Chop" Tobacco*, Commonwealth Department of Health and Ageing, December 2004.
- <sup>60</sup> "Blackmarket tobacco more damaging", *The Australian*, 7 July 2008.
- <sup>61</sup> "Contraband killing convenience stores", *Globe and Mail*, 7 April 2010
- <sup>62</sup> "Cigarette sales begin to drag in Dublin as counterfeiters make mark", *Tribune*, 24 January 2010

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<sup>63</sup> Internal figures.

<sup>64</sup> “Illegal Tobacco Sales: A Crisis for Canadians”, Canadian Tobacco Manufacturers’ Council, 2008.

<sup>65</sup> UK Department of Health, *Consultation on the Future of Tobacco Control*, para. 3.80, p.42.

<sup>66</sup> Master Grocers of Australia, “National Tobacco – Senator Fielding’s Plain Tobacco Packaging Bill Senate Enquiry into Plain Tobacco Packaging”, *Independent Retailer Magazine*, February 2010, p. 6.