



**BRITISH AMERICAN  
TOBACCO  
AUSTRALASIA**

**British American Tobacco Australia Limited  
Submission in response to the Consultation Paper  
Tobacco Plain Packaging:  
Proposed approach to non-cigarette tobacco products**

**Submission to the Department of Health and Ageing**

28 October 2011

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## PLAIN PACKAGING EXECUTIVE SUMMARY

### EXECUTIVE SUMMARY

British American Tobacco Australia (BATA) welcomes the opportunity to respond to the Consultation Paper issued by the Department of Health and Ageing (**DoHA**) on Tobacco Plain Packaging: Proposed approach to non-cigarette tobacco products (the **Consultation Paper**).

BATA notes that DoHA is seeking comment on the Government's proposed approach to implementing plain packaging for non-cigarette tobacco products. However, BATA believes it is important to look at plain packaging as a whole. Failure to do so could see important unintended consequences of the legislation ignored.

Whilst addressing issues which are specific to non-cigarette tobacco products, BATA's submission also looks at the issue as a whole and again draws DoHA's attention to all issues surrounding the implementation of plain tobacco packaging.

For the reasons outlined below, BATA is opposed to the introduction of plain packaging. We believe there are significant legal obstacles to its implementation, that the policy is not supported by real evidence and that there are significant consequences and implications which may arise if the *Tobacco Plain Packaging Bill (TPP Bill)* and the *Trade Marks Amendment (Tobacco Plain Packaging) Bill (TMA Bill)* are passed.

Following is a summary of BATA's objections to plain packaging.

#### Plain packaging faces significant legal obstacles and issues

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

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

BATA believes the proposed legislation threatens the intellectual property rights of legal entities within Australia and could be used as the first step by regulators to control or remove intellectual property rights for products deemed objectionable. Simply citing 'public health' reasons, with little or no real evidence to support such claims, in our respectful submission is not a sufficient reason for the Government to disregard its obligations under the international treaties to which it is a party.

## Improper reliance on the FCTC to justify the TPP Bill

In justifying the TPP Bill, its drafters assert improperly that the Framework Convention on Tobacco Control (**FCTC**), an international convention to which Australia is a signatory, **obligates** Australia to enact the TPP scheme.

Notably, this assertion is made in spite of the fact that no other party to the FCTC subject to this alleged “obligation” has yet felt compelled to enact similar laws on plain packaging. This is not surprising: as a factual matter, the FCTC itself does not even contemplate “plain packaging.”

## Plain Packaging Scheme acquires BATA’s intellectual property

By virtue of the prohibition on the use of trade marks, markings and other intellectual property, the TPP Bill creates an entire class of intellectual property, in particular, graphical trade marks, that are for all intents and purposes utterly devalued and restricted to goods only in Class 34 for tobacco products, are rendered unusable. This is so, in spite of the years of investment made in that property.

The Government’s awareness that the proposal is an acquisition of tobacco companies’ property is clearly underlined by section 15 of the TPP Bill, which contemplates that in the event the plain packaging is held to be an acquisition of IP rights, it will not apply, thus forestalling the Department’s obligation to compensate tobacco companies on just terms for their acquired property under section 51(xxxi) of the Constitution.

The plain packaging proposal’s near-total acquisition of tobacco companies’ rights in their existing intellectual property cannot be excused by mere technical amendments to the *Trade Marks Act* contemplated by the TMA Bill that provide tobacco companies a hollow opportunity to apply for and defend trade marks that as a practical matter, they will never be able to use.

***As there is no evidence that the TPP Scheme will be effective, the proposal’s likely unintended side effects do not warrant its adoption.***

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

There is no real world data to demonstrate that the plain packaging of tobacco products will be effective in discouraging youth initiation, encouraging cessation by existing smokers, or increasing the salience of health warnings, a point acknowledged on a number of occasions by the Health Minister herself. See: <http://www.theaustralian.com.au/national-affairs/opinion/cigarettes-may-be-too-hot-to-handle/story-e6frqd0x-1226063986305>).

The likely risks arising from a plain packaging scheme, however, are much clearer, and indeed, may lead to an increase in the uptake of smoking and/or a decline in cessation rates, precisely the opposite of the scheme’s intention.

The Government has relied on a number of studies, research and data to purportedly support its claims that plain packaging will achieve its desired purpose. BATA does not consider that those studies, research and data supports the proposition of plain

packaging. A recent international report by Deloitte<sup>1</sup> found that packaging laws have not directly reduced smoking, and calls into question whether plain packaging will achieve government health objectives.

### **Plain packaging should be properly considered**

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

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

### **Concerns with plain packaging are shared globally by companies and business groups**

To date there have been two recent legislative reviews in relation to plain packaging - in Australia and the UK. In both reviews, groups from retailers, to intellectual property groups, to think tanks all raised their concerns around the unintended consequences around plain packaging.

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

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

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

### **Plain packaging could lead to an increase in illegal tobacco trade**

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

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

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

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

### **Plain packaging will give rise to other significant unintended consequences**

The TPP Bill will wipe out a key means of differentiating one tobacco product from another — intellectual property, particularly trade marks. Without a means of differentiating their products by brand, manufacturers will be forced to differentiate their products by price. This will most likely create a downward spiral of tobacco prices, with manufacturers looking to make up losses in market share that will readily be captured by cheaper local brands or new entrants to the market encouraged by the now-levelled playing field created by the TPP Bill.

Such a price war could well lead to smokers who quit due to increases in excise on tobacco returning to smoking, or individuals who had avoided smoking due to cost concerns now being willing to take up smoking.

Therefore, not only will the intentions of the TPP Bill not be met, but the introduction of plain packaging will potentially give rise to these and other significant unintended consequences, which include:

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

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

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

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

We note that the final details of how the TPP Bill will operate, that is the regulations, will not be finalised until after 1 January 2012, meaning that legitimate tobacco manufacturers would have, at best, 120 days to develop print drums to print the artwork (including Graphic Health Warnings (**GHWs**)), overhaul their manufacturing process, order and make relevant new machinery, train workers on new equipment and

manufacture and package sufficient product to sell and replace existing product in stores. With respect, this is impossible.

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

### **Recommendation**

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

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

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

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

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

## **1. BACKGROUND**

### **1.1 BATA and the Australian tobacco market**

With approximately 45.6 percent of the legitimate cigarette market<sup>2</sup>, BATA is the country's leading tobacco company. We manufacture and distribute cigarettes and roll-your-own tobacco and distribute pipe tobaccos and cigars. Our brands include Winfield, Benson & Hedges, Dunhill, Pall Mall and Holiday.

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

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

### **1.2 BATA supports evidence-based and proportionate regulation**

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

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

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

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

This ensures there is a clear understanding of all regulatory options to address a given problem, and possible administrative and compliance mechanisms, and associated benefits, costs and risks<sup>3</sup>. For this reason, good regulatory practice dictates that tobacco manufacturers should be included in the consultation process to develop effective tobacco regulation.

BATA is therefore surprised that the Government has sought to introduce the TPP Bill and the TMA Bill in the absence of any meaningful consultation with the tobacco industry

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

<sup>3</sup> OBPR website, "Effective Consultation and Effective Regulation" (on line)

in Australia nor has it conducted a thorough RIS process. Further, it appears that the Government has had no regard to the submissions to the Exposure Draft from a number of legitimate tobacco manufacturers, including BATA. It also appears to have had no regard to any submissions from any party who opposes the TPP Bill and TMA Bill.

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

## 2. FLAWS WITH THE PROPOSALS IN THE CONSULTATION PAPER

### 2.1 Legal flaws with the proposal

In section 3 below, we identify many of the legal concerns with plain packaging as a whole. These are arguments that we have made in previous submissions in respect of plain packaging for tailor made cigarettes and they apply equally to non-cigarette tobacco products.

However, in addition to these well founded concerns, BATA has identified a further legal problem in what has been proposed in the Consultation Paper. The scheme proposed by the Consultation Paper permits either:

- the wholesale repackaging of non-cigarette tobacco products in packaging bearing either:
  - the brand/variant name printed thereon; or
  - a blank white space on which the brand/variant name can be handwritten in black ink; or
- the overstickering of non-compliant packaging with pre-printed adhesive stickers in the specified colour/style bearing the brand/variant name, or a blank white space on which the brand/variant name can be handwritten in black ink.

In the case of cigar bands, the proposed legislation will permit the removal altogether of those bands, replacement of the original band with a compliant band, or overstickering of the band with pre-printed adhesive stickers in the specified colour/style bearing the brand/variant name, or a blank white space on which the brand/variant name can be handwritten in black ink.

By expressly permitting not only the complete obliteration, removal, or defacing of trade marks placed upon tobacco products manufactured overseas for use in Australia, but also, impliedly the destruction of the original packaging in which those products were manufactured for sale, the proposed legislation purports to permit conduct which has long been prohibited under sections 145 and 148 of the *Trade Marks Act*: the unlawful removal or falsification of trade marks on products without the trade mark owner's authorisation. There is good reason to criminalise such conduct: permitting third parties to alter, deface or remove trade marks, or even the wholesale repackaging—or worse yet, rebranding—of products without the trade mark owner's authorisation destroys (1) consumers' ability to be certain they are buying a fresh, unadulterated product of their choice sealed by the manufacturer; and (2) the ability of the trade mark owner to control the integrity of its trade marks.

Like many products consisting of organic materials, cigars, RYO tobacco and other tobacco products have a limited shelf life, and depend on the integrity of packaging, sealed at the time of manufacture, to ensure the product is fresh and unadulterated when purchased. As well, the placement of trade marks on a product's packaging by a trade mark owner clearly communicates to consumers its identity, and confirms that products bearing the trade mark are identical in quality to previous products the consumer purchased bearing that same trade mark.

The plain packaging regime contemplated by the Consultation Paper not only allows for importers to scrawl the brand name of the product on a label by hand, it also contemplates removal by the importers of such products from their original sealed packaging, and placement of those products in packaging that may comply with the plain packaging law, but does not bear any resemblance in quality or function to the packaging expressly designed by the original manufacture to keep the tobacco product sealed and fresh. As well, the removal of any such fragile products from their packaging, particularly the removal of bands from cigars, poses a very high risk of damage to those products.

This will directly impact consumers who will now be at risk of purchasing stale, adulterated and/or damaged products exposed to the air or mishandled during repackaging. It will also harm the reputation of brand owners, who will have no say or control over the manner, method and materials used by importers, who will only be concerned with the external appearance of the packaging and not the product inside.

As well, by expressly permitting repackaging, there is a very real risk that unscrupulous importers, permitted by law to unseal and remove tobacco products from their original packaging, will feel no compunction about placing those products in packaging bearing the wrong trade mark, or worse, another company's trade mark, knowing that consumers will have no method at all to confirm the true nature of what they are buying due to this change in the law. Given this, the law proposed by the Consultation Paper has the clear potential to spur on counterfeiting or other types of consumer confusion or deception.

These are exactly the evils that sections 145 and 148 of the *Trade Marks Act* are intended to prevent.

## 2.2 Practical flaws with the proposal

Putting to one side the legal problems that are raised by plain packaging generally and the proposals contained in the Consultation Paper in particular, BATA has also identified various practical difficulties with the Government's plain packaging proposal.

In addition to the logistical/practical difficulties that apply to plain packaging for all tobacco products identified in section 8 below, BATA has identified the following difficulties and areas of ambiguity which are specific to the Consultation Paper.

BATA requires further clarity on a number of points of information not currently specified in the Consultation Paper as follows:

- **Positioning of the alphanumeric code on the RYO Pouches.** BATA currently has a Manufacturer's code and a "Best Before" date code printed across 3 lines on the back face of the pouch and requires both of these for product traceability and freshness purposes due to the nature of the product.
- **The frequency and position of Measurement Marks for RYO pouches.** BATA currently has these printed on the front and 2 sides of the pouch for ease of reference by consumers. It is unclear whether this would still be permissible under this proposal.

- **Placement of Trade Description / Name and Address of company.** The placement of this is not identified in the regulations and this needs to be clarified. BATA currently places this below the flap of RYO pouches.

In order to be able to comply with the Government's plain packaging proposal, BATA requires the following capability on RYO packaging (all of which is currently not clarified in the Consultation Paper):

- As stated in our previous submissions, correspondence and meetings with DoHA, BATA has significant concerns regarding our ability to fully comply with the timeliness set out in the TPP Bill and Consultation Paper, especially given that at the time of writing, the TPP Bill has still not yet become law.
- BATA is required by the *National Trade Measurement Regulation 2009* that the quantity quoted in the measurement mark on the two principal display panels on an RYO pouch be prefixed with the AQS (Average Quantity System) "e" mark (3mm high minimum dimension) to denote that the weight measurement meets the prescribed standard. The current TPP regulations firstly, do not specifically allow the use of this mark, and secondly require marks to be in Lucida sans 10pt font which would contravene the AQS defined standards. BATA is seeking for this marking to be accommodated as per the AQS standards as part of the TPP regulations.
- On all BATA RYO pouches, a resealable tab is used to hold the flap of the pouch closed after each use. This is the only means for sealing the pouch once it has been opened. In the absence of such a sealing mechanism, loose tobacco is likely to fall out of the pouches, causing wastage, consumer frustration and litter. This tab is in fact made up of two individual tabs layered on top of each other to enable the consumer to remove the first one once its adhesive qualities have been lost, and use the second one for the remainder of the product's shelf life. These two tabs are identified by two different plain colour ends so that the consumer can separate them. The current proposal does not specify the use of such a tab in the first instance, nor does it accommodate the use of colours to distinguish the ends. The allowance of such tabs, with appropriate mandated colours, would ensure both product integrity and be consistent with the TPP Bill's aim of removing decorative features from tobacco packaging.
- No allowance is made currently in the TPP Bill for a complaints call centre number to be included on tobacco packaging. BATA recommends that provision be made for this or some other mechanism, whether it be an email address or website, so that consumers are able to notify tobacco manufacturers of any issues regarding their purchase, which may include potential product recall scenarios.
- The accommodation of a 75% Graphic Health Warning on the back of the pouch requires the current flap to be extended to accommodate the larger Health Warning. This is because if the Graphic Health Warning was printed across the flap and the base of the pouch, the image would be distorted and possibly rendered illegible unless there was a perfect alignment each time the pouch was

closed. This could be avoided by having a larger flap so that all of the health warning appeared on just the one surface. Extending the flap would however require a redesign of the packaging and changes to BATA's current machinery in order to manufacture product in this new packaging. Any such requirement would further impact on the compliance timeline, limiting BATA's ability to comply with the proposed start date for compliance with the requirements of the TPP Bill and its regulations.

- A Standard 13 digit Barcode, of a minimum width of 29.83mm and height of 18.28mm is required to appear on the pack pouch for sale through retailers. Placing a 75% graphic health warnings on the only two surfaces that can accommodate them (the front and back), limits BATA's ability to place a barcode on pack that meet the GS1 requirements.
- Single Pouches are wrapped in groups of 5 by a clear poly wrapper into a bundle for shipping and retail sale. On each bundle, 1 single pouch's barcode is visible through the clear poly exterior, and to avoid this being scanned resulting in 5 pouches being sold for the price of 1, BATA places a white sticker with a black barcode over the single pouch barcodes. This is currently not accommodated in regulations. Failure to address will lead to disruption and possible significant loss to retailers if bundles of 5 pouches are sold for the price of one pouch.

### 3. LEGAL BARRIERS TO MANDATING PLAIN PACKAGING

#### 3.1 Introduction

BATA opposes the introduction of plain packaging as it is effectively a ban on using valuable intellectual property assets. It also amounts to a taking of business goodwill as reflected in the value of brands, some of which have been established for over 100 years.

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

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

#### 3.2 Plain packaging violates Australian domestic law

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

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

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

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

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<sup>4</sup> The Australian newspaper, 28 May 2011 in an article entitled "Cigarettes may be too hot to handle"

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

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

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

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

### 3.3 Breaches of international treaties — Paris Convention

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

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

### 3.4 Breaches of international treaties — TRIPs Agreement

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

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

A 2009 email between two senior members of the Commonwealth authority that administers Australia's trademarks and intellectual property regime, IP Australia, warns the move may fall foul of key articles in TRIPs<sup>9</sup>. *“I'm not surprised that (was it Health?) are arguing that Article 20 is ambiguous ... it suits their purposes, for that. However: It is pretty clear from ... the negotiation documents that this is exactly the issue that A[r]ticle 20 was targeted at ....”*<sup>10</sup>

Further, an IP Australia briefing note stated that *“Article 8(1) of TRIPs allows for members to adopt measures necessary to protect public health . but the final part of this Article stipulates that measures like this have to be consistent with the rest of the*

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

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

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

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

*provisions of TRIPs. Therefore it seems unlikely that this Article could be used to avoid Article 20.*<sup>11</sup>

Notwithstanding the view expressed internally within the Government and various Government departments, the Government is now publicly attempting to use 'public health' reasons as a means to avoid its obligations under TRIPs. With respect, using the words of Mark Arblaster, Deputy Registrar of Trade Marks, IP Australia, this "is a long bow I think."<sup>12</sup>

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

### **3.5 Breaches of international treaties — TBT Agreement**

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

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

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

### **3.6 Serious ramifications can flow from breaches of Australia's treaty obligations**

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

Furthermore, the uncertainty created by any attempted extinguishment by the Government of valuable intellectual property may deter companies from investing in Australia. In this regard, Australia was identified in submissions to the United States Trade Representative (USTR) in relation to its "Special 301" report, which highlights countries that fail to protect companies' investments in intellectual property. Further, it should be noted that the United Kingdom Government recently stated that it must

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

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

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

“carefully examine” the evidence base regarding plain packaging, and “give weight to the legal implications of restrictions on packaging for intellectual property rights and freedom of trade”.

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

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

### **3.7 The Government has received legal advice regarding plain packaging and its impact on its international treaty obligations**

In spite of the Government’s reluctance to acknowledge the likely impact that the TPP Bill will have on Australia’s compliance with TRIPs, the TBT and other international treaties, the Government is actually well aware of that impact, and has received advice in this respect from a number of bodies.

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

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

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

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<sup>14</sup> Tobacco Label Fight Heats Up, the Australian Financial Review, 21 January 2010

We encourage DoHA to obtain a copy of, and review, the AG's Legal Advice before proceeding further with this proposal.

### 3.8 FCTC does not impose any obligation to introduce plain packaging

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

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

Put simply, the TPP Bill fails to balance Australia's binding obligations under other treaties, against what are clearly only "suggestions" contained within FCTC guidelines—not even in the FCTC itself. Australia cannot invoke the FCTC and its Guidelines to justify such violations of WTO rules.

### 3.9 Significant concerns in the international community

A number of countries have raised concerns about the plain packaging of tobacco products. This is subsequent to countries such as Canada<sup>15</sup> and France<sup>16</sup> investigating plain packaging and then rejecting it.

Via the World Trade Organisation, we learnt that questions about the Bill were raised by the European Union<sup>17</sup>, Indonesia<sup>18</sup> and Mexico among others<sup>19</sup>. Several other governments, such as China and Brazil, requested further investigation into the Bill<sup>20</sup>.

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

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

- The International Chamber of Commerce said '*it [plain packaging] would have negative consequences beyond the aims of the policy while also serving to undermine the very intent of the policy as a result of the unintended consequences.*'<sup>22</sup>

<sup>15</sup> [http://www.plain-packaging.com/downloads/Health\\_Minister\\_David\\_Dingwall\\_6\\_Dec\\_96\\_-\\_excerpt.pdf](http://www.plain-packaging.com/downloads/Health_Minister_David_Dingwall_6_Dec_96_-_excerpt.pdf)

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

<sup>17</sup> [http://ec.europa.eu/enterprise/tbt/tbt\\_repository/AUS67\\_EN\\_6.pdf](http://ec.europa.eu/enterprise/tbt/tbt_repository/AUS67_EN_6.pdf)

<sup>18</sup> [http://www.wto.org/SmartKMS/do/www/readDoc?document\\_id=115025](http://www.wto.org/SmartKMS/do/www/readDoc?document_id=115025)

<sup>19</sup> [http://www.wto.org/english/news\\_e/news11\\_e/trip\\_07jun11\\_e.htm](http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm)

<sup>20</sup> [http://www.wto.org/english/news\\_e/news11\\_e/trip\\_07jun11\\_e.htm](http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm)

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

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

- US-ASEAN Business Council as part of a group with the US Chamber of Commerce said *'we are strongly convinced that the plain/generic packaging proposal will have a detrimental effect on the integrity of the protection of intellectual property around the world, while its potential effects on public health are not encouraging either.'*<sup>23</sup>
- The premier collection of businesses in Europe and North America, the Trans-Atlantic Business Dialogue, stated that plain packaging *'would abrogate trademark rights for an entire industry with significant consequences for all other intellectual property rights holders.'*<sup>24</sup>

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<sup>23</sup>[http://www.nftc.org/default/Publications/Trade\\_Policy/1100011370\\_Joint%20Business%20Statement%20Plain%20Packaging%20Australia.pdf](http://www.nftc.org/default/Publications/Trade_Policy/1100011370_Joint%20Business%20Statement%20Plain%20Packaging%20Australia.pdf)

<sup>24</sup> [http://tabd.com/index.php?option=com\\_content&task=view&id=84&Itemid=9](http://tabd.com/index.php?option=com_content&task=view&id=84&Itemid=9)

## 4. EVIDENCE

### 4.1 The TPP Bill is not supported by real evidence

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

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

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

### 4.2 Concerns around lack of real evidence

During the 1990's, certain governments considered plain packaging as a tool to reduce smoking prevalence. However, as noted in 1997 by the Australian Government, the evidence was limited, *"...there is no international experience of the effect of generic packaging on consumer behaviour. In addition, there is limited primary research on the potential effect of generic packaging or the factors underlined or relevant to the uptake and cessation of tobacco consumption."*<sup>25</sup>

In June 2010 a Senate Estimates Committee question on notice asked DoHA *"What is the estimated reduction in smoking rates from the plain packaging measure?"*

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

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

Two days before the then Prime Minister and Federal Health Minister Roxon announced their plain packaging plans (29<sup>th</sup> April 2010) emails show that the Health Department had not provided Health Minister Roxon's office with any real evidence proving that plain

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

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

packaging would work. It states "*We are going to need actual figures from the research [on the effect of the measure on smoking levels] -- not just the claims.*"

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

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

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

A recent international report by Deloitte<sup>29</sup> found that packaging laws have not directly reduced smoking, and calls into question whether plain packaging will achieve stated government health objectives.

The report assessed 27 countries covering a period of 14 years<sup>30</sup> and suggested that governments consider the extent to which plain packaging will deliver policy objectives in advance of any implementation.

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

There is ample real world evidence to test predictions regarding smoking prevalence rates in relation to GHW's. In addition to the Deloitte study, a UK Department of Health study in 2010 reviewed the effects of the UK Government's implementation of GHW's and made a number of significant findings that the establishment of GHW's on cigarette packaging in England had not had any impact on smoking prevalence, on aggregate cigarette consumption or salience of health warnings<sup>31</sup>.

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

28 Senate Hansard Community Affairs, 20 October 2010

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

30 IBID

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

In Canada, the empirical evidence shows that the change in health warnings in 2001 (from a 25% text health warning to 50% GHW's front and back) has not altered the smoking behaviour of Canadians<sup>32</sup>.

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

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

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

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

## 5. POOR POLICY-MAKING PROCESS

### 5.1 Robust review of plain tobacco packaging needed

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

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

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

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

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

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

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

## 6. PLAIN PACKAGING NOT IMPLEMENTED BY OTHER GOVERNMENTS

### 6.1 General

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

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

We have also seen a number of countries raise concerns about the plain packaging of tobacco products. This is subsequent to countries such as Canada<sup>38</sup> and France<sup>39</sup> investigating plain packaging and then not implementing it.

Via the World Trade Organisation, we learnt that questions about the Bill were raised by the European Union<sup>40</sup>, Indonesia<sup>41</sup> and Mexico among others<sup>42</sup>. As noted earlier, several other governments, such as China and Brazil, requested further investigation into the Bill<sup>43</sup>.

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

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

The National Foreign Trade Council also warned that *“by preventing the use of trademarks (apart from the name in plain typeface), the Bill would actually deprive*

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

38 [http://www.plain-packaging.com/downloads/Health\\_Minister\\_David\\_Dingwall\\_6\\_Dec\\_96\\_-\\_excerpt.pdf](http://www.plain-packaging.com/downloads/Health_Minister_David_Dingwall_6_Dec_96_-_excerpt.pdf)

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

40 [http://ec.europa.eu/enterprise/tbt/tbt\\_repository/AUS67\\_EN\\_6.pdf](http://ec.europa.eu/enterprise/tbt/tbt_repository/AUS67_EN_6.pdf)

41 [http://www.wto.org/SmartKMS/do/www/readDoc?document\\_id=115025](http://www.wto.org/SmartKMS/do/www/readDoc?document_id=115025)

42 [http://www.wto.org/english/news\\_e/news11\\_e/trip\\_07jun11\\_e.htm](http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm)

43 [http://www.wto.org/english/news\\_e/news11\\_e/trip\\_07jun11\\_e.htm](http://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm)

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

*consumers of important information about the product such as whether the product is filtered, and the taste, flavour and quality of the product<sup>45</sup>.”*

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

Further as recently as 20 April 2011, the International Chamber of Commerce in a letter to the Australian Minister for Trade observed that plain packaging *“by eroding the means of asserting intellectual property rights (IP), the measure proposed would restrain trade, hamper consumer choice and safety, subvert trademark and IP laws and increase counterfeiting and illicit trade while encouraging lower priced legal and illegal commerce in tobacco products”.*

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

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

## 7. UNINTENDED CONSEQUENCES

### 7.1 Waste of taxpayers' money in legal fees

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

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

A note, from 18 February 2010 from DoHA, suggests that the Government has budgeted \$4.8 million to implement the legislation and that this figure *"does not include legal costs, estimated to be \$10+ million"*<sup>47</sup>.

### 7.2 Possible compensation

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

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

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

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

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

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

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

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

48 The Sydney Morning Herald, Monday 24th July 1995

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

The Property Rights Alliance warned that *“by denying companies to compete on the basis of logo/trademark differentiation, consumers will be unable to differentiate products in any meaningful manner other than on price. As such, the Bill will result in some cigarette manufacturers choosing to compete on the basis of price, leading to a fall in tobacco prices. As such, it is submitted that the bill might have the counter-intuitive effect of potentially increasing tobacco consumption<sup>50</sup>.”*

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

The Council went on to say that *“while there is no established correlation between plain packaging and a reduction in cigarette use, there is a correlation between low cigarette prices and increased tobacco consumption. As noted above, plain packaging will likely lead to more counterfeit cigarettes, and while there is no evidence that trademarks “mislead and deceive consumers,” there is much evidence that contraband products often do. Plain packaging legislation will undoubtedly result in larger numbers of counterfeit cigarettes being distributed putting consumers at greater risk from entirely unregulated illicit products<sup>51</sup>.”*

#### **7.4 Significant impact on illegal tobacco trade**

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

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

Since that time, the quantity, availability and impact of illegal tobacco on the market has increased in Australia, with a recent Deloitte report finding that taxpayers are losing out on almost \$1.1 billion in excise revenue<sup>55</sup>.

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

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

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

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

54 The Age, April 30th 2010

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

The Report estimated that 2.68 million kilograms of illegal tobacco products were sold in Australia during 2010, equivalent to 15.9% of the total legal tobacco market and further found that the illegal tobacco market has grown nearly 150% in just three years, from 6.4% of the total market in 2007 to 15.9% in 2010<sup>56</sup>.

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

The illicit trade in tobacco products should give rise to another concern for Government: organised crime gangs – who are importing loose leaf tobacco, counterfeit and contraband cigarettes – are now the fourth largest tobacco player in Australia just behind Imperial Tobacco which holds 17% of the legal market<sup>57</sup>.

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

## 7.5 Tobacco counterfeiting – a serious world wide problem

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

*“Tobacco smuggling and counterfeit cigarette production are problems worldwide.*

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

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

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

The Business Action to Stop Counterfeiting and Piracy (BASCP) and the International Chamber of Commerce wrote in a submission to the Senate Fielding Bill inquiry that plain packaging “*would increase the prevalence of counterfeit goods in the market because counterfeit products will become easier to make, distribute and sell. Further, plain packaging enables the counterfeit industry to ‘adopt’ brand imagery: both counterfeiters and contraband operators would assume, correctly, that plain packaging would result in a significant increase in demand for illicit products in particular amongst*

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56 Ibid

57 Ibid

58 Australian Crime Commission Organised Crime in Australia 2011

*sections of society that many regulatory measures seek to protect most. It would further reduce brand owners' ability to take action against such activity<sup>59</sup>.”*

The Institute of Patent and Trade Mark Attorneys of Australia stated that *“efforts to combat counterfeit trade hinge upon the maintenance of a principled, balanced and coherently articulated system of national and international treaties, laws and regulations, particularly in regards to trademarks and related intellectual property rights. Plain packaging would make both counterfeiting and smuggling more attractive. This presents the risk of an uncontrolled market for illegal products, potentially undermining the intention of plain packaging legislation to reduce smoking by instead leading to a prevalence of cheaper counterfeited or smuggled items<sup>60</sup>.”*

The National Foreign Trade Council Inc believe that *“... the requirement to use simple brown matte packaging and standard typeface will make it easier to manufacture and distribute counterfeit and contraband products, thereby increasing consumer confusion.”* *“In addition, plain packaging likely will cause an increase in the production and distribution of counterfeit products by making it easier to copy the packaging in a manner that is not discernible to the typical consumer<sup>61</sup>.”*

Finally, The Washington Legal Foundation stated in a submission that *“there is every reason to believe that adoption of plain packaging would cause the counterfeiting problem to sky-rocket; the existence of elaborate trademarks is one of the best controls on counterfeiting currently in place<sup>62</sup>.”*

Concerns about the impact plain packaging could have on illicit trade is shared, it would appear, by DoHA itself. In the Department’s draft RIS it stated that:

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

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

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

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

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

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

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

## **8. UNWORKABLE NATURE OF THE TPP BILL AS PRESENTLY DRAFTED**

### **8.1 Introduction**

BATA is opposed to the introduction of plain packaging for the reasons outlined in sections 1-7 above. However, in the event that the Government disregards BATA's position and proceeds with the TPP Bill, there are a number of operational matters that it must take into account lest it causes massive disruption to the cigarette market in Australia.

These are broken into a number of elements – namely:

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

### **8.2 Commencement provisions for manufacturing are unrealistic – BATA cannot comply**

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

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

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

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

The draft Regulations provide only limited additional clarity and are inherently subject to change or revision until promulgated. BATA, like all other legitimate tobacco manufacturers, needs clear guidelines, directions and instructions in order to begin developing and manufacturing new packets.

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

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

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

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

Further, when the Federal Labor Government proceeded with the Reduced Fire Risk (RFR) regulations, it also allowed for a similar timeframe. To quote from the ACCC *“on the information available to it, the ACCC is satisfied that 18 months is a reasonable lead-in time for commencement of the proposal. While a shorter period would not cause problems for some manufacturers/importers, it clearly does for others. An 18 month lead in period was provided for compliance with the Trade Practices (Consumer product Information Standards) (Tobacco) Regulations 2004 and has been widely accepted as reasonable by many overseas jurisdictions”*<sup>64</sup> No reason has been given for departing from this previously accepted norm.

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

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

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

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<sup>64</sup> Page 26 Regulatory Impact Statement, Reduced Fire Risk Cigarettes.

- Development of Blue Box (Key Lines) and GHW Template
  - i. Redevelop 22 + different packaging type key lines for pack architecture.
  - ii. Fit the GHW according to regulation.
  - iii. Legal approval of all artwork pieces (GHW Artwork)
- Development of Artwork
  - i. Fit the Bar codes to specification
  - ii. Fit Product name to specification
  - iii. Fit the EAN Codes to specification
  - iv. Fit other regulatory material to specification
  - v. Pre press to prepare files for printing
- Legal Approval of Artwork
  - i. Each piece to be subject to marketing and legal review individually
- Tooling (engraving cylinders)
  - i. Procure Cylinders.
  - ii. Engrave Cylinders (for each of the 300 SKU's)
- Printing of materials
  - i. Schedule print runs for 300 SKU's
- Freight of materials to source factories in Sydney, Malaysia, Singapore and Netherlands.
  - i. Materials for 200+ SKU's printed in Australia but shipped to Malaysia or Singapore for Production.
- Production of Cigarettes and RYO and shipment to Sydney from source factories
  - i. Manufacture & Shipment of RYO from Netherlands to Australia is 12 weeks.
  - ii. Manufacture & Shipment of TMC from Asia to Australia is 8 weeks.
- Distribution across state warehouses and retail outlets
  - i. Distribution of product across Australia is approx 3 weeks Capital City retailers and 4 weeks nationally.

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

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

- those parts need to be designed to the specification;
- the parts then need to be manufactured;
- they then need to be delivered, generally by ship because of their size and weight, to the specific factory that manufactures our products;

- Upon receipt of the part at the factory, the change part then needs to be assembled and extensively tested over a period of time and at high speed; and
- Employees need to be trained on how to operate machinery prior to machine being fully operational.

If the changes required by the plain packaging scheme require changes to BATA's packaging which cannot be produced on our existing machinery which in turn requires BATA to purchase new machinery, BATA anticipates that it would take even longer to be able to produce compliant products. Purchasing new machinery is even more complex, more time consuming and more costly. It should be noted that there are only an extremely limited number of machine suppliers who have the capability to do this sort of work.

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

There are approximately 35,000 retailers throughout Australia that sell tobacco products. It can take up to 3 hours to remove all tobacco products from a merchandising unit in a retail outlet (which is the sales unit, which generally sits on the back wall in a retail outlet) and replace it with new stock. In circumstances where retailers are busy making their living and/or selling goods, we believe it is unreasonable to expect that they can comply within the short timeframe proposed in the TPP Bill. It is also unrealistic to expect that BATA could visit all 35,000 retailers and replace all non-compliant tobacco products within the time provided for in the TPP Bill.

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

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

- Once production has been completed, product is loaded onto pallets to ship/transport stock from the factory. For product manufactured in Australia, this is a relatively straightforward process. For product that is imported into Australia from other countries, tobacco products will be manufactured in that overseas country and then shipped to Australia. The shipping takes approximately 4-8 weeks, depending on where the product is coming from.
- Tobacco products are then put on pallets. In the event of mandated specifications that exceed BATA's current variance ranges, then palletisation stacking will need to be reviewed to ensure that OH&S requirements continue to be met at logistics suppliers / customer dock delivery points.
- Logistic suppliers must then select, or pick, product to fulfil orders. In a 'plain packaging world', logistic suppliers will need to review their business order

picking processes as different coloured packaging will no longer be available in a plain packaging environment. When every pack looks the same, just consider how much more time will be needed to ensure the correct product has been picked for each delivery.

- Products are then delivered to stores or retail outlets. Increased time will be required to manage order drop offs, verify products and deal with product returns as it will be more difficult for retailers, and the logistic service provider, to quickly identify products. More care and attention and therefore more time will be spent on ensuring what has been ordered is what has been delivered.
- Under the TPP Bill, new barcodes will be needed on all packaging. This will require back office modifications (to I.T. systems) as well as create administrative requirements flowing onto suppliers and customers. The reason being that once new barcodes are obtained, application and testing protocols amongst all our customers that use product scanning systems will be needed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[On tobacco packaging:](#)

Call centre telephone number on its tobacco packaging. Under the TPP Bill BATA will only be permitted to print on its packaging the manufacturer name and address. By preventing BATA from printing a telephone number on its packaging, it will hamper the ability of consumers to lodge complaints related to any issues regarding their purchase, including the possibility of alerting BATA to a potential product recall scenario;

## **8.6 Amendments to the TPP Bill, that BATA considers are important**

BATA is of the opinion that under its duty of care obligations to its consumers, it needs to be permitted to continue to use/print all of the matters raised in 8.5 above. In addition to these, BATA respectfully requests that DoHA consider and recommend the following changes:

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

For the reasons set out in paragraph 8.4 above, BATA requests a change to the TPP Bill to allow manufacturers to make cartons (as that term is defined in the TPP Bill) in either cardboard OR clear plastic (with a black strip to cover the packet barcode);

## **8.7 Clarification still required on a number of provisions – BATA can't prepare**

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

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

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

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

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

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

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

### **8.8 Costs are extensive and go beyond compliance requirements**

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

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

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

## **9. CONCLUSION**

### **Conclusion**

In spite of its clear knowledge of the inherent risks under the Australian Constitution, and under a plethora of international agreements to which Australia is bound, to say nothing of the inherent risk that the scheme will have precisely the opposite effect to its intended effect, the Government has nevertheless chosen to press on with its proposal for plain packaging.

Given the issues at stake here, both to BATA's and other companies lawful rights, as well as Australia's international reputation, the issue of plain packaging requires a probing and careful review to avoid the legal barriers and unintended consequences discussed in this submission. BATA again requests that the current suite of plain packaging legislation be put on hold until a thorough regulatory impact study process has been followed and a fully informed decision can be made as to whether or not to proceed with plain packaging.

## Appendix A

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