



Imperial Tobacco Australia Limited

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

regarding the Consultation Paper

***Tobacco Plain Packaging: Proposed
approach to non-cigarette tobacco
products***

28 October 2011

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1 EXECUTIVE SUMMARY

Imperial Tobacco Australia Limited (“**ITA**”) welcomes this opportunity to provide submissions to the Department of Health and Ageing (“**DoHA**”) regarding its Consultation Paper *Tobacco Plain Packaging: Proposed approach to non-cigarette tobacco products* (30 September 2011) (“**Consultation Paper**”). ITA provides this submission in conjunction with:

- (a) ITA’s submission dated 6 June 2011 to the DoHA regarding the Tobacco Plain Packaging Bill 2011 (Exposure Draft) and Consultation Paper (“**ITA’s first submission**”);
- (b) ITA’s submission dated 22 July 2011 to the House Standing Committee on Health and Ageing regarding the Inquiry into Plain Tobacco Packaging (“**ITA’s second submission**”);
- (c) ITA’s submission dated 2 September to the Senate Legal and Constitutional Affairs Committee regarding the Inquiry into the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (“**ITA’s Trade Marks Amendment submission**”); and
- (d) ITA’s submission dated 17 October 2011 to the Australian Competition and Consumer Commission regarding the Consultation Paper - *Proposed Tobacco Labelling (Graphic Health Warnings) Mandatory Standard* (“**ITA’s Graphic Health Warning submission**”).

ITA supports the balanced and practical regulation of tobacco products. While ITA recognizes that it is the role of governments to provide the general public with clear and consistent messages about the health risks to smokers associated with their smoking, ITA urges the Government to simultaneously respect principles of adult choice, freedom of competition, the commercial rights of trade mark owners and legitimate businesses when doing so.

The Government’s tobacco plain packaging proposal for non-cigarette tobacco products (as described in the Consultation Paper) is opposed by ITA for the following reasons:

- (a) there is no credible evidence to support the introduction of plain packaging for non-cigarette products;

- (b) plain packaging will increase the trade in counterfeit tobacco;
- (c) plain packaging requirements for non-cigarette products will facilitate breaches of the *Trade Marks Act 1995* (Cth) (“**Trade Marks Act**”); and
- (d) from a practical perspective, several of the proposed requirements for plain packaging of non-cigarette products are almost impossible to implement and will also result in the authorisation of product tampering.

This submission outlines ITA’s concerns with respect to the above and also responds to the general and product-specific requirements of the plain packaging regime for non-cigarette products as outlined in the Consultation Paper.

Further, ITA is very concerned about the timeframe pursuant to which tobacco companies will be required to implement the plain packaging requirements. In circumstances where the *Tobacco Plain Packaging Bill 2011* (Cth) (“**Plain Packaging Bill**”) and *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011* (“**Trade Marks Bill**”) have not yet passed through the Senate and the *Tobacco Plain Packaging Regulations 2011* (Cth) (“**Draft Plain Packaging Regulations**”) are still in draft form, do not incorporate the non-cigarette proposals and have not been tabled in the House of Representatives as yet, the regime (the “**Plain Packaging Legislation**”) is still very much a work in progress. Tobacco companies such as ITA are still unaware of the precise requirements for the retail packaging for tobacco products. As such, to require tobacco companies to implement plain packaging by July 2012 imposes a huge and possibly insurmountable burden on tobacco companies. Based on current circumstances, it will be impossible for ITA to comply with the deadlines currently proposed.

ITA repeats its requests for additional industry consultation in relation to the Government’s plain packaging proposals and implementation timelines. The “adhesive stickering” proposal set out in the Consultation Paper is short-sighted and unworkable. It is in and of itself evidence of a lack of satisfactory industry consultation, will lead directly to product tampering and facilitate breaches of Australia’s intellectual property laws and international obligations.

2 COMPANY BACKGROUND

ITA is the Australian-based wholly owned subsidiary of Imperial Tobacco Group PLC, the world's fourth largest international tobacco company and Van Nelle Tabak Nederland B.V. is a Netherlands based company within the Imperial Tobacco Group PLC, which owns the trade mark rights effective in Australia. In Australia, ITA has a share of approximately 20.5% of the total tobacco market and approximately 60% of the loose and roll-your-own tobacco market. In the loose and roll-your-own tobacco market, our leading brands include Drum, Champion, Golden Virginia and White Ox fine-cut (roll your own) tobacco. ITA and Van Nelle have approximately 300 registered trade marks in Australia which cover brand names, signatures, numerals, devices, pack designs, headings, labels and other aspects of packaging, which will be affected by the Plain Packaging Bill and the Trade Marks Bill.

ITA employs approximately 400 people in Australia as well as being a significant contributor to the Australian economy, delivering over \$1.7 billion annually to the Federal Treasury through excise duties on tobacco products and GST. In addition, ITA makes further contributions to government through corporate taxation, employment taxes and other revenues of approximately \$35 million annually.

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

ITA has spent the past 12 years investing heavily in its Australian business and brands, including introducing new brands, at great expense. With the imminent introduction of the Plain Packaging Legislation in conjunction with the further encroachments onto retail packaging for tobacco as outlined in the Consultation Paper, ITA faces the prospect that the value of its investment will be stripped away, after its entry into the Australian market and its portfolio of brands and trade marks that it acquired at that time was approved by the ACCC.

Any investor would fight to protect its valuable assets, be they real property or intellectual property. Imperial Tobacco is no different, simply because it owns tobacco brands.

3 NO CREDIBLE RESEARCH TO SUPPORT THE INTRODUCTION OF PLAIN PACKAGING

3.1 Lack of evidence-based reasons for implementing plain packaging

As outlined in detail in ITA's first and second submissions, there is no credible evidence to indicate that people take up smoking or continue to smoke because they see tobacco branding on packaging. ITA repeats the arguments proffered in ITA's first and second submissions that the materials relied on by the Government to supposedly provide evidentiary support for the implementation of plain packaging are selective and questionable.

3.2 Lack of availability of consumer research commissioned by DoHA

The Consultation Paper confirms various general requirements for the plain packaging for non-cigarette tobacco products, including that:

- (a) the colour of packaging will be drab dark brown (Pantone 448C) in matt finish; and
- (b) the optimal font style and size for the brand name on the packaging will be Lucida Sans at 14 point size.

The Consultation Paper states that these decisions were based on earlier consumer research commissioned by the DoHA. The consumer research relied upon by the DoHA in formulating the general requirements for plain packaging is not currently available to the public. Accordingly, ITA questions the independent nature, objectivity and credibility of such research and its underlying data. The DoHA's failure to make this crucial information available makes it impossible for ITA to fully assess the bases for the plain packaging requirements. This is a significant flaw in the consultation process and ITA calls for this research to be released immediately. The absence of the availability of the market research means that there is little objective justification for many aspects of the Plain Packaging Legislation.

4 INCONSISTENCIES WITH THE TRADE MARKS ACT

ITA supports competition in Australia, including in the tobacco goods sector, which is comprised of a variety of distributors, products, brands, packaging types and sizes within the marketplace. This includes various niche brands and products, which are often imported from overseas and sold in small volumes in Australia. Indeed, ITA is the distributor of various low-volume brands which contribute to a small, but essential market share which facilitates competition in the tobacco sector. As noted in the Consultation Paper, the plain packaging of products which have a small market share at the point of manufacture may be impracticable. For the reasons set out below, ITA opposes the proposals set out by the Government in the Consultation Paper.

4.1 Adhesive labeling and handwriting options an offence under the Trade Marks Act

ITA strongly opposes the manner in which the Consultation proposes that the retail packaging comply with the plain packaging requirements, particularly the options for “overstickering” where (i) the tobacco product brand and variant names will be allowed to be printed on an adhesive label and fixed to the retail packaging or the product (“**the adhesive label option**”); and (ii) the brand and variant name may be hand written in black ink either directly on the retail packaging in a rectangular space allocated for this purpose (“**the handwritten option**”).

ITA notes that under the current Plain Packaging Bill, tobacco products not made in Australia may be imported without complying with the plain packaging requirements, so long as they comply with the requirements at the first on-sale in Australia. Accordingly, it appears that the adhesive label and the handwritten options are designed to allow importers of tobacco products to “oversticker” and continue to sell such imported products in accordance with the requirements of the Plain Packaging Legislation. Similarly, the adhesive label and handwritten options are presumably designed to allow suppliers of tobacco products to amend their existing stock so that it complies with the Plain Packaging Legislation.

Alarming, the adhesive label and handwritten options effectively facilitate such importers and suppliers to breach the Trade Marks Act, which creates offences for altering, defacing, making any addition to, removing, erasing or obliterating (in part or in whole) registered trade marks. It is also an offence to falsify and to sell such goods.

For instance, section 145 of the Trade Marks Act sets out various criminal offences for falsifying or unlawfully removing a registered trade mark:

(1) A person is guilty of an offence if the person falsifies or unlawfully removes a trade mark that:

- a. has been applied to any goods that are being, or are to be, dealt with or provided in the course of trade; or
- b. has been applied in relation to any goods or services that are being, or are to be, dealt with or provided in the course of trade;

knowing that the trade mark is registered or reckless of whether or not the trade mark is registered.

(2) A person falsifies a registered trade mark if the person:

- a. alters or defaces it; or
- b. makes any addition to it; or
- c. partly removes, erases or obliterates it;

without the permission of the registered owner, or an authorised user, of the trade mark and without being required or authorised to do so by this Act, a direction of the Registrar or an order of a court.

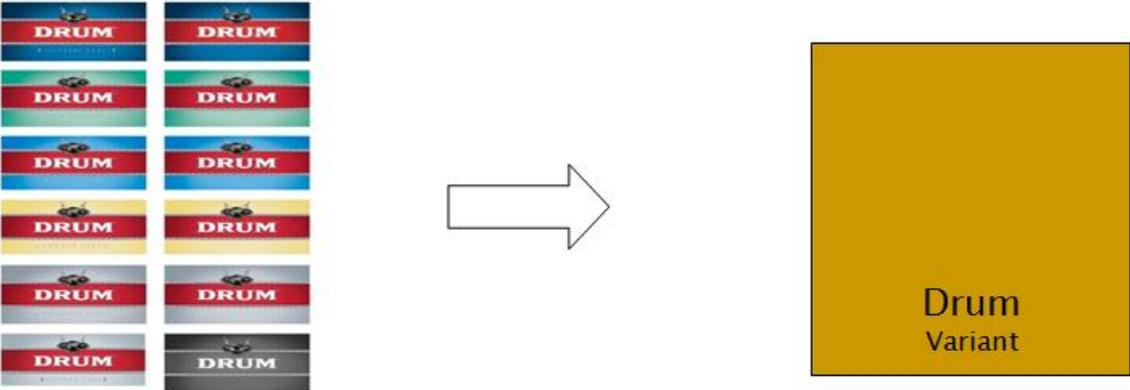
(3) A person unlawfully removes a registered trade mark if the person wholly removes, erases or obliterates it:

- a. without the permission of the registered owner, or an authorised user, of the trade mark; and
- b. without being required or authorised to do so by this Act, a direction of the Registrar or an order of a court.

Affixing an adhesive label over the pack design of imported tobacco products (which will most likely comprise, amongst other elements, the manufacturer's registered trade mark) erases or obliterates the registered trade mark as it appears on the original packaging. This is illustrated in the image below.



Further, the actual requirement that the adhesive label contain a brand and/or variant name in Lucida Sans font, 14 point size in the colour Pantone Cool Grey 2C (or alternatively handwriting on the packaging) alters or defaces a registered trade mark. To provide an example with respect to registered trade mark 1373078:



Similarly, the handwritten option permits a falsification of a registered trade mark. Handwriting a brand name (assuming the brand name is also a registered trade mark) onto the retail packaging for tobacco products is clearly an alteration or defacement of a registered trade mark which is an offence pursuant to s 145(2)(a) of the Trade Marks Act.

For ITA’s roll-your-own tobacco products sold in pouches, to “cover all surface of the retail packaging that do not otherwise comply with the plain packaging requirements” as proposed by the Consultation Paper would involve overstickering on the inside of product packaging. To access this part of the packaging would necessarily involve product tampering and therefore compromise the consumer goods inside. It would also expose manufacturers to extensive legal risks, in circumstances where they would be unable to control the quality of the product, if it were subsequently opened and overstickered by a third party.

4.2 Exposure of suppliers to penalties and breach of existing contractual obligations

Where a supplier sells tobacco products that utilise the adhesive label and handwriting options, that supplier will be in breach of s148 of the Trade Marks Act which makes it an offence to sell, expose goods for sale, have goods in possession for sale, or import goods with a falsified registered trade mark, where a registered trade mark has been unlawfully removed from the goods or where a registered trade mark is falsely applied to the goods or in relation to the goods.

Not only will the adhesive label option or the handwritten option facilitate a breach of the Trade Marks Act, but it will often force suppliers of tobacco products who have contractual arrangements with trade mark owners to breach these contractual obligations. Typically where there is a contract or distribution agreement between a tobacco manufacturer and a supplier, the supplier warrants that it will not interfere with the trade marks of the manufacturer. Legislation requiring suppliers to affix a label on tobacco products which obstructs the manufacturers' trade marks, for example, will put the supplier in breach of its warranty to the manufacturer.

The corollary of this is that legislation which allows for the adhesive label or handwritten options gives parallel importers and importers of illicit tobacco, who have no contractual obligations to trade mark owners, a significant advantage over legitimate suppliers of tobacco products. Who will police whether the handwritten brand name will actually be affixed to the legitimate brand? This policy will be a counterfeiter's delight.

4.3 Inconsistencies should not be overcome through unjustified Henry VIII clause

The Government may have tried to overcome such inconsistencies as identified above through the proposed section 231A(3) of the Trade Marks Bill which contains a Henry VIII clause which provides that the delegated legislation:

- (a) may be inconsistent with the Trade Marks Act; and
- (b) prevail over the Trade Marks Act to the extent of any inconsistency.

However, ITA is of the view that this provision is unconstitutional, and at the very least bad policy. If the Draft Plain Packaging Regulations operate to facilitate a breach of s145 of the Trade Marks Act as outlined above, then, via this Henry VIII clause, the Executive effectively has the power to override conduct declared to be *criminal* in the Trade Marks Act. These offences attract not insignificant penalties - namely a fine not exceeding 500 penalty units (a maximum of \$550,000, where one penalty unit = \$110) or imprisonment for a period not exceeding two years. To allow the Executive to override conduct legislated by the Parliament to be serious enough to amount to a criminal offence is bad law and bad policy.

As outlined in ITA's Trade Marks Amendment Submission, Henry VIII clauses have only been recognised as being appropriate in certain limited circumstances. The Scrutiny of Legislation Committee in the Legislative Assembly of Queensland has said that clauses which

allow for the amendment of the relevant act by subordinate legislation are generally objectionable.¹ Rather, the justifiable uses of a Henry VIII clause are limited as follows: (i) to facilitate immediate Executive action; (ii) to facilitate effective application of innovative legislation; (iii) to facilitate transitional arrangements; and (iv) to facilitate the application of national schemes of legislation. None of these cases have been made out by the Government.

In addition, the Queensland Law Reform Commission recommended that with certain exceptions, Henry VIII clauses should be generally removed from the statute book.² ITA agrees that where the clause affects a single class of rights holders as a result of government policy, this delegation of power should be rejected.

ITA is of the view that proposed section 231A(3) is unconstitutional and beyond the powers of the *Trade Marks Act 1995*. In this regard, Section 51 of Constitution sets out the powers of the Parliament in respect of intellectual property as follows:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -

(xviii.) Copyrights, patents of inventions and designs, and trade marks.

The power to overturn legislation is a power that should be reserved for Parliament. ITA regards the purported delegation of this power to the Executive as a breach of the separation of powers.

Any legislation which undermines the provisions, in particular the *offence* provisions such as s 145, contained in the Trade Marks Act must be properly scrutinized, debated and passed by both the House of Representatives and the Senate in order to become law. In the event that the Plain Packaging Bill has consequences which are unintended or unforeseen by the Minister, then the Plain Packaging Bill (if passed) must be amended by the legislature. It is highly inappropriate for the Minister to issue delegated legislation, to remedy any defects in the Plain Packaging Bill.

Placing power in the hands of the Executive to make regulations (such as those which override the Offence provisions in Part 14 of the Trade Marks Act), that are intended to be inconsistent with the Trade Marks Act must be regarded as unconstitutional. Such delegation subverts the legislative process, significantly impairs the sovereignty of the Parliament and shifts the balance required by the Constitution.

RESPONSE TO THE GENERAL REQUIREMENT FOR THE RETAIL PACKAGING FOR NON-CIGARETTE PRODUCTS

4.4 Colour and text of packaging

The Consultation Paper states that the selection of the colour Pantone 448C and the Lucida Sans font was based on consumer research commissioned by the DoHA. However, as noted at paragraph 3.2 above, the consumer research is not currently available to the public.

Accordingly, ITA questions the independent nature, objectivity and credibility of such research and its underlying data. At present there is no objective justification for the colour and text choice with respect to the Plain Packaging Legislation.

4.5 Format of packaging

ITA currently utilises a number of different packaging formats, several of which include what may termed “inserts”. Inserts appear to be prohibited under the plain packaging proposals. The format of packaging for Champion Ruby and Horizon, for instance, includes paper insert pouches. The packaging material is a polyethylene clear film with a printed paper label insert, that in turn forms part of the pouch containing the product.

Similarly, JPS RYO and Champion Round Midnight are packaged in paper insert pouches, made of polypropylene printed film with a blank paper label insert.

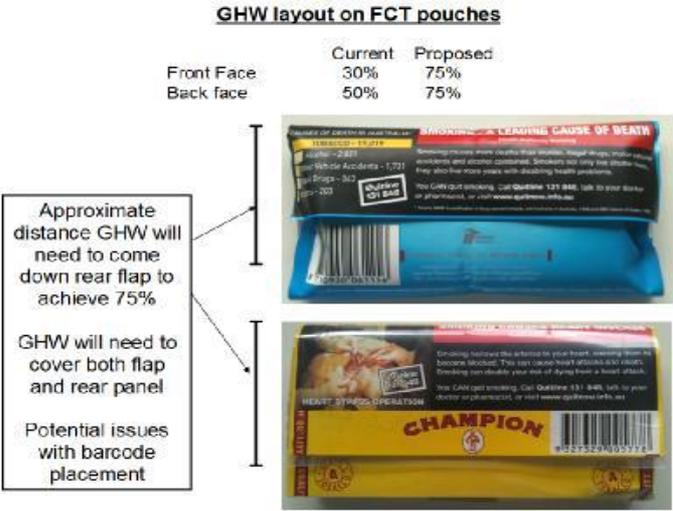
ITA is concerned that, according to the Consultation Paper, these packages would be unintentionally precluded from the market under the current drafting.

4.6 Bar codes and manufacturing and importing information

The Consultation Paper notes that bar codes and other packaging requirements as set out in the *National Trade Measurement Regulations 2009* (Cth) (“**Trade Measurement Regulations**”) and *Commerce (Imports) Regulations 1940* (Cth) (“**Commerce Import Regulations**”) will be permitted.

ITA is concerned about the way in which these legal requirements can be practically fulfilled in light of the other requirements of the plain packaging and proposed expanded graphic health warning regime. For example, as outlined in ITA’s Graphic Health Warning submission, with respect to pouches, ITA is concerned that the application of a 75% graphic

health warning would exceed the size of the back of a landscape pouch and interfere with the positioning of a barcode, which is necessary for product scanning. The below illustrates ITA’s concerns.



4.7 Other symbols and logos

The Consultation Paper at paragraph 25 confirms that to ensure that no other design features detract from the impact of the plain packaging measure, no other symbols or logos, apart from those required under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) under the *Australian Consumer Law*, or other regulations, are to appear on retail packaging of tobacco products.

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

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

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

Packaging Regulations specifically excludes “*a date by which it is recommended that the product be used*”. In addition, the “*measurement mark and trade description*” under reg 2.6 of the Draft Plain Packaging Regulations is restricted to the name and address of the manufacturer as required by Division 4.3 of the Trade Measurement Regulations, the statement of measurement as required by Division 4.4 of the Trade Measurement Regulations, and the trade description as required by clauses 6A, 7(n) and 8 of the Commerce Import Regulations. Accordingly, there is no provision for the display of consumer hotline numbers of manufacturers by which consumers can obtain information regarding the product, or report potential manufacturing or product quality-related concerns or suspected counterfeit goods.

It is imperative for consumer health and safety, as well as manufacturing statutory reporting obligations under the Australian Consumer Law, that the use of a consumer response number is specifically allowed on tobacco packaging. It is important that consumers be able to contact any manufacturer quickly in the event of a manufacturing or product fault or to report other matters such as product tampering. For example, in the unlikely event that a product was contaminated in some way, it could be a matter of immediate public health and safety. Similarly, if a “pattern” of complaints is identified, this could lead to an urgent product recall.

For this reason, all ITA-distributed products are printed with a toll-free telephone number that consumers (or retailers) can call in order to report any product-related issues. On non-tobacco products, the number used is “1800 677 953”. It is clear that the number used by ITA does not constitute any form of advertising or promotion and such consumer contact numbers should be expressly permitted under the plain packaging regime.

In addition, the removal of the “tidy-man” symbol is at odds with Australia’s obligations under Article 18 of the *Framework Convention on Tobacco Control* which requires that the parties “have due regard to the protection of the environment and the health of persons in relation to the environment in respect of tobacco cultivation and manufacture within their respective territories”. ITA is proud to voluntarily display the “tidy-man” symbol on its products and supports the responsible disposal of tobacco packaging and refuse. How can the Australian Government continually seek to criticise tobacco companies for facilitating the irresponsible littering of refuse from tobacco products whilst requiring the removal of its anti-littering message?

4.8 Health warnings

Paragraphs 26 to 28 of the Consultation Paper refer to the proposed updated and expanded health warnings to be included on tobacco products, including non-cigarette packs. ITA has significant concerns about these proposals which have been outlined in detail in ITA's Graphic Health Warning submission.

4.9 Anti-counterfeiting measures

Paragraph 29 of the Consultation Paper sets out the Government's proposed response to anti-counterfeiting that will arise from the Plain Packaging Legislation. The anti-counterfeiting measures proposed are:

- (a) the permission of the use of unique alphanumeric code markings on the retail packaging in a specified place and format on a voluntary basis on condition that these codes are not linked to tobacco marketing or promotion and do not interfere with graphic health warnings;
- (b) the permission of the continued use of covert markings in compliance with all other aspects of the Tobacco Plain Packaging Bill; and
- (c) not specifying the packaging material to be used for non-cigarette tobacco product retail packaging.

ITA uses a small, laser-printed code on pouches of tobacco which enables ITA to identify certain information such as the batch, time of manufacture, and the machine on which the product was produced. However, as an anti-counterfeiting measure, ITA is of the view that the measures will fall far short of what is required to combat the exponential increase in the trade of illicit tobacco which will occur as a result of the introduction of the Plain Packaging Legislation.

The best protection against counterfeit product is to allow for tobacco products and packaging which contain distinctive branding, trade marks and other indicia. By removing such devices, the Plain Packaging Legislation will make cigarettes and other tobacco products indistinguishable, cheaper and easier to copy and facilitate the importation and sale of illicit product.

Without Government supported national infrastructure, there is little prospect of a small, inconspicuous code, or a covert mark on the retail packaging for tobacco products combating

anti-counterfeiting. As outlined in ITA's first and second submissions, the illicit tobacco business today is highly sophisticated. It is not difficult for a counterfeiter to place a small code on packaging, particularly where the Draft Plain Packaging Regulations mandate the specific font, font size, and placement of an alphanumeric code.

ITA believes the most important measure in combating illicit trade is the use of overt elements on the packaging which allow the reasonable consumer to know what they are purchasing. A consumer cannot be expected to know that the appearance on the packaging of an inconspicuous alphanumeric code or a covert mark, for example, identifies a tobacco product as legitimate. The requirements of the Plain Packaging Legislation make it impossible for a consumer to know whether the product inside the packaging is the product that they have paid for or whether it contains counterfeit product. Smokers have the same right as any consumer to know what they are buying. The fact that these consumers are purchasing tobacco is irrelevant.

5 RESPONSE TO PRODUCT-SPECIFIC REQUIREMENTS FOR THE RETAIL PACKAGING FOR NON-CIGARETTE PRODUCTS

5.1 Loose leaf tobacco (roll your own or RYO) tobacco and pipe tobacco

ITA notes that the sale of loose leaf tobacco will continue to be permitted in its current packaging, such as pouches and tins. However, ITA reminds the DoHA that as noted in ITA's Graphic Health Warning submission, there are significant practical difficulties in printing complex images (such as the Graphic Health Warnings set out in Attachment A to the Consultation Paper) on tins.

Generally speaking, the use of tin as a printing material is more problematic than the use of paper or cardboard. For example, the certainty of printing location (what is termed "registration") on a tin is harder to ensure than on cigarette packs due to the printing machines' inability to know the precise location of the tin as it does not have any angles for the machine to judge location. This would impact specific size and distance requirements, which ultimately could be out by a small variation on each tin.

The practical difficulties of printing complex images on tins were discussed in detail with the ACCC prior to the introduction of graphic health warnings on cigarette and pouch forms of packaging, which is why this form of packaging is currently only required to bear a text-only health warning.

ITA is of the view that the use of a text-only warning on tins is sufficient to inform relevant consumers of any relevant health risks.

5.2 Cigars and other like products

The Consultation Paper acknowledges stakeholder concerns about the applicability of plain packaging to cigar bands and as such the Consultation Paper sets out the choices proposed to be available with respect to the management of cigar bands, namely that they be:

- removed; or
- replaced with a drab dark brown band with the brand name and variant and country of origin printed in a standard font style, size and colour; or
- fully covered with an adhesive drab dark brown band with the brand name and variant and country of origin printed in a standard font style, size and colour; or

- fully covered with an adhesive white or drab dark brown band on which the brand name and variant and country of origin could be hand written in black ink.

ITA is particularly concerned with these “choices” proposed by the Consultation Paper. As outlined in section 4 of this submission above, where the original cigar brand comprises a registered trade mark, the option of covering a cigar band with an adhesive drab dark brown band with the brand name in Lucida Sans font, is an alteration, defacement or obliteration of the registered mark on the original band. Currently, this is a criminal offence pursuant to s 145 of the Trade Marks Act. To import or supply such products is an offence pursuant to s 148 of the Trade Marks Act. As outlined at section 4.3 above, any proposal to overcome this problem by utilising a Henry VIII clause (s 231A(3) of the Trade Marks Bill) is bad policy and bad law.

There is no evidence to suggest that the plain packaging requirements to be applied to cigars and other like products will reduce the consumption of those products in Australia. ITA is of the view that even if the Plain Packaging Legislation reduces the purchase of cigars and other like products physically in Australia, it will simply just encourage the purchase of those products from international locations, and the importation of such products from overseas for personal use.

The requirements with respect to the management of cigar bands are yet another unsupported, problematic and unnecessary aspect of the Plain Packaging Legislation.

5.3 Smokeless tobacco

Smokeless tobacco is currently prohibited for sale in Australia. Accordingly, ITA does not intend to additionally comment on the proposed new health warnings, other than to repeat its concerns outlined above in relation to plain packaging for tobacco products.

6 INADEQUATE TIME FOR COMPLIANCE

In circumstances where the:

- (a) Tobacco Plain Packaging Bill and the Trade Marks Bill have not yet been passed by the Senate;
- (b) Tobacco Plain Packaging Regulations are still in draft form; and
- (c) consultation process for both the Plain Packaging Legislation as well as the proposed new graphic health warnings is ongoing,

it will be **impossible for ITA to comply with the deadlines** currently proposed.

The implementation of changes to non-tobacco materials for plain packaging would be a colossal exercise. Extensive planning and legal review is required to ensure regulatory compliance, materials supply, printing cylinders for all product and product variants in varying pack sizes (which are known as stock keeping units (“**SKUs**”)) and production scheduling, logistics, stock management and market supply issues. In addition, ITA is at a competitive disadvantage in comparison to British American Tobacco Australia (“**BATA**”) and Philip Morris Limited (“**PML**”), with ITA having only 20.5% of the total market-share and the majority of ITA’s product (approximately 60% of SKUs) being imported from overseas. All of ITA’s non-cigarettes products are imported.

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

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

It is physically impossible for ITA to comply with such a deadline, in circumstances where there is barely six months until full compliance is required. The proposed timeline is completely inadequate for the practical implementation of plain packaging and has no regard to practical or commercial realities of the industry, suppliers and retailers.

This matter appears to have now been recognised by Minister Roxon, who issued a press release on 13 October 2011 stating that “*the Government now has no choice but to reconsider the impact on implementation timeframes*”.³ It is ITA’s position that not only is further consultation needed with the industry, but that a **minimum** of 11 – 17 months (and preferably longer) for manufacturers and importers is needed from the time the legislative regime is **finalised** to the time of commencement and a further 3-6 months of sell-through time. This is the only reasonable way that manufacturers and retailers can possibly be expected to comply with the proposed onerous and complex changes, which would affect every single tobacco product in their portfolios.

7 CONCLUSION

As emphasised in ITA's first submission and ITA's second submission, the evidence to support plain packaging for tobacco products, including non-cigarette tobacco products, is significantly lacking. In particular, the unavailability of the consumer evidence to support the specific requirements of the Plain Packaging Legislation (such as the mandated colour, font style and font size) is particularly concerning and prevents stakeholders such as ITA from commenting on the legitimacy of the research. This is something ITA should have the right to do, particularly given it is directly affected by the requirements.

The proposals for the retail packaging for non-cigarette products, in particular the "quick fix" options, such as the "oversticker" adhesive label and handwritten options, are seriously problematic. The requirements are wholly inconsistent with provisions of the Trade Marks Act and which are *criminal* in nature. To overcome these inconsistencies with a Henry VIII clause as proposed by the Trade Marks Bill is not an answer as the provision raises a raft of legal, policy and constitutional issues.

Finally, with the Plain Packaging Legislation still far from finalisation, the Government must acknowledge that the proposal that tobacco companies comply with the requirements of the Plain Packaging Legislation by mid 2012 imposes an insurmountable obstacle on them. There is simply inadequate time for the tobacco companies to properly comply with the requirements and a broader timeline is needed. Further negotiation between the Government and tobacco companies with respect to this is warranted.

ENDNOTES

¹ Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *Report on the use of 'Henry VIII Clauses' in Queensland Legislation*, January 1997, pg 56.

² Queensland Law Reform Commission, Report No 39, *Henry VIII Clauses*, Brisbane, 1990, pg 12.

³ *Senate Stalls World First Tobacco Legislation*, 13 October 2011, available at [http://www.health.gov.au/internet/ministers/publishing.nsf/Content/67D5DDB50924AE66CA25792700281B09/\\$File/Senate%20Stalls%20World%20First%20Tobacco%20Legislation.pdf](http://www.health.gov.au/internet/ministers/publishing.nsf/Content/67D5DDB50924AE66CA25792700281B09/$File/Senate%20Stalls%20World%20First%20Tobacco%20Legislation.pdf).