

WORLD TRADE ORGANIZATION

*Panel established pursuant to Article 6 of the Understanding on Rules and
Procedures Governing the Settlement of Disputes*

**Australia – Certain Measures Concerning
Trademarks and other Plain Packaging
Requirements Applicable to Tobacco Products and
Packaging
(WT/DS434)**

**Australia – Certain Measures Concerning
Trademarks, Geographical Indications and other
Plain Packaging Requirements Applicable to Tobacco
Products and Packaging
(WT/DS435/441/458/467)**

First Written Submission of Australia

Geneva, 13 March 2015

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<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
<i>Canada – Pharmaceutical Patents</i>	Panel Report, <i>Canada – Patent Protection of Pharmaceutical Products</i> , WT/DS114/R, adopted 7 April 2000, DSR 2000:V, p. 2289
<i>China – Rare Earths</i>	Panel Report, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R / WT/DS432/R / WT/DS433/R / and Add.1, adopted 29 August 2014, upheld by Appellate Body Report WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
<i>China – Raw Materials</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243

Short Title	Full Case Title and Citation
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DS1997:II, p. 591
<i>EC – Seal Products</i>	Appellate Body Report, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, p. 3499
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Mexico – Telecoms</i>	Panel Report, <i>Mexico – Measures Affecting Telecommunications Services</i> , WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, p. 1537
<i>Thailand — Cigarettes</i>	GATT Panel Report, <i>Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes</i> , DS10/R, adopted 7 November 1990, BISD 37S/200
<i>US – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act 1916, Complaint by Japan</i> , WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p.4831
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865

Short Title	Full Case Title and Citation
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Report WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
<i>US – Customs Bond Directive</i>	Panel Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VIII, p. 2925
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Restrictions on Imports of Tuna</i>	GATT Panel Report, <i>US – Restrictions on Imports of Tuna</i> , DS21/R, 3 September 1991
<i>US – Section 110(5) Copyright Act</i>	Panel Report, <i>United States – Section 110(5) of the US Copyright Act</i> , WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, p. 3769
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Section 211 Appropriations Act</i>	Panel Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/R, adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, p. 683
<i>US – Section 337</i>	GATT Panel Report, <i>US – Section 337 of the Tariff Act 1930</i> , BISD 36S/345, adopted 7 November 1989
<i>US – Shrimp</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821

Short Title	Full Case Title and Citation
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Exhibit Number	Description of Exhibit
COP	Conference of the Parties to the Framework Convention on Tobacco Control
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
FCTC	World Health Organization Framework Convention on Tobacco Control
GATT 1994	<i>The General Agreement on Tariffs and Trade, 1994</i>
Paris Convention	<i>Paris Convention for the Protection of Industrial Property (as Revised at Stockholm in 1967)</i>
SPS Agreement	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>
TBT Agreement	<i>Agreement on Technical Barriers to Trade</i>
TMA Act	<i>Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)</i>
TPP Act	<i>Tobacco Plain Packaging Act 2011 (Cth)</i>
TPP Regulations	<i>Tobacco Plain Packaging Regulations 2011 (Cth)</i>
Trade Marks Act	<i>Trade Marks Act 1995 (Cth)</i>
TRIPS Agreement	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
Vienna Convention	<i>The Vienna Convention on the Law of Treaties</i>
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO Agreement	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

LIST OF EXHIBITS

Exhibit Number	Description of Exhibit
AUS-1	<i>Tobacco Plain Packaging Act 2011</i> (Cth) No. 148, 2011.
AUS-2	Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011 (Cth).
AUS-3	<i>Tobacco Plain Packaging Regulations 2011</i> (Cth) (as amended).
AUS-4	<i>Trade Marks Amendment (Tobacco Plain Packaging) Act 2011</i> (Cth).
AUS-5	Explanatory Memorandum to the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011.
AUS-6	Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011.
AUS-7	Expert Report of J. Samet (5 March 2015).
AUS-8	Expert Report of F. Chaloupka (Illicit Market) (6 March 2015).
AUS-9	Expert Report of F. Chaloupka (Public Health) (7 March 2015).
AUS-10	Expert Report of N. Tavassoli (10 March 2015).
AUS-11	Expert Report of J.P. Dubé (9 March 2015).
AUS-12	Expert Report of P. Slovic (4 March 2015).
AUS-13	Expert Report of A. Biglan (6 March 2015).
AUS-14	Expert Report of G. Fong (4 March 2015).
AUS-15	Expert Report of T. Brandon (9 March 2015).
AUS-16	Expert Report of C. Correa (10 March 2015).
AUS-17	Expert Report of T. Chipty (9 March 2015).
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Exhibit Number	Description of Exhibit
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AUS-350	<i>Tobacco Products Control Act 2006</i> (WA) (as made).
AUS-351	<i>Tobacco (Amendment) Act 1990</i> (ACT).
AUS-352	<i>Public Health Act 1991</i> (NSW) (as made), Section 59.

Exhibit Number	Description of Exhibit
AUS-353	<i>Tobacco Products (Prevention of Supply to Children) Act 1998</i> (Qld) (as made), Section 15, 22, 40.
AUS-354	<i>Tobacco Products Control (Miscellaneous) Amendment Act 1993</i> (SA).
AUS-355	<i>Tobacco Act 1992</i> (NT) (as made), Sections 3, 9.
AUS-356	<i>Public Health Amendment Act 1996</i> (Tas).
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Exhibit Number	Description of Exhibit
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AUS-397	<i>Tobacco Products Regulation (Further Restrictions) Amendment Act 2012</i> (SA).

Exhibit Number	Description of Exhibit
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AUS-399	<i>Tobacco (Amendment) Act 2005</i> (Vic), Section 5, 18, 24.
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Exhibit Number	Description of Exhibit
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Exhibit Number	Description of Exhibit
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Exhibit Number	Description of Exhibit
AUS-453	<i>Tobacco Act 1927 (ACT) Sections 18, 21.</i>
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AUS-464	<i>Tobacco Advertising Prohibition Act 1992 (as made).</i>
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AUS-491	<i>Trade Marks Registration Act 1875</i> (UK), Section 3.

Exhibit Number	Description of Exhibit
AUS-492	<i>Trade Marks Act 1905 (UK).</i>
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I. INTRODUCTION AND SUMMARY

1. This dispute concerns a Member's right to regulate the promotion of a unique, highly addictive, and deadly product – tobacco. Tobacco is the only legal consumer product that kills half of its long-term users when used exactly as intended by the manufacturer, and up to two in every three Australian smokers. The death toll caused by tobacco, to both users and those exposed to tobacco smoke, has led the World Health Organization ("WHO") to classify it as a global epidemic.

2. Through the measure at issue in this dispute, Australia extended its comprehensive ban on tobacco marketing to remove one of the last avenues for advertising and promotion that remained open to the tobacco industry in the Australian market – the product itself and its retail packaging. The tobacco plain packaging measure has curbed the tobacco industry's well-documented use of tobacco packaging to increase the appeal of tobacco products to consumers and prospective consumers, including young people, while ensuring that tobacco companies remain able to distinguish their products from other products in the marketplace. Australia's tobacco plain packaging measure is consistent with the Guidelines to the WHO Framework Convention on Tobacco Control ("FCTC"), to which 180 countries, including Australia and two of the complainants, are parties.

3. The principal measures at issue in this dispute are the Tobacco Plain Packaging Act 2011 ("TPP Act")¹ and the Tobacco Plain Packaging Regulations 2011 as amended ("TPP Regulations")² (collectively, the "tobacco plain packaging measure"). Broadly speaking, the tobacco plain packaging measure: (1) prohibits the use of logos, brand imagery, colours and promotional text on the retail packaging of tobacco products; (2) permits the use of brand, business or company name and any

¹ *Tobacco Plain Packaging Act 2011* (Cth) No. 148, 2011, Exhibit AUS-1. The *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth), Exhibit AUS-4, was enacted at the same time as the TPP Act to ensure that applicants for trademark registration and registered owners of trademarks are not disadvantaged by the practical operation of the TPP Act. *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*, Explanatory Memorandum, Exhibit AUS-5, p. 2.

² *Tobacco Plain Packaging Regulations 2011* (Cth) as amended, made under the *Tobacco Plain Packaging Act 2011*, Exhibit AUS-3.

variant names on retail packaging, as long as these names appear in a standardised form; (3) imposes certain restrictions upon the shape and finish of retail packaging for tobacco products; and (4) imposes other requirements pertaining to the appearance of tobacco products.

4. As set forth in the TPP Act, the objectives of the tobacco plain packaging measure are to reduce the appeal of tobacco products to consumers; increase the effectiveness of health warnings on the retail packaging of tobacco products; and reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products. In these ways, the tobacco plain packaging measure contributes to the overall objectives of Australia's comprehensive tobacco control strategy. In addition to giving effect to Australia's obligations under the FCTC, the TPP Act specifies that the measure is intended to contribute to improving public health by discouraging people from taking up smoking or using tobacco products; encouraging people to give up smoking, and to stop using tobacco products; discouraging people who have given up smoking or stopped using tobacco products, from relapsing; and reducing exposure to second-hand smoke.

5. At the same time, the tobacco plain packaging measure ensures that the manufacturers of tobacco products can continue to use trademarks to distinguish their products from those of other manufacturers in the course of trade. In the Australian market, as a result of a number of tobacco control measures that are not challenged in this dispute, the principal means by which tobacco companies can distinguish their products in the course of trade is through the brand and variant names of those products. The tobacco plain packaging measure ensures that tobacco manufacturers can continue to distinguish their products on this basis by allowing them to use company, brand and variant names on tobacco retail packaging. In addition, section 28 of the TPP Act and other features of Australian law discussed in this submission ensure that the inability of tobacco manufacturers to use certain types of trademarks (such as figurative trademarks) on tobacco products and packaging does not impair their rights under Australian law in respect of the registration and enforcement of such trademarks.

6. Australia will demonstrate in this first written submission that, contrary to the complainants' contentions, the tobacco plain packaging measure is fully consistent with Australia's obligations under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"), the *Agreement on Technical Barriers to Trade* ("TBT Agreement"), and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

7. This submission is organized and may be summarized as follows. First, in Part II of this submission, Australia will provide an overview of the global tobacco epidemic and the toll that it continues to take on the health of Australian citizens. Over the course of the past 50 years, Australia has adopted a series of measures to curb tobacco use. These measures include restrictions on tobacco advertising and promotion including restrictions on the display of tobacco products at the point of sale, restrictions on the sale of tobacco products to persons under the age of 18, mandatory text and graphic health warnings on tobacco packaging, the introduction of smoke free work places and public spaces, increased excise taxes, support for counselling services for smokers trying to quit and the use of social marketing campaigns and social media to promote anti-smoking messages. Consistent with international best practice, these measures form a comprehensive suite of tobacco control measures that have been highly effective in reducing tobacco use by Australians.

8. In Part II Australia will explain why tobacco plain packaging was the next logical step in its comprehensive tobacco control strategy. Australia's comprehensive restrictions on tobacco advertising, marketing and promotion have made it a "dark" market for the tobacco industry – one of the "darkest" markets in the world.³ In this environment, prior to the implementation of tobacco plain packaging, tobacco retail packaging and the tobacco product itself remained as a "billboard" for the tobacco industry to promote its products to consumers and prospective consumers. Tobacco companies have been among the most sophisticated users of colours, typefaces,

³ Australia is a "dark market" because it has a highly restricted regulatory environment for tobacco advertising and promotion.

figurative shapes, and other design elements to create positive perceptions and associations with products. These companies have skilfully shaped their brands so as to appeal to particular groups of consumers and prospective consumers – especially young people, without whose recruitment as smokers the tobacco industry will eventually cease to exist. The tobacco industry's use of retail packaging as a medium for advertising, marketing and promotion is evidenced by internal industry documents and direct admissions by tobacco company executives. For example, a 2001 document from British American Tobacco, one of the world's largest tobacco companies, and the largest tobacco company in Australia, stated that:

Globally constraints are being placed upon markets in terms of their ability to market the brand above the line. In some key markets legislative restrictions mean that the only medium available to communicate with consumers is via packaging. The pack becomes the primary communication vehicle for conveying the brand essence. In order to ensure the brand remains relevant to target consumers, particularly in these darkening markets, it is essential that the pack itself generates the optimum level of modernity, youthful image and appeal amongst ASU30 [Adult Smokers Under 30] consumers.⁴

9. As Australia will discuss in Part II.F, the WHO and the Conference of the Parties ("COP") to the FCTC have specifically recommended that the Parties to the FCTC, currently 180 countries, consider the adoption of tobacco plain packaging measures. Article 11 of the FCTC obliges Parties to require health warnings on tobacco packaging and to implement measures to eliminate the propensity of tobacco packaging to mislead consumers about the health effects of smoking, while Article 13 requires Parties to implement comprehensive bans on tobacco advertising, promotion and sponsorship. In 2008, the COP to the FCTC adopted by consensus two sets of guidelines that recommend consideration of tobacco plain packaging as a means of implementing these obligations. In their submission to the Panel, the WHO and the FCTC Secretariat have explained the extensive scientific and evidentiary basis for this recommendation.

⁴ British American Tobacco, Packaging Brief, 2 January 2001 Bates no. 325211963, Exhibit AUS-23.

10. In Parts II.G and II.H, Australia will describe the tobacco plain packaging measure in detail and explain how the requirements imposed by the measure support Australia's tobacco control objectives. In Part II.I, Australia will document, in particular, how tobacco plain packaging reduces the appeal of tobacco products, increases the effectiveness of graphic health warnings, and reduces the ability of tobacco packaging to mislead consumers as to the dangers of tobacco use. In Part II.J, Australia will then begin to respond to the complainants' erroneous and misleading evidence and arguments concerning the alleged ineffectiveness of plain packaging as a tobacco control measure. Australia sets forth further detailed responses to the complainants' evidence and expert submissions in Annexure E to this submission.

11. Having reviewed the tobacco plain packaging measure and its rationale, Australia will respond to the complainants' legal claims in respect of the measure at issue.

12. First, in Part IV, Australia will respond to the complainants' claims under the TRIPS Agreement. Australia will begin by rebutting the central underpinning of those claims, namely, that the TRIPS Agreement requires Members to confer a "right of use" upon owners of registered trademarks, or that such a right can be inferred from the text of the Agreement. In fact, as Australia will demonstrate, the rights that Members are required to confer under the TRIPS Agreement are rights in respect of trademark registration and the negative right to exclude third parties from certain uses of a trademark. There is no positive "right of use" under the TRIPS Agreement.

13. In Parts IV.B and IV.C, Australia will demonstrate that the nature of the rights that Members are required to confer under the TRIPS Agreement disposes of the complainants' claims under Article 15, Article 2.1 (incorporating Article 6***quinquies*** A(1) of the Paris Convention), and Article 16 of the TRIPS Agreement. The complainants' claims under these provisions effectively seek to convert certain rights in respect of registration and exclusion into an affirmative right of trademark owners to use their trademarks in the marketplace. The complainants' interpretations of these provisions find no textual support in the TRIPS Agreement and the Paris Convention. Moreover, the complainants' claims under these provisions largely ignore the fact that section 28 of the TPP Act ensures that a trademark owner's inability to use certain

trademarks on tobacco products and their retail packaging does not affect a trademark owner's otherwise existing right to register, and maintain registration of, a trademark under the Trade Marks Act, or to prevent others from using identical or similar signs. In this way, the TPP Act ensures that Australia's tobacco plain packaging requirements do not interfere with the rights that Australia is required to confer upon trademark owners under the TRIPS Agreement.

14. In Part IV.D, Australia will turn to the complainants' claims under Article 20 of the TRIPS Agreement, which provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". Australia will begin by demonstrating that the complainants' claims fail at the threshold because they do not identify any encumbrance upon the "use" of a trademark "in the course of trade". The complainants do not take into account the fact that other measures not at issue in this dispute – most importantly, restrictions on the display of tobacco products at the point of sale – mean that the use of brand and variant names is the principal way that tobacco companies can distinguish their products from other products in the course of trade. Because the TPP Act allows manufacturers to use brand and variant names on tobacco retail packaging, there is no additional encumbrance that results from the special requirements at issue.

15. Even if the complainants had established the threshold applicability of Article 20, Australia will demonstrate in Part IV.D.4 that they have failed to demonstrate that any encumbrance resulting from the special requirements at issue has been imposed "unjustifiably". The ordinary meaning of the term "unjustifiably", interpreted in its context and in light of the object and purpose of the TRIPS Agreement, requires a complainant to demonstrate that there is no rational connection between special requirements imposed upon the use of a trademark in the course of trade and the pursuit of a legitimate public policy objective. This interpretation is fully supported by prior panel and Appellate Body reports interpreting the term "unjustifiable". The complainants twist the term "unjustifiably" beyond recognition when they seek to interpret this term as encompassing notions of "necessity" and "least trade-restrictiveness" in light of "reasonably available alternatives", or when

they seek to imbue it with other meanings that find no support in a proper interpretation of the term.

16. Having established the proper interpretation of the term "unjustifiably", Australia will demonstrate in Part IV.D.4IV.D.4(d)i.e that the complainants have failed to establish that there is no rational connection between any encumbrance resulting from the special requirements at issue and the pursuit of Australia's public health objectives. In support of their contention that Australia's tobacco plain packaging requirements are "unjustifiable", the complainants would have the Panel believe, *inter alia*: (1) that retail tobacco packaging is not a form of tobacco promotion and advertising; (2) that the wealth of evidence demonstrating that plain packaging can reduce the appeal of tobacco products, increase the effectiveness of warnings and reduce the capacity of packaging to mislead consumers as to the harms of tobacco use is all unreliable; (3) that the FCTC COP acted without any rational basis when it agreed by consensus to recommend tobacco plain packaging as a means of implementing obligations under the FCTC; and (4) that tobacco plain packaging has no rational connection to its objectives as part of a comprehensive tobacco control strategy. The complainants have not even remotely discharged their burden of establishing these counterfactual and counterintuitive propositions.

17. In Parts IV.E and IV.F, Australia will conclude its response to the complainants' claims under the TRIPS Agreement by demonstrating that their claims in respect of "unfair competition" and geographical indications are unfounded. The complainants' "unfair competition" claims under Articles 2.1 (incorporating Article 10*bis* of the Paris Convention), and 22.2(b) of the TRIPS Agreement attempt to recast these provisions so as to prohibit Members from imposing any restrictions on the use of signs, including trademarks and geographical indications, and any measures that could affect any "aspect of competition". Australia will demonstrate that these provisions discipline the conduct of market actors in relation to rival competitors and potential consumers, and do not support the complainants' claims in this dispute. In relation to the complainants' claims under Article 24.3 of the TRIPS Agreement regarding the protection of geographical indications, Australia will demonstrate that

the complainants' claims entirely misconstrue the scope of Article 24.3, and must be rejected for this reason.

18. Part V of this submission sets forth Australia's response to the complainants' claims under Article 2.2 of the TBT Agreement, which provides that "[t]echnical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."

19. In Part V.A, Australia will demonstrate that the complainants' claims under Article 2.2 fail at the threshold because they have failed to identify any respect in which the tobacco plain packaging measure limits international trade in the tobacco products that are subject to the measure. The complainants' principal allegation of trade-restrictiveness is that the tobacco plain packaging measure reduces brand differentiation and, as a consequence, results in "downtrading" from "premium" to "non-premium" tobacco brands. Even if the complainants had established that this downtrading effect were properly attributable to the tobacco plain packaging measure, the complainants have failed to demonstrate how downtrading from one brand segment to another brand segment would have a limiting effect on trade in tobacco products. In point of fact, Australia's imports of tobacco products have increased substantially since the implementation of the tobacco plain packaging measure, as domestic production has declined. Australia will demonstrate in this part of the submission that the complainants' other allegations of trade-restrictiveness are equally unfounded.

20. In Part V.B, Australia will demonstrate that, even if the complainants had established that the tobacco plain packaging measure has a limiting effect on trade in tobacco products, the measure is nonetheless not more trade-restrictive than necessary to fulfil Australia's legitimate objectives. The foundation of the complainants' case under Article 2.2 (and, for that matter, under Article 20 of the TRIPS Agreement) is that the tobacco plain packaging measure makes no contribution to its stated objectives and, in fact, will necessarily undermine the accomplishment of those objectives. In support of this contention, the complainants recycle arguments that their tobacco industry supporters have advanced, unsuccessfully, in other fora over the

course of many years. Australia rebuts these arguments in Part V.B.2 and in Annexure E.

21. In Part V.B.3, Australia will then demonstrate that the risks non-fulfilment of the objectives of the tobacco plain packaging measure would create are great, because the nature of the risks at issue is "both vital and important in the highest degree", and that the consequences that would arise from non-fulfilment of the legitimate objectives of the tobacco plain packaging measure are grave given the enormous harm to public health caused by tobacco products. In Part V.B.4, Australia will then explain why the complainants' proposed alternatives are not reasonably available, not less trade-restrictive even according to the complainants' erroneous interpretation of that term, or able to make an equivalent contribution to the objectives of the tobacco plain packaging measure.

22. Finally, in Part VI, Australia will demonstrate that Article IX of the GATT 1994 disciplines measures which require the application of marks of origin and does not apply to measures which prohibit the application of such marks. Accordingly, Cuba's claim does not fall within the scope of Article IX:4.

II. THE GLOBAL TOBACCO EPIDEMIC AND AUSTRALIA'S EFFORTS TO REDUCE THE DAMAGE CAUSED BY TOBACCO

A. TOBACCO AND TOBACCO PRODUCTS ARE UNIQUE

23. Tobacco use is the world's leading cause of preventable morbidity and mortality, and has been classified as a global epidemic under the FCTC. Tobacco use is responsible for the deaths of nearly 6,000,000 people annually, including 600,000 non-smokers exposed to second-hand smoke.⁵ There is no safe level of tobacco use or safe level of exposure to second-hand or environmental tobacco smoke.⁶ Tobacco use harms nearly every organ in the body.⁷

1. All tobacco products are highly addictive

24. Nicotine is the chemical in tobacco that causes addiction.⁸ Reviews by the WHO⁹ and bodies of high international standing such as the Royal College of Physicians of London,¹⁰ have concluded that the pharmacologic and behavioural processes that determine tobacco addiction are similar to those that determine addiction to other drugs, such as heroin and cocaine. The Royal College of Physicians of London concluded in 2007 that:

⁵ World Health Organization Media Centre, "Tobacco Fact sheet No. 339" (May 2014), available at: <http://www.who.int/mediacentre/factsheets/fs339/en/> (last accessed 25 February 2015), Exhibit AUS-28.

⁶ World Health Organization Media Centre, "Protection from exposure to second-hand tobacco smoke," *Policy Recommendations* (2007) WHO Press, Geneva, Exhibit AUS-24, p. 2.

⁷ United States Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (June 2004), (US Surgeon General's Report (2004)), Exhibit AUS-25, p. 25.

⁸ United States Department of Health and Human Services, *The Health Consequences of Smoking - Nicotine Addiction: A Report of the Surgeon General* (May 1988), (US Surgeon General's Report (1988)), Exhibit AUS-29, p. 9.

⁹ G. Edwards, A. Arif, and R. Hadgson, "Nomenclature and classification of drug- and alcohol-related problems: a WHO memorandum", *Bulletin of the World Health Organization*, Vol. 59, No. 2 (1981), 225, Exhibit AUS-30.

¹⁰ Royal College of Physicians of London, *Nicotine Addiction in Britain: A Report of the Tobacco Advisory Group of the Royal College of Physicians* (2000), Exhibit AUS-31, p. xiv.

Initial use of nicotine is more likely to lead to addictive use, and the prevalence of addiction among all users is higher than that observed for other addictive substances.¹¹

25. All tobacco products contain substantial amounts of nicotine;¹² cigarettes are particularly effective in delivering nicotine.¹³ Likewise, cigars can deliver nicotine in concentrations comparable to cigarettes and smokeless tobacco¹⁴ - a single large cigar can contain as much tobacco as an entire packet of cigarettes and can take between one to two hours to smoke.¹⁵

26. The tobacco industry has known for decades¹⁶ that nicotine is addictive, acknowledging privately as early as 1963 that:

[N]icotine is addictive. We are then in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.¹⁷

27. The addictive properties of nicotine are critical in the transition of smokers from experimentation to sustained smoking¹⁸ and to the maintenance of smoking for the majority of smokers who wish to quit.¹⁹ Statistics indicate that 95% of all quit

¹¹ Royal College of Physicians, *Harm Reduction in Nicotine Addiction: Helping People who Can't Quit: A Report by the Tobacco Advisory Group of the Royal College of Physicians* (2007), Exhibit AUS-32, p. 66.

¹² United States Department of Health and Human Services, *The Health Consequences of Smoking - Nicotine Addiction: A Report of the Surgeon General* (May 1988), (US Surgeon General's Report (1988)), Exhibit AUS-29, p. 9.

¹³ Expert Report of J. Samet, (5 March 2015), Exhibit AUS-7, para. 40.

¹⁴ United States Department of Health and Human Services, National Cancer Institute, "Smoking and Tobacco Control Monograph No. 9" in D. Burns, K.M. Cummings, D. Hoffmann (eds) *Cigars: Health Effects and Trends* (NIH Publication No 98-4302, 1998), Exhibit AUS-33, p. 11.

¹⁵ American Lung Association, "Cigars: Facts and Figures", available at: <http://www.lung.org/stop-smoking/about-smoking/facts-figures/cigars.html> (last accessed 30 January 2015), Exhibit AUS-34.

¹⁶ RD Hurt and CR Robertson, "Prying Open the Door to the Tobacco Industry's Secrets about Nicotine: the Minnesota Tobacco Trial", *The Journal of the American Medical Association*, (1998), 280:1173–1181, Exhibit AUS-35.

¹⁷ Brown and Williamson, "Implications of Battelle Hippo I and II and the Griffith Filter," (17 July 1963), Bates 1802.05, Exhibit AUS-36.

¹⁸ United States Department of Health and Human Services, *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* (2014), (US Surgeon General's Report (2014)), Exhibit AUS-37, p. 113.

¹⁹ United States Department of Health and Human Services, *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* (2014), (US Surgeon General's

(continued)

attempts are unsuccessful, such is the grip of nicotine addiction.²⁰ As the Union for International Cancer Control and Cancer Council Australia note:

addiction to nicotine...is the fundamental reason that individuals persist in using tobacco products.²¹

2. Tobacco products cause death and disease when used exactly as intended

28. Authoritative scientific opinion has concluded that smoking causes many forms of cancer (lung, larynx, lip, tongue, mouth, pharynx, oesophagus, pancreas, bladder, kidney, cervix, stomach and acute myeloid leukaemia, liver cancer, and urinary tract cancer), stroke, peripheral vascular disease, chronic obstructive pulmonary disease, several serious cardiovascular diseases, many kinds of respiratory diseases and impairments and other types of disease.²²

29. There is also authoritative scientific opinion that involuntary inhalation of tobacco ("passive smoking") "causes premature death and disease in children and in adults who do not smoke" including lung cancer, coronary heart disease and Sudden Infant Death Syndrome (SIDS).²³

30. Smoke from cigars, like the smoke from cigarettes, contains toxic and cancer causing chemicals harmful to both smokers and non-smokers.²⁴ However, the

Report (2014)), Exhibit AUS-37, p. 113; Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 48.

²⁰ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para 50.

²¹ Union for International Cancer Control and Cancer Council Australia, *Written Submission of Non-Party Amici Curiae* (11 February 2015), Exhibit AUS-38, para. 3.4.

²² United States Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (June 2004), (US Surgeon General's Report (2004)), Exhibit AUS-25, p. 4, Table 1.1; United States Department of Health and Human Services, *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* (2014), (US Surgeon General's Report (2014)), Exhibit AUS-37, p. 113.

²³ United States Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), (US Surgeon General's Report (2006)), Exhibit AUS-39, p. 7.

²⁴ National Cancer Institute, "Fact Sheet, Cigar Smoking and Cancer" (October 2010), available at: <http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars> (last accessed 2 March 2015), Exhibit AUS-40; Cancer Council of Victoria, *Submission on Tobacco Plain Packaging: Proposed approach to non-cigarette tobacco products* (28 October 2011), Exhibit AUS-41, pp. 2-3.

amounts of these substances found in cigar smoke are much higher.²⁵ Cigar smoking is causally linked to cancer, cardiovascular disease and chronic lung disease,²⁶ and the WHO notes that:

smoke from cigars contains the same toxic constituents as smoke from cigarettes, and cigar smoking causes many of the same diseases caused by cigarette smoking.²⁷

B. THE GLOBAL TOBACCO EPIDEMIC

31. The WHO estimates that if current trends continue, the annual death toll worldwide from tobacco use could rise to more than 8,000,000 by 2030.²⁸ This "global tobacco epidemic"²⁹ affects all WTO Members.

32. In their joint Amicus Submission,³⁰ the WHO and FCTC Secretariat outline the extensive health, social, environmental, and economic consequences of tobacco consumption and exposure, and make clear that these consequences "have a particularly acute impact on developing countries."³¹ Tobacco use is the only common risk factor across all four major non-communicable diseases (cardiovascular diseases, cancers, chronic respiratory diseases and diabetes).³² The burden of death and diseases from non-communicable diseases is most heavily concentrated in the world's poorest countries.³³

²⁵ National Cancer Institute, "Fact Sheet, Cigar Smoking and Cancer" (October 2010), available at: <http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars> (last accessed 2 March 2015), Exhibit AUS-40.

²⁶ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, paras. 75-77.

²⁷ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 3.

²⁸ World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2011: Warning about the Dangers of Tobacco* (2011), Exhibit AUS-43, p. 8.

²⁹ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, p. 33.

³⁰ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 5.

³¹ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 5.

³² Union for International Cancer Control and Cancer Council Australia, *Written Submission of Non-Party Amici Curiae* (11 February 2015), Exhibit AUS-38, para. 4.2.

³³ Union for International Cancer Control and Cancer Council Australia, *Written Submission of Non-Party Amici Curiae* (11 February 2015), Exhibit AUS-38, para. 4.2.

33. Tobacco related illness has a significant impact on the poor and economically vulnerable and places increasing social and economic strain on governments forced to spend greater amounts to help address the burden of disease that tobacco use causes.³⁴ So serious is the effect of tobacco consumption on developing countries, that the United Nations has highlighted the implementation of the FCTC as a sustainable development goal for the post-2015 development agenda.³⁵

C. TOBACCO USE IN AUSTRALIA

34. Tobacco use remains one of the leading causes of preventable disease and premature death in Australia. Estimates of the annual mortality attributable to smoking in Australia since 2000 have "ranged from about 15,000 deaths to about 20,000 with the differences reflecting methodology".³⁶ As many as two in three Australian smokers will die prematurely from smoking-related diseases.³⁷ The harmful consequences of tobacco use are disproportionately felt by disadvantaged communities,³⁸ and smokers in Australia are twice as likely as non-smokers to have been diagnosed or treated for a mental illness.³⁹ Smoking is responsible for 12.1% of the total burden of disease and 20% of deaths among Aboriginal and Torres Strait Islander peoples.⁴⁰

³⁴ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, paras. 4-5.

³⁵ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 10.

³⁶ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 100.

³⁷ E. Banks, G. Joshy, M. Weber, B. Lui, R. Grenfell, S. Eggar, E. Paige, A. Lopez, F. Sitas and V. Beral, "Tobacco smoking and all-cause mortality in a large Australian cohort study: findings from a mature epidemic with current low smoking prevalence", *BMC Medicine*, Vol. 13, (2015), 38, Exhibit AUS-27, p. 38.

³⁸ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 103.

³⁹ Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey Report*, Drug Statistics Series No. 25 (July 2011) (Australian Institute of Health and Welfare Survey (2011)), Exhibit AUS-45, p. 22.

⁴⁰ T. Vos, B. Barker, L. Stanley and A.D. Lopez, *The Burden of Disease and Injury in Aboriginal and Torres Strait Islander Peoples: Summary Report*, School of Population Health, The University of Queensland. (September 2007), Exhibit AUS-46, p. 55.

35. Although rates of smoking prevalence in Australia continue to decline, the social and economic costs of tobacco consumption in Australia, estimated at AUD31.5 billion in 2004,⁴¹ are expected to continue to rise, as the disease and health effects caused by tobacco consumption can take many years to manifest.⁴²

36. Australia's comprehensive and dynamic approach to tobacco control over many decades has resulted in a remarkable drop in smoking prevalence. Prevalence in Australia is now the lowest it has been in many decades, with the most recent declines occurring during the period in which tobacco plain packaging was in force. Between 2010 and 2013, rates of daily smoking among people aged 18 or older dropped from 15.9% to 13.3%.⁴³ In 2013, 12.8% of people in Australia aged 14 or older were daily smokers, declining from 15.1% in 2010.⁴⁴ The figure below⁴⁵ illustrates tobacco smoking status of people aged 14 years or older between 1991 and 2013:

⁴¹ D.J. Collins and H.M. Lapsley, *The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05: A Report for the Commonwealth of Australia* (2008), Exhibit AUS-47, p XI.

⁴² Professor Samet notes that: "The four-stage model of the evolution of the tobacco epidemic and its consequences developed by Lopez and colleagues (Lopez, Collishaw et al. 1994), reflects the experience gained across the last century in witnessing the rise and fall of tobacco use and the parallel but lagged rise and fall of major tobacco-caused diseases." Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 94.

⁴³ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian Institute of Health and Welfare Survey (2014)), Exhibit AUS-48, Table 3.4: Tobacco smoking status, people aged 12 years or older, by age, 2001 to 2013. The National Drug Strategy Household Survey is conducted every 2-3 years by the Australian Institute of Health and Welfare and collects information on alcohol and tobacco consumption and illicit drug use in Australia, as well as providing valuable insight into the current situation on smoking prevalence in Australia.

⁴⁴ Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey Report*, Drug Statistics Series No. 25 (July 2011) (Australian Institute of Health and Welfare Survey (2011)), Exhibit AUS-45, p. ix

⁴⁵ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian Institute of Health and Welfare Survey (2014)), Exhibit AUS-48, Figure 3.1 on tobacco smoking status, people aged 14 or older, 1991-2013 (per cent), p. 19

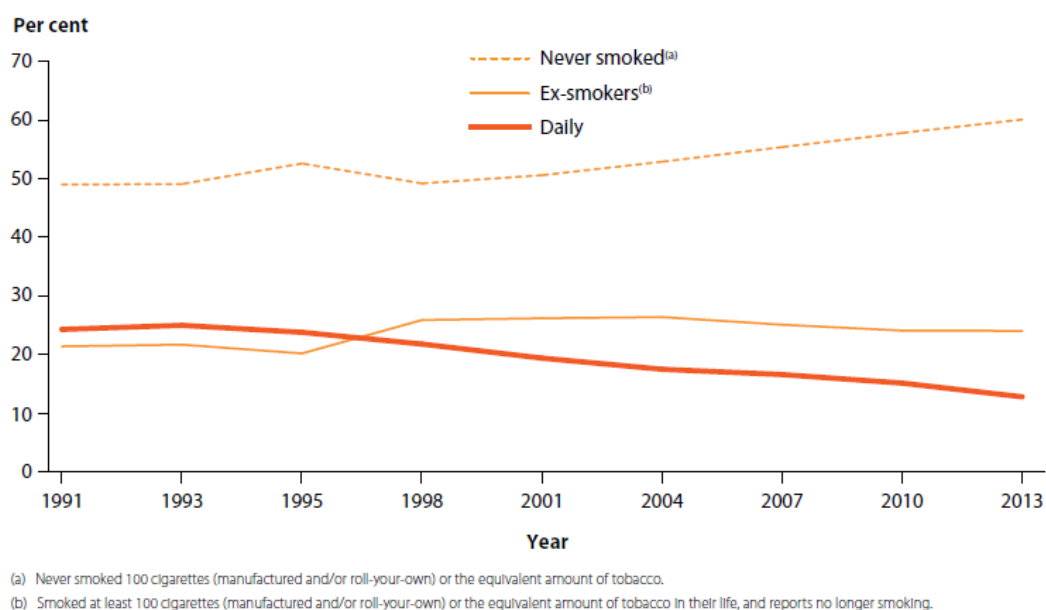


Figure 1: Tobacco smoking status, people aged 14 or older, 1991–2013 (per cent)

37. Aboriginal and Torres Strait Islander peoples have a much higher rate of tobacco use than non-Indigenous Australians, with 41.6% of Aboriginal and Torres Strait Islander peoples above the age of 15 smoking on a daily basis.⁴⁶ In 2012-13 current daily smoking was more prevalent among Aboriginal and Torres Strait Islander peoples than non-Indigenous people in every age group.⁴⁷

D. A COMPREHENSIVE APPROACH TO TOBACCO CONTROL

1. Characteristics of successful tobacco control strategies

38. To understand the scientific evidence and policy judgments that underpin Australia's tobacco control strategy, and the success of its strategy to date, it is necessary to recognise the fundamental importance of a comprehensive approach to tobacco control. Such an approach to tobacco control is the most effective means of

⁴⁶ Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey, Updated Results, 2012-13, cat. no. 4727.0.55.006 (2014), Exhibit AUS-49.

⁴⁷ Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey, Updated Results, 2012-13, cat. no. 4727.0.55.006 (2014), Exhibit AUS-49.

reducing the incidence and prevalence of smoking⁴⁸ and its importance is recognised in the FCTC.⁴⁹ Tobacco control strategies must cover all aspects of supply and demand for tobacco and apply to all tobacco products.⁵⁰ Adoption of a comprehensive strategy of tobacco control measures leads to greater reductions in tobacco use than would result from the sum of the separate effects of individual tobacco control policies given the priming, additive and synergistic effect of these policies. A piecemeal approach to tobacco control will be much less effective than a comprehensive one.⁵¹

39. Governments must refresh and revise tobacco control strategies to maintain their effectiveness and to counter attempts by the tobacco industry to undermine tobacco control efforts.⁵²

(a) Tobacco control strategies must cover all aspects of supply and demand for tobacco

40. The power of a comprehensive strategy of tobacco control measures was recognised in the 2000 United States Surgeon General's Report, which concluded:

⁴⁸ The terms "incidence" and "prevalence" are epidemiological terms and their technical meaning is explained by Professor Samet: "Incidence refers to new onset of disease and the incidence rate to the frequency of occurrence of new cases over time. Prevalence is a straightforward epidemiological indicator that is the proportion of people in the population having a particular characteristic, e.g., an exposure, such as cigarette smoking, or a disease, e.g., chronic obstructive pulmonary disease. Crudely, it is calculated as the number of people with the disease or exposure, divided by the total population." Expert Report J. Samet (5 March 2015), Exhibit AUS-7, para. 60.

⁴⁹ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Articles 4.4 and 5.1; World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 72.

⁵⁰ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 12; Expert Report of Professor J. Samet (5 March 2015), Exhibit AUS-7, paras. 106-109; Centers for Disease Control and Prevention, "Best Practices for Comprehensive Tobacco Control Programs –2014" (2014), available at: http://www.cdc.gov/tobacco/stateandcommunity/best_practices/ (last accessed 2 March 2015), Exhibit AUS-50; P. Jha and F.J. Chaloupka, *Curbing the epidemic: governments and the economics of tobacco control* (World Bank, 1999), Exhibit AUS-51.

⁵¹ Australian Government National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020, Technical Report 2 - Tobacco Control in Australia: Making Smoking History* (24 July 2009), Exhibit AUS-52, p. vi.

⁵² *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 5.

The impact of these various efforts, as measured with a variety of techniques, is likely to be underestimated because of the synergistic effect of these modalities. The potential for combined effects underscores the need for comprehensive approaches.⁵³

41. The synergies between measures can amplify the overall effect of tobacco control strategies more than any individual measure alone. For example, mass media campaigns on the dangers of smoking increase people's motivation to quit. Excise tax increases lead more people to attempt to quit smoking. When these measures are accompanied by increased support for cessation services, more of those attempting to quit will succeed.⁵⁴ These cumulative and synergistic effects may similarly be seen in the context of tobacco packaging. Tobacco plain packaging, by decreasing the appeal of tobacco products, also increases the effectiveness of graphic health warnings. It is logical therefore that enlarged graphic health warnings, combined with tobacco plain packaging, would lead to a stronger effect than either measure alone.

42. The increasing heterogeneity of tobacco use reinforces the need for a comprehensive approach to tobacco control.⁵⁵ Individual measures may impact only particular groups or segments of consumers, or may only impact them to varying degrees (e.g. excise increases will have the greatest impact on price sensitive consumers). Evidence shows that comprehensive regulation is more likely to achieve a reduction in smoking uptake and prevalence across all socio-economic groups.⁵⁶

43. As the United States Centers for Disease Control and Prevention underscores in its report, *Best Practices for Comprehensive Tobacco Control Programs 2014*, tobacco control strategies must target all smoking behaviour. The report notes that a comprehensive tobacco control regime should target: initiation among youth and young adults; quitting among youth and adults; exposure to second-hand smoke; and

⁵³ US Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000), (US Surgeon General's Report (2000)), Exhibit AUS-53, p. 6.

⁵⁴ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 16.

⁵⁵ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 106.

⁵⁶ Centers for Disease Control and Prevention, "Best Practices for Comprehensive Tobacco Control Programs –2014" (2014), available at: http://www.cdc.gov/tobacco/stateandcommunity/best_practices/ (last accessed 2 March 2015), Exhibit AUS-50, pp. 9-10.

tobacco-related disparities among population groups.⁵⁷ In particular, a focus on preventing youth initiation is important, as youth and adolescence is the key period in which the initiation of tobacco products is likely to occur. Moreover, evidence shows that people who begin smoking early are more likely to continue smoking.⁵⁸

(b) Tobacco control strategies must be comprehensive and apply to all tobacco products

44. Successful tobacco control strategies must apply to all tobacco products. As Professor Frank Chaloupka, Distinguished Professor of Economics at the University of Illinois in Chicago (UIC) and Director of the UIC Health Policy Center, states in his expert report:

Tobacco control policies and other interventions need to be comprehensive in terms of the tobacco products they cover, given that a policy that impacts only a subset of tobacco products will be effective in reducing the use of those products, but will likely result in substitution to other products. Similarly, tobacco control measures need to be comprehensive in the scope of the activities, places, and/or other domains they cover in order to minimize the ability of tobacco companies and/or tobacco users to avoid these measures. Finally, adoption of a comprehensive suite of tobacco control measures will almost certainly lead to greater reductions in tobacco use than would result from the sum of their separate effects given the synergies among these policies.⁵⁹

45. Failure to apply tobacco control regimes in a comprehensive manner, encompassing all tobacco products, creates a regulatory gap which, if left unaddressed, could be exploited by the tobacco industry or could allow consumers to

⁵⁷ Centers for Disease Control and Prevention, "Best Practices for Comprehensive Tobacco Control Programs –2014" (2014), available at: http://www.cdc.gov/tobacco/stateandcommunity/best_practices/ (last accessed 2 March 2015), Exhibit-50, p. 19.

⁵⁸ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian Institute of Health and Welfare Survey (2014)), Exhibit AUS-48, p. 22.

⁵⁹ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 11.

avoid measures associated with particular tobacco products (by switching to less-regulated products).⁶⁰

(c) Comprehensive strategies are consistent with the FCTC

46. Comprehensive approaches to tobacco control are consistent with, and fundamental to, the FCTC. This is confirmed in the Amicus Submission⁶¹ submitted by the WHO and the FCTC Secretariat, which states that:

[T]obacco control relies upon implementation of comprehensive multi-sectoral measures that work together as cumulative interventions in a complementary regulatory scheme.⁶²

47. Article 5 of the FCTC explicitly includes the following general obligation of Parties:

Each Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party.

48. The FCTC Secretariat explains:

It is through the implementation of such a comprehensive multisectoral approach that the tobacco control measures contained in the FCTC are most effective.⁶³

49. The FCTC includes measures directed at both demand and supply, and obliges Parties to regulate the packaging and labelling of tobacco products, as well as the contents of tobacco products; warn people about the dangers of tobacco; and

⁶⁰ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 14; see also Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 114, in which Professor Samet refers to the United States experience of switch and substitution by consumers from cigarettes to small cigars due to differential tax treatment of non-cigarette products, and use by the tobacco industry of small cigars to maintain an array of products that would appeal to youth (in the light of marketing restrictions placed on cigarettes).

⁶¹ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42.

⁶² World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 72.

⁶³ World Health Organization, *Statement of the World Health Organization in relation to the issue of Standardized Tobacco Product Packaging*, WTO TBT Committee Meeting, Geneva (5 November 2014), Exhibit AUS-54, p. 2.

undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.⁶⁴ These obligations are not exhaustive,⁶⁵ and Parties are encouraged to implement measures beyond those required by the FCTC.

2. Australia's history of applying a comprehensive approach to tobacco control

50. Australia's tobacco control regime is one of the most comprehensive in the world. Over a period of almost 50 years, Australia has progressively implemented stringent evidence-based tobacco control measures at the Commonwealth, state and territory level, consistent with obligations under the FCTC. The complainants themselves acknowledge the comprehensiveness of Australia's tobacco control policies, and their success to date.⁶⁶ Australia has taken a broad approach, employing diverse tobacco control strategies that apply to the full range of tobacco products.⁶⁷ Australia's approach to tobacco control has also been dynamic, in order to maintain the tobacco control regime's effectiveness, respond to new challenges, and address tactics used by the tobacco industry that seek to undermine or circumvent tobacco control efforts.⁶⁸

51. Australia's comprehensive range of tobacco control measures now includes:

- restrictions on tobacco advertising and promotion;
- mandatory text and graphic health warnings on tobacco packaging;
- restrictions on the sale of tobacco products via the regulation of:

⁶⁴ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44; see also Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 17-27.

⁶⁵ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 2.

⁶⁶ See, e.g. Ukraine's first written submission, paras. 6, 11-114; Cuba's first written submission, para. 78; Indonesia's first written submission, para. 18.

⁶⁷ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 110.

⁶⁸ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 113.

- i. who can sell tobacco (retailer and wholesaler licensing);
 - ii. who can purchase tobacco (banning sales to minors);
 - iii. what can be sold (bans on flavoured cigarettes, smokeless tobacco,⁶⁹ and toys and confectionery resembling tobacco products) and in what quantity (minimum pack sizes and reduced duty free allowances); and
 - iv. where tobacco can be sold (restrictions on vending machine, online and mobile sales);
- increased prices of tobacco products through excise and customs duty;
 - laws to combat illicit tobacco;
 - bans on smoking in workplaces, public transportation, public places, prisons and in cars when children are present;
 - investments in anti-smoking initiatives including school-based education campaigns and public education and mass media campaigns;
 - subsidised nicotine replacement therapies and other smoking cessation medicines and support services;
 - Quitlines and other smoking cessation support services in each state and territory; and
 - investments in targeted smoking prevention and cessation support for Aboriginal and Torres Strait Islander communities.

52. The complainants do not challenge any of these measures, including measures requiring the display of text and pictorial warnings on tobacco packaging, the latest

⁶⁹ *Consumer Protection Notice No 10 of 1991* (as made), Exhibit AUS-55, made under the *Trade Practices Act 1974* (Cth), Exhibit AUS-56, Section 65C(7), imposes a permanent ban on chewing tobacco and snuffs intended for oral use.

iteration of which were implemented simultaneously with the tobacco plain packaging measure.⁷⁰

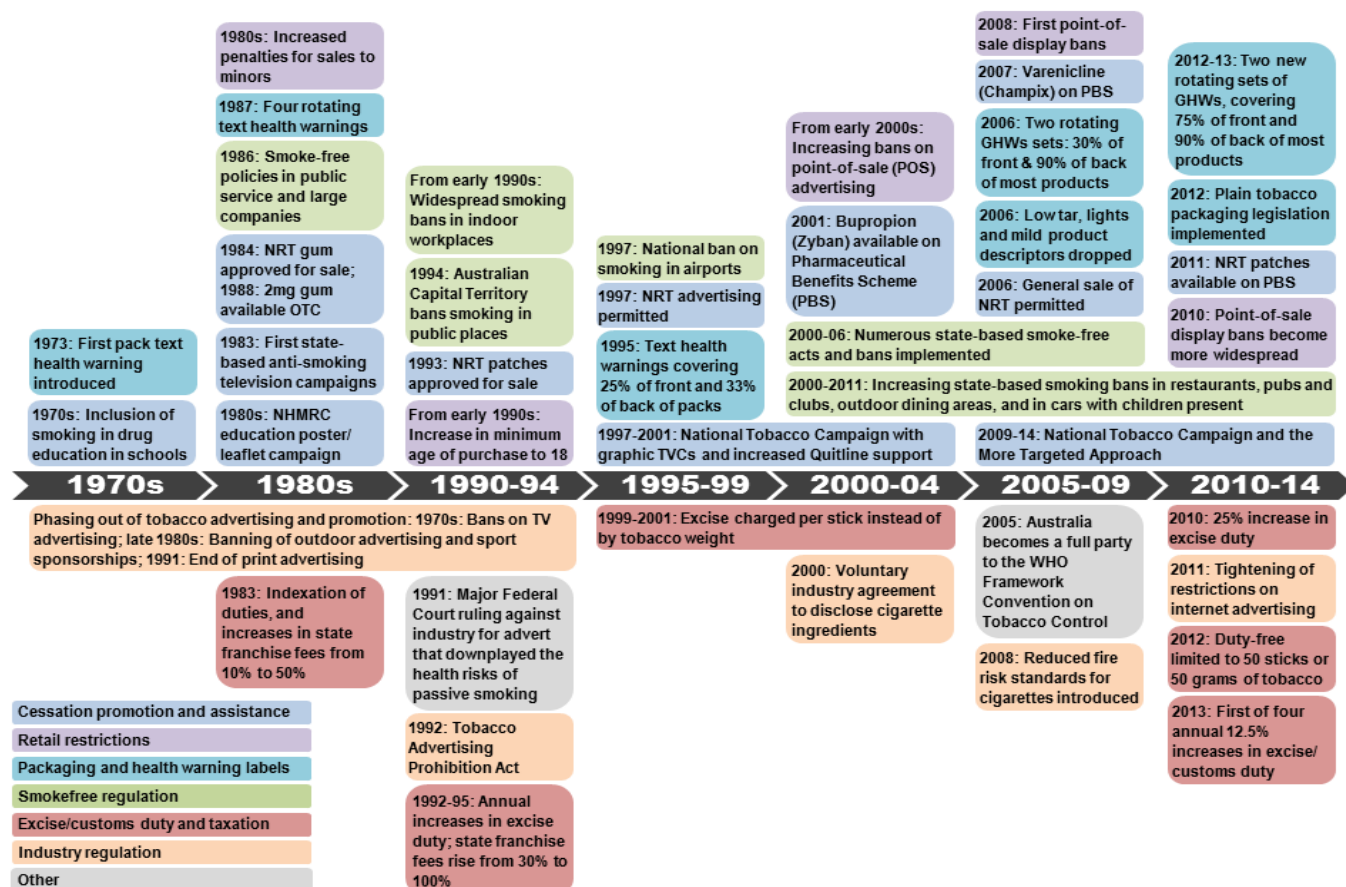


Figure 2: Evolution of Australia's tobacco control measures over the past 40 years⁷¹

⁷⁰ Ukraine's first written submission, para. 7: "Ukraine is not challenging these many other stringent tobacco control measures"; Dominican Republic's first written submission, para. 27: "The Dominican Republic does not challenge the requirements relating to health warnings. Rather, this dispute concerns solely the residual portions of the pack not taken up by the health warnings..."; Cuba's first written submission, para. 7: "The core disagreement between Cuba and Australia is whether this difference in [plain] packaging...will have the intended effect..."; Indonesia's first written submission, para. 6: "None of the complainants are challenging Australia's right to restrict the advertising of tobacco products, labelling requirements, point-of-sale restrictions, mandatory health warnings, and the other numerous measures taken by Australia to reduce the consumption of tobacco products and lower smoking prevalence rates within its borders."

⁷¹ M. Scollo, M. Bayly and M. Wakefield, Plain packaging: a logical progression for tobacco control in one of the world's 'darkest markets'. *Tobacco Control* Vol. 24 (2015), Exhibit AUS-57, pp. ii3-ii8.

53. Working together, over time, these measures have successfully reduced the prevalence of smoking in Australia, as the figure below demonstrates for the last 25 years:

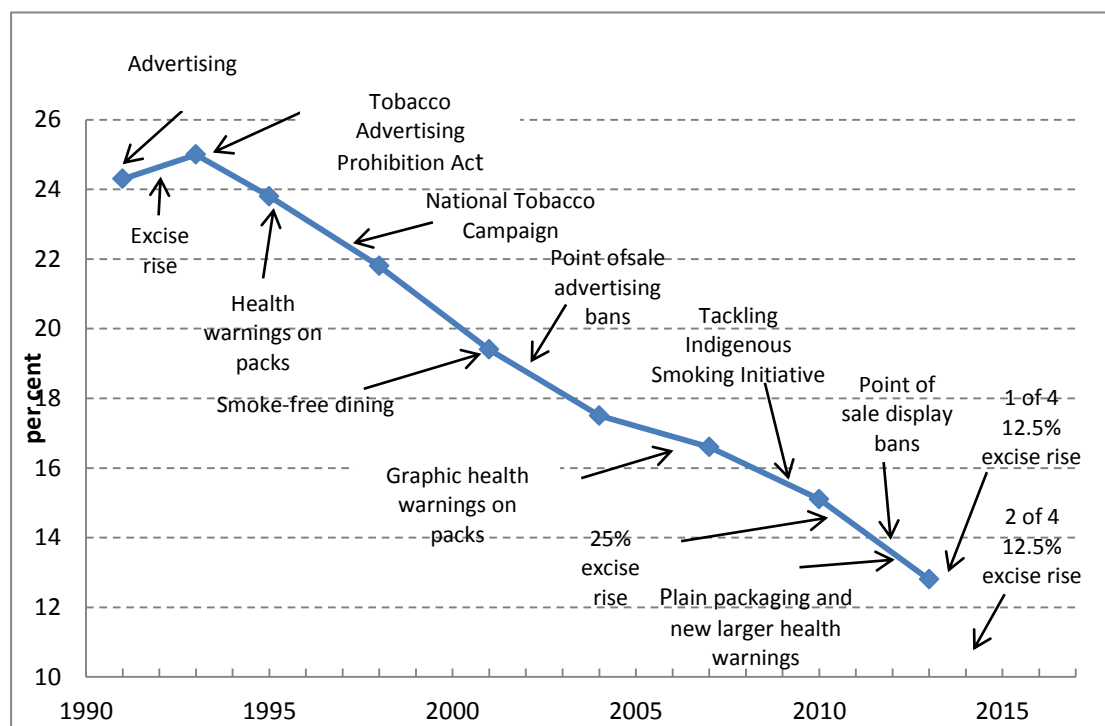


Figure 3: Smoking prevalence rates for smokers 14 year or older and key tobacco control measures in Australia from 1990-2015⁷²

3. Tobacco plain packaging is the next logical step in restricting advertising and promotion of tobacco products as part of Australia's comprehensive strategy of tobacco control measures

54. The implementation of the tobacco plain packaging measure must be understood in the context of a long line of measures that progressively restricted the

⁷² Smoking prevalence rates for smokers 14 year or older and key tobacco control measures in Australia from 1990-2015. Smoking prevalence data from Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian Institute of Health and Welfare Survey (2014)), Exhibit AUS-48, Online data table Table 3.1: Tobacco smoking status, people aged 14 years or older, 1991 to 2013 (per cent).

marketing, advertising and promotion of tobacco products, culminating in the dark market in Australia today.

55. Since 1966, increasingly stringent restrictions on the advertising and promotion of tobacco products have been introduced in Australia at the Commonwealth, state and territory level. Australia's introduction of the tobacco plain packaging measure therefore targeted one of the last forms of advertising, marketing and promotion that remained available to the tobacco industry prior to 1 December 2012 - tobacco products and packaging.

56. Measures which have progressively restricted tobacco advertising and promotion in Australia include:

- 1966: cigarette advertising was governed by a Voluntary Code for Advertising of Cigarettes on Radio and Television ("the Code").
- 1971: the Code was amended to restrict, among other things, cigarette advertising during hours when children were particularly exposed to radio and television.⁷³
- 1973-76: the first bans on cigarette advertising on radio and television were introduced.⁷⁴
- 1988: cigarette advertising bans were extended to cover radio and television advertising for all types of tobacco products.⁷⁵

⁷³ Minister for Health, Senator I Greenwood, "Voluntary code for advertising of cigarettes on radio and television" (Press Release, 3 May 1971), attaching a copy of the code, Exhibit AUS-58.

⁷⁴ *Broadcasting and Television Amendment Act 1976* (Cth), Exhibit AUS-59, Section 5 inserting Sections 100(5A) and 100(10) into the *Broadcasting and Television Act 1942-1975* (Cth); Minister Robinson, "Minister's Second Reading Speech to the Broadcasting and Television Amendment Bill 1976", Commonwealth, *Parliamentary Debates*, House of Representatives, 20 May 1976, Exhibit AUS-60, p. 2299.

⁷⁵ *Broadcasting Legislation Amendment Act 1988* (Cth), Exhibit AUS-61, Section 41 amending Section 100(5A) of the *Broadcasting Act 1942* (Cth).

- Late 1980s and early 1990s: Commonwealth, state and territory governments introduced broader bans on advertising, including on food, toys or other products designed to resemble tobacco products, in response to growing concerns about the promotional activity of tobacco manufacturers.⁷⁶
- 1990: Australian Government prohibited advertising of all types of tobacco products in newspapers and magazines published in Australia.⁷⁷
- 1992: the Australian Government introduced broader restrictions on the broadcasting and publishing of tobacco advertisements, including print media advertising, advertisements in film, videos, television or radio, and outdoor advertising on billboards or public transport.⁷⁸ Exceptions included publications distributed solely to persons in the tobacco trade; at the point of sale at retail premises (if permitted by state and territory law); on a tobacco product itself, or on the packaging of a tobacco product; and at major international sporting or cultural events held in Australia, if granted an exemption by the Minister.⁷⁹
- 1998-2007: States and territories enacted legislation prohibiting tobacco advertising at the point of sale and restricting the display of tobacco products within retail premises.⁸⁰

⁷⁶ See, for example, *Smoking and Tobacco Products Advertisements (Prohibition) Act 1989* (Cth), Exhibit AUS-62; *Broadcasting Services Act 1992* (Cth) s.42(1) and Sch. 2 items, Exhibit AUS-63.

⁷⁷ *Smoking and Tobacco Products Advertisements (Prohibition) Act 1989* (Cth) (as made), Exhibit AUS-62, Section 5(1).

⁷⁸ *Broadcasting Services Act 1992* (Cth) (as made), Exhibit AUS-63, Section 42(1) and Schedule 2 items 7(1)(a), 8(1)(a), 9(1)(a), 10(1)(a), 11(1)(a). See also *Tobacco Advertising Prohibition Act 1992* (Cth), Exhibit AUS-64, Sections 9(2), 10(3), 16 and 18.

⁷⁹ *Tobacco Advertising Prohibition Act 1992* (Cth) (as made), Exhibit AUS-64, Sections 9(2)-9(4), 10(3), 16, 18. The TAP Act continues to maintain some exceptions to allow advertising under certain limited circumstances, including accidental or incidental broadcasts and publications under Sections 9, 14, 19.

⁸⁰ For details of this legislation, refer to Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

- 2000: the Australian Government removed the discretion to grant an exemption from the general ban on tobacco advertising at international sporting or cultural events in Australia.⁸¹ Those events that had already been granted an exemption were required to end tobacco sponsorship by October 2006.
- 2010-2012: all Australian states and territories enacted bans on the retail display of tobacco products to ensure that tobacco products were out of sight in retail outlets,⁸² with the effect that to purchase a tobacco product in Australia, that product must be requested by name. Some states retained specific exemptions for specialist tobacconists and duty free shops.⁸³ Purchasers of tobacco products are now only able to view the packaging of tobacco products after they have decided to purchase the product.⁸⁴ Consumers may only see limited information about available tobacco brands (such as brand name, pack size and price) on a price board in all states and territories, except Queensland and the Australian Capital Territory (ACT), where price boards are prohibited. Where permitted, each state and territory has specific requirements for how retailers may display information on price boards, price tickets and price lists, including as to size, font and colour. Retailers are also limited from promoting tobacco products through word-of-mouth advertising.

⁸¹ *Tobacco Advertising Prohibition Amendment Act 2000* (Cth), Exhibit AUS-65, Schedule 1, item 1, repealing and substituting Section 18(2) of the TAP Act; Minister's Second Reading Speech to the Tobacco Advertising Prohibition Amendment Bill 2000, Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2000, Exhibit AUS-66, p. 16625 (Dr Wooldridge).

⁸² Australian Government National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020, National Preventative Health Strategy, The Roadmap for Action*, (30 June 2009), Exhibit AUS-67, p. 181. For further information refer Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

⁸³ For further information refer to Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

⁸⁴ Note that Victoria and Western Australia retain exemptions for specialist tobacconists and, in Victoria's case, duty free shops. For further information refer to Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

- 2012: amendments to the *Tobacco Advertising Prohibition Act 1992* (Cth) made it an offence for any person to publish tobacco advertising on the internet or other electronic media in Australia such as mobile phones, unless certain limited exceptions apply.⁸⁵ In September 2012, regulations were made requiring online point of sale tobacco advertising to be presented in a plain, text-only format, without product images, and accompanied by health warnings and age warnings.⁸⁶

57. The complainants challenge none of these measures restricting the advertising and promotion of tobacco products, including point of sale and retail display bans.⁸⁷

58. Australia agrees fully with Indonesia's assessment that

It is important to view Plain Packaging (PP) in light of the existing regulatory environment in which the measures were adopted and the array of tobacco marketing restrictions that were already in place at the time PP was implemented.⁸⁸

59. When considered in light of Australia's increasingly stringent restrictions on advertising and promotion of tobacco products before the introduction of tobacco plain packaging, tobacco packaging was one of the last remaining avenues for the promotion of tobacco products to consumers and potential consumers in Australia. The tobacco plain packaging measure removes this exception to Australia's comprehensive approach to banning advertising and promotion of tobacco products.⁸⁹

⁸⁵ *Tobacco Advertising Prohibition Act 1992* (Cth), Exhibit AUS-64, Section 15A. A key exception allows internet point-of-sale tobacco advertising, provided that it complies with state or territory legislation that expressly deals with internet point-of-sale tobacco advertising or, in the absence of such legislation, Australian Government regulations. States and territories have not yet enacted legislation expressly dealing with internet point-of-sale tobacco advertising. Australian Government regulations commencing on 6 September 2012 set out specific requirements regarding the content and format of internet point-of-sale tobacco advertisements, requiring advertisements to be presented in a plain, text-only format (i.e. no product images) with, among other things, graphic health warnings and warnings about age restrictions on tobacco sales.

⁸⁶ *Tobacco Advertising Prohibition Amendment Regulation 2012 (No. 1)* (Cth), Exhibit AUS-68, Schedule 1, item 4, adding Regulation 8A into the *Tobacco Advertising Prohibition Regulation 1993* (Cth).

⁸⁷ See fn.70.

⁸⁸ Indonesia's first written submission, para. 53.

⁸⁹ Professor Chaloupka highlights the limits of partial, as opposed to comprehensive, bans on advertising, noting that the U.S. provides "clear examples of the shifting of expenditures [by the

(continued)

E. PROMOTION, ADVERTISING AND MARKETING OF TOBACCO PRODUCTS, INCLUDING THE ROLE OF PACKAGING

60. The long-term viability of the tobacco industry rests on continuing to recruit millions of young people worldwide to initiate use of tobacco products. This is why tobacco companies have focused their efforts on promoting, advertising and marketing their products to young people, including through the use of tobacco packaging. The evidence, including the tobacco industry's own documents, is outlined below and shows a clear link between:

- The role of tobacco marketing and promotion in influencing youth uptake of tobacco products;
- The role of tobacco product packaging as a form of marketing; and
- The role of tobacco product packaging in influencing tobacco smoking behaviour.

61. By removing one of the last remaining frontiers for tobacco advertising in Australia through the introduction of tobacco plain packaging,⁹⁰ Australia sought to sever the link between tobacco product packaging and tobacco smoking behaviour, particularly for youth.

1. Tobacco marketing and promotion influences youth smoking behaviour

62. The significance of adolescent initiation of use of tobacco products cannot be overstated. The vast majority of smokers begin smoking prior to the age of 25,⁹¹ with

tobacco industry] from banned to non-banned channels in response to partial restrictions on tobacco company marketing." See Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 84.

⁹⁰ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p. 1.

⁹¹ Dr Biglan notes that the United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General* (2012), summarises the evidence as showing that "65.1% of daily smokers began daily smoking by age 18 and an additional 30.5% began daily smoking by age 25. Thus, only 4.4% of daily smokers began after age 25." See Expert Report of A. Biglan (6 March 2015) Exhibit AUS-13, para. 14.

the average age of smoking initiation in Australia reported as being 15.9 years of age in 2013.⁹² As the tobacco industry has recognised, without youth initiation, tobacco companies cannot survive long-term.⁹³ Indeed, the tobacco industry has admitted that:

[Y]ounger adult smokers have been the critical factor in the growth and decline of every major brand and company over the last 50 years...if younger adults turn away from smoking, the Industry must decline, just as population which does not give birth will eventually dwindle.⁹⁴

63. Acting on this commercial imperative, the tobacco industry has sought to influence youth smoking behaviour at every opportunity. In its landmark 2006 decision in *United States v. Philip Morris*, the United States District Court for the District of Columbia highlighted the ways in which tobacco companies focus their activities on youth, finding that:

The overwhelming evidence set forth in this Section - both Defendants' internal documents, testimony from extraordinarily qualified and experienced experts called by the United States, and the many pictorial and demonstrative exhibits used by the Government - prove that, historically, as well as currently, Defendants do market to young people, including those under twenty-one, as well as those under eighteen. Defendants' marketing activities are intended to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-caused illnesses) or quit. Defendants intensively researched and tracked young people's attitudes, preferences, and habits. As a result of those investigations, Defendants knew that youth were highly susceptible to marketing and advertising appeals, would underestimate the health risks and effects of smoking, would overestimate their ability to stop smoking, and were price sensitive. Defendants used their knowledge of young people to create highly sophisticated and

⁹² According to the Australian Institute of Health and Welfare, the average age at which young people aged 14–24 smoked their first full cigarette has steadily risen since 1995 from 14.2 to 15.9 in 2013 indicating a delay in uptake of smoking. See Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian Institute of Health and Welfare Survey (2014)), Exhibit AUS-48, p. 22.

⁹³ C.E. Teague, "Research Planning Memorandum on some thoughts about new brands of cigarettes for the youth market" (2 February 1973), Exhibit AUS-69, Bates No. 505101981.

⁹⁴ R.J. Reynolds, "Strategic Research Report: Young Adult Smokers – Strategies and Opportunities" (29 February 1984), Exhibit AUS-70, p. 2, Bates No. 501923769/3776.

appealing marketing campaigns targeted to lure them into starting smoking and later becoming nicotine addicts.⁹⁵

64. The effects of decades of tobacco advertising and promotion on smoking behaviour is analysed in multiple United States Surgeon General reports,⁹⁶ as well as reports by the United States National Cancer Institute,⁹⁷ United States Institute of Medicine⁹⁸ and the WHO.⁹⁹ Reviewing these, Professor Frank Chaloupka concludes that:

as the research evidence has accumulated over time, reviews that have taken such a multidisciplinary perspective in assessing the totality of the evidence have come to increasingly strong conclusions that there is a causal relationship between tobacco company marketing and increased tobacco use ... The strong conclusions of multiple U.S. Surgeon Generals, the U.S. National Cancer Institute, the U.S. Institute of Medicine, the World Health Organization, and others ... conclude that tobacco advertising has a causal influence on tobacco use.¹⁰⁰

⁹⁵ *United States of America, et al., v. Philip Morris USA, Inc., et al., Final Opinion* (2006). 449 F. Supp. 2d 1 (D.D.C), Exhibit AUS-71, para. 3298.

⁹⁶ United States Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General* (1989), Exhibit AUS-72; United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General* (1994), Exhibit AUS-73; United States Department of Health and Human Services, *Tobacco Use Among U.S. Racial/Ethnic Minority Groups - African Americans, American Indians and Alaska Natives, Asian Americans and Pacific Islanders, and Hispanic: A Report of the Surgeon General* (1998), Exhibit AUS-74; United States Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000), Exhibit AUS-53; United States Department of Health and Human Services, *Women and Smoking: A Report of the Surgeon General* (2001), Exhibit AUS-75; United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76; United States Department of Health and Human Services, *The Health Consequences of Smoking - 50 Years of Progress: A Report of the Surgeon General* (2014), Exhibit AUS-37.

⁹⁷ National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use, Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77.

⁹⁸ B.S. Lynch and R.J. Bonnie (eds), *Growing up Tobacco Free: Preventing Nicotine Addiction in Children and Youth* (Institute of Medicine Publication, National Academy Press, 1994), p. 116-131 (extract), Exhibit AUS-78; R.J. Bonnie, *Ending the Tobacco Problem* (Institute of Medicine Publication, National Academy Press, 2007), Exhibit AUS-79.

⁹⁹ World Health Organization, *Report on the Global Tobacco Epidemic, 2013* (2013), Exhibit AUS-80, pp. 26-27.

¹⁰⁰ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 77.

65. Australia acted on this mounting body of evidence demonstrating a causal link between tobacco marketing and tobacco use by enacting increasingly stringent advertising and promotion restrictions.

2. The role of tobacco packaging as a form of marketing

66. If left unregulated, tobacco product packaging can perform the same function as other forms of marketing and promotion, especially in a dark market like Australia. Prior to 1 December 2012, one of the tobacco industry's last remaining vehicles to advertise and promote their products with consumers and potential consumers of tobacco products was the packaging. This is acknowledged by the tobacco industry, and evidenced in marketing and public health science.

(a) Tobacco companies admit to using tobacco packaging as advertising

67. Tobacco industry documents show that tobacco packaging has been developed and exploited as a form of advertising and promotion for many years,¹⁰¹ a strategy which is ongoing. Indeed, major tobacco companies predicted two decades ago that, as marketing and promotion restrictions increased, the pack would eventually provide the only vehicle of communication with the consumer. As a Philip Morris marketing presentation in 1994 stated:

our final communication vehicle with our smoker is the pack itself.
In the absence of any other marketing messages, our packaging...is
the sole communicator of our brand essence.¹⁰²

68. Similarly, following enactment of bans on advertising and promotion of tobacco products in Australia, RJ Reynolds recognised in 1997 that:

[t]he most effective means Australia has had to get the consumer to
notice something new post restrictions was a new/different
packaging configuration.¹⁰³

¹⁰¹ C. Chantler, *Standardised packaging of tobacco: A Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.22.

¹⁰² Philip Morris, "Marketing issues corporate affairs conference" (27 May 1994), Exhibit AUS-82, p. 21, Bates No. 2504015017/5042.

69. Most recently, a spokesperson from British American Tobacco Australia acknowledged in a 2014 interview with Sir Cyril Chantler (in his independent review into the standardized packaging of tobacco products, commissioned by the Government of the United Kingdom (Chantler Review)) that "tobacco companies, like other consumer goods companies, see branded packaging as one of the tools of advertising".¹⁰⁴ Similarly, in representing Japan Tobacco International against Australia in an unsuccessful challenge to the constitutionality of the tobacco plain packaging legislation, counsel for Japan Tobacco International went so far as to describe the pack as a "billboard".¹⁰⁵

(b) Tobacco packaging forms part of the marketing mix

70. Retail packaging of products has long been acknowledged as an effective means of marketing, acting as a promotional tool in its own right rather than simply as an instrument to reinforce advertising.¹⁰⁶ The tobacco pack forms part of the "marketing mix", and promotes tobacco products by acting as a communication vehicle and by using innovation and design elements to influence consumer behaviour.

i. Packaging as a form of communication

71. Marketers have recognised the use of packaging in the "marketing mix", and the role it plays in communicating information to consumers in order to influence consumer perceptions of "brand identity" and the appeal of the product itself. For example, Professor Jean-Pierre Dubé, Professor of Marketing at the University of Chicago Booth School of Business, states that:

¹⁰³ R.J. Reynolds, "Australia trip: topline learning (highly restricted market)", (12 February 1997), Exhibit AUS-83, p. 2, Bates No. 518093846/3852.

¹⁰⁴ C. Chantler, *Standardised packaging of tobacco: A Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.22.

¹⁰⁵ High Court of Australia Transcripts, *Japan Tobacco International SA v Commonwealth of Australia* [2012] HCA Trans 91 (17 April 2012), Exhibit AUS-84, pp. 15-16.

¹⁰⁶ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, paras. 30-33.

A good package draws the consumer in and encourages product choice.¹⁰⁷

72. Similarly, Professor Nader Tavassoli, Professor of Marketing at the London Business School, highlights the way in which packaging provides an important means of advertising and communication along all key dimensions of marketing theory such as function, reach, versatility, size and interactivity.¹⁰⁸ Citing the well-known marketing textbook "Marketing Management" by Kotler and Keller, Professor Tavassoli points out that packaging can create a "billboard effect", acting as "five-second commercials" for the product.¹⁰⁹

73. Most importantly, the tobacco industry itself has acknowledged the importance of packaging as a form of commercial communication:

[W]e will increasingly see the pack being viewed as a total opportunity for communications – from printed outer film and tear tape through to the inner frame and inner bundle. Each pack component will provide an integrated function as part of a carefully planned brand or information communications campaign.¹¹⁰

¹⁰⁷ Expert Report of J.P. Dubé (9 March 2015), Exhibit AUS-11, para. 25.

¹⁰⁸ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, Section 2.2.

¹⁰⁹ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 16. Professor Tavassoli's notes that his conclusion is supported by industry studies on the "hidden power" of packaging. For example, British Brands Group stated in 2012: "Notably, packaging offers brand owners the possibility to communicate with consumers through distinctive designs and on-pack communication in the form of logos, graphics, images, colours, messages and product information. This represents an important medium for marketing communication."; see also P. Kotler and K.L. Keller, *Marketing Management Global Edition*, 14th ed. (Pearson Education, 2012), Exhibit AUS-85, p. 368.

¹¹⁰ Quit Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (August, 2011), Exhibit AUS-86, p. 8.

74. Cigar manufacturers have also taken great care to develop packaging which reflects these intentions, recognising that:

[s]trict tobacco regulation, combined with new consumer habits, is challenging us to be innovative and to develop our products and brands... We can only communicate through the packaging or through point-of-sale materials. That is forcing us to pay more attention to the quality of the product and the presentation of the packaging, and to constantly consider our offer to the consumer.¹¹¹

ii. Packaging innovation and design elements influence consumer behaviour

75. Tobacco packaging has become a pivotal marketing tool due to this ability to communicate "brand identity" to consumers. This point figures often in tobacco industry documents, as the following extract shows:

Smokers buy cigarettes frequently. They carry their brand around with them and see other brands constantly. The product is the prime means of communicating a change.¹¹²

76. Professor Slovic, Professor of Psychology at the University of Oregon and President of Decision Research, notes:

carefully designed tobacco packs...have great visibility through what is known as incidental brand exposure. Unlike most other consumer goods, cigarette packs remain with consumers once purchased, and are taken out and used or displayed many times each day...Even a small brand logo on the bottom of a pack is likely to produce positive affect that is reinforced thousands of times when a smoker reaches for a cigarette from a branded pack.¹¹³

77. Packaging, and its various components (including shape, structure, design and colour), have been used as an element of an integrated marketing campaign and as a popular form of communication across industries. A report compiled by the Cancer

¹¹¹ K. Hammar, "Strong brand portfolio in a diversified market", *Swedish Match Insider Magazines*, Vol. 3 (2008), Exhibit AUS-87, p. 10.

¹¹² Submission from Center for Democracy and Peace to the Health Committee House of Commons, United Kingdom Parliament, *Memorandum by Centre for Tobacco Control Research, University of Strathclyde* (1998) No 3, Exhibit AUS-88, Appendix 26.

¹¹³ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 78.

Council Victoria, Australia,¹¹⁴ demonstrates how packaging innovation has occurred in Australia. For example, a pack redesign for Benson and Hedges in Australia in 2003 was promoted to retailers as:

contemporising the pack...[stating that] your customers are ready for this change. They like the new pack and see the hallmark as an interesting and relevant addition to their pack and their brand, modernising it, which is why the new packaging has researched so well.¹¹⁵

78. Dr Biglan (Senior Scientist, Oregan Research Institute),¹¹⁶ and Professors Slovic¹¹⁷ and Fong (Professor of Psychology and Health Studies at the University of Waterloo and Chief Principal Investigator of the International Tobacco Control Policy Evaluation Project)¹¹⁸ agree that the potential for packaging innovation for all tobacco products is extremely broad, and that even a small unregulated area which can be used to incorporate design elements can be extremely effective.

79. Packaging strategies such as innovation, and design elements such as colour, shape and size, can all influence consumer responses, including purchase and consumption behaviour.¹¹⁹ Through branding and pack design, packaging provides a direct link between consumers and manufacturers which, given the high degree of social visibility of consumer products such as tobacco,¹²⁰ allows both consumers and non-consumers to develop a relationship with the brand.¹²¹

¹¹⁴ Quit Victoria, Cancer Council Victoria, Australia, *The packaging of tobacco products in Australia* (September, 2013), Exhibit AUS-89.

¹¹⁵ Quit Victoria, Cancer Council Victoria, Australia, *The packaging of tobacco products in Australia* (September, 2013), Exhibit AUS-89, p. 49.

¹¹⁶ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 131-134.

¹¹⁷ Expert Report of P Slovic (4 March 2015), Exhibit AUS-12, Section 5.4.

¹¹⁸ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 301.

¹¹⁹ The Centre for Tobacco Control Research Core, Cancer Research UK, *The packaging of tobacco products* (March, 2012), Exhibit AUS-90, p. 11.

¹²⁰ D. Hammond, "'Plain packaging' regulations for tobacco products: the impact of standardizing the color and design of cigarette packs", *Salud Pública de México*, Vol. 52, No. 2, (2010), 226, Exhibit AUS-91, p. 227.

¹²¹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 128; United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General* (2012), Exhibit AUS-76, p. 6.

80. Industry documents confirm that tobacco companies have invested heavily in pack design, including innovative packaging, in order to communicate messages about "brand identity" and appeal to specific demographic groups, especially for young smokers.¹²² For example, tobacco marketers have, in the past, encouraged packs to be "slick, sleek, flashy, glittery, shiny, silky, and bold" to appeal specifically to young women.¹²³ A presentation by Philip Morris in 1990 reveals:

We are going now into the concept area of innovative packaging... the proposition is an innovative packaging concept which projects a distinctive young masculine appearance. The idea was well received in concept study, results showed it to be: new, original, sensual and striking. Test concluded: pack has tremendous appeal among young smokers.¹²⁴

81. This focus on packaging was evident again 22 years later in 2012, when Philip Morris provided a presentation to their investors:

Chesterfield offers a classic, quality smoke in a distinctive, modern pack, retailing at the top of the mid-price segment. Packaging for the mainline was refreshed last year and we added the distinctive "slider" pack shown here, to appeal to Young Adult Smokers.¹²⁵

82. Similarly, the tobacco industry has noted that cigars are more of a "fashion industry", where the consumer appreciates different flavours, new packaging and innovative formats.¹²⁶ This includes innovations such as the release of exclusive cigar

¹²² Quit Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (August, 2011), Exhibit AUS-86; J.R. Difranza, D.M. Clark and R.W. Pollay, "Cigarette package design: opportunities for disease prevention", *Tobacco Induced Diseases*, Vol. 1, No. 2 (2003), Exhibit AUS-92; M. Wakefield, C. Morley, J.K. Horan and K.M. Cummings, "The cigarette pack as image: new evidence from tobacco industry documents", *Tobacco Control*, Vol. 11, No. 1 (2002), Exhibit AUS-93; K.M. Cummings, C.P. Morley, J.K. Horan, C. Steger and N-R. Leavell, "Marketing to America's youth: evidence from the corporate documents", *Tobacco Control*, Vol. 11, No. 1 (2002), 5, Exhibit AUS-94.

¹²³ Philip Morris, "Opportunities in packaging innovation" (1992), Exhibit AUS-95, Bates No. 2048976191/6208.

¹²⁴ Philip Morris, "Marketing new products in a restrictive environment" (1990), Exhibit AUS-96, Bates No. 2044762173/2364.

¹²⁵ Philip Morris International, "Investor Day 2012 Transcript" (remarks by Mirosław Zielinski, President, EEMA Region and PMI Duty Free), (21 June 2012), Exhibit AUS-97, slide 25.

¹²⁶ K. Hammar, "New products and increased sales: driving growth", *Swedish Match Insider Magazines*, Vol. 4 (2008), Exhibit AUS-98, p. 7.

tubes,¹²⁷ brightly coloured "foil fresh" packaging¹²⁸ and presentation in brightly coloured boxes.¹²⁹ Consumers often keep these specialised cigar boxes, displaying them long after purchase, with one Australian consumer noting that "you'd get the big cigars with the nice flash boxes, they'd be all colourful...and then you'd keep the box out."¹³⁰ The importance of product packaging for cigar products was highlighted by Swedish Match in its 2013 Annual Report:

We took aggressive measures during the year to improve our attractiveness to consumers by upgrading products and packaging...¹³¹

83. The role of packaging as a means of influencing consumer behaviour is further heightened in a dark market like Australia, where all other forms of advertising and promotion have been banned. The tobacco industry has adapted to increasing restrictions, and sought to use tobacco packaging as a prime vehicle to continue to influence consumer behaviour, particularly after the implementation of restrictions on traditional forms of advertising and promotion:

As media restrictions increase, the brand pack should become a media vehicle. The "book pack" objective is to transform the pack from a "passive container" into an "active means of communication", an object that projects an image and a lifestyle by itself.¹³²

84. As Professor Slovic points out, packaging is one of the last remaining linkages between tobacco products, consumers, and the effects of positive imagery cultivated

¹²⁷ K. Hammar, "New launch on Game", *Swedish Match Insider Magazines*, Vol. 5 (2009), Exhibit AUS-99, p. 5.

¹²⁸ Swedish Match, "New Products", *Swedish Match Insider Magazines*, Vol. 2 (2008), Exhibit AUS-100, p. 23.

¹²⁹ B. Sjöberg, "Cigars for a trend-conscious generation", *Swedish Match Insider Magazines*, Vol. 1 (2007), Exhibit AUS-101, p. 10.

¹³⁰ Miller et al, "'You're made to feel like a dirty filthy smoker when you're not, cigar smoking is another thing all together': Responses of Australian cigar and cigarillo smokers to plain packaging", *Tobacco Control* Vol. 24 (2015), ii58-ii65, Exhibit AUS-102, p.4

¹³¹ Swedish Match, *2013 Annual Report* (quote from Joakin Tilly, President, Scandinavia Division) (2013), Exhibit AUS-103, p. 9.

¹³² Philip Morris, "Marketing new products in a restrictive environment" (1990), Exhibit AUS-96, Bates No. 2044762173/2364.

by the tobacco industry in the past.¹³³ It is this link that the tobacco plain packaging measure seeks to sever.

(c) The role of the trademark as part of a branding strategy

85. It is well established that, in addition to distinguishing the goods of one undertaking from those of another in the course of trade, trademarks serve an advertising function.¹³⁴ That function is described as the "cachet" or "aura" which the consumer associates with the mark, usually as a result of the way the proprietor has used and promoted the mark and its goods or services.¹³⁵ The tobacco industry has long used trademarks to influence consumer behaviour, particularly of young people:

The challenge and opportunity is to identify upcoming new young trademarks which offer easy registration potential, via social networking and brainstorming with trendsetters and to go for cigarette brand synergy at an early stage as these trademarks develop to capture the spirit of our future clientele.¹³⁶

86. Australia's tobacco plain packaging measure restricts the ability of trademarks (as well as other signs and branding elements) to serve a promotional function by prohibiting the use of non-standardised fonts, colours and logos on the retail packaging of tobacco products. In this way, the tobacco plain packaging measure represents the next logical step in a comprehensive ban on the advertising and promotion of tobacco products in Australia.

¹³³ Professor Slovic notes that "[B]rand imagery maintains, even in the absence of recent promotion", citing evidence that smokers still linked Australian actor Paul Hogan with the Winfield brand in 1993, more than a decade after he was removed from the brands' advertising: Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 68.

¹³⁴ Thomas McCarthy describes them as "a prime instrument in advertising and selling the goods" in M. Davison, T. Berger and A. Freeman, *Shanahans's Australian Law of Trade Marks and Passing Off*, 4th ed., (Lawbook co., 2008), Exhibit AUS-102, p. 16, para. 5.10, quoting T. McCarthy, *Trademarks and Unfair Competition*, (Lawyers Co-Operative Publishing Co., 1984), Vol 1. p. 86. See also D. Llewellyn, J. Mellor, T. Moody-Stuart, D Keeling, I. Berkeley, *Kerly's Law of Trademarks and Trade Names*, 14th ed, (Sweet & Maxwell Ltd, 2005), Exhibit AUS-105, p. 9.

¹³⁵ D. Llewellyn, J. Mellor, T. Moody-Stuart, D Keeling, I. Berkeley, *Kerly's Law of Trademarks and Trade Names*, 14th ed, (Sweet & Maxwell Ltd, 2005), Exhibit AUS-105, p. 9.

¹³⁶ Philip Morris, "Marketing new products in a restrictive environment" (1990), Exhibit AUS-96, Bates No. 2044762173/2364.

3. The role of tobacco packaging in influencing smoking behaviour

87. Tobacco packaging, that is, the physical packaging in which tobacco products are contained and sold, plays an important role in attracting new smokers, generating positive images and connotations about tobacco products in the minds of smokers, communicating to young people that smoking the product will help fulfil particular psychological needs, and presenting a visual cue and reminder to those smokers who have, or are attempting to, quit smoking.

(a) Packaging can generate positive perceptions of a product

88. Packaging can create positive perceptions of the brand and the product, by associating the brand with attractive imagery and themes used in marketing. These positive perceptions can exert powerful influences on behaviour¹³⁷ - particularly in a dark market like Australia.

89. Using logos, emblems or other branding imagery (such as embossed calligraphy) on packaging can communicate specific messages to targeted demographic groups,¹³⁸ and mere exposure to the packaging (even briefly) can produce an increase in positive feelings toward a particular product type or brand, without any awareness that this is actually occurring.¹³⁹ Consumers might not even be consciously aware of the impact and positive associations conveyed.¹⁴⁰ Thus packagaing design, including branding, logos, emblems and pack characteristics such

¹³⁷ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 102.

¹³⁸ Quit Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (August, 2011), Exhibit AUS-86; J.R. Difranza, D.M. Clark and R.W. Pollay, "Cigarette package design: opportunities for disease prevention", *Tobacco Induced Diseases*, Vol. 1, No. 2 (2003), Exhibit AUS-92; M. Wakefield, C. Morley, J.K. Horan and K.M. Cummings, "The cigarette pack as image: new evidence from tobacco industry documents", *Tobacco Control*, Vol. 11, No. 1 (2002), Exhibit AUS-93; K.M. Cummings, C.P. Morley, J.K. Horan, C. Steger and N-R. Leavell, "Marketing to America's youth: evidence from the corporate documents", *Tobacco Control*, Vol. 11, No. 1 (2002), 5, Exhibit AUS-94.

¹³⁹ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 79.

¹⁴⁰ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, paras. 78-79; Expert Report of Professor N. Tavassoli (10 March 2015), Exhibit AUS-10, paras. 61-63.

as shape and colour, creates the type of positive associations that make the activity of smoking more appealing.¹⁴¹

90. Professor Slovic highlights internal tobacco industry documents that provide key insights into "the way in which tobacco advertising and promotion is deliberately geared to generate positive [associations] for tobacco products", and that underscore the importance of packaging and design.¹⁴² Professor Slovic states that "mere exposure" to objects that are presented repeatedly to an individual is capable of creating a positive attitude or preference for those objects.¹⁴³

91. Packaging is therefore critical. Package attractiveness and salience have a direct effect on post-purchase perceptions about tobacco products or tobacco consumption because the pack typically continues to be used by the smoker to store and carry their tobacco products, serving as an advertisement for the tobacco product type and brand (and for smoking itself) to other consumers and potential consumers, including peers and family members, numerous times a day. Using the estimate of 2.5 million Australian smokers from the 2013 National Drug Strategy Household Survey, Professor Dubé estimates that this would generate 241 million packaging impressions per week.¹⁴⁴

(b) Packaging communicates to young people that smoking the brand will help fulfil particular psychological needs

92. Young people can be motivated to try smoking because they have certain psychological needs, such as the desire for social integration and acceptance, and, as

¹⁴¹ Quit Victoria, Cancer Council Victoria, Australia, *The packaging of tobacco products in Australia* (September, 2013), Exhibit AUS-89; J.R. Difranza, D.M. Clark and R.W. Pollay, "Cigarette package design: opportunities for disease prevention", *Tobacco Induced Diseases*, Vol. 1, No. 2 (2003), Exhibit AUS-92, p. 98; R.W. Pollay, "Targeting youth and concerned smokers: evidence from Canadian tobacco industry documents", *Tobacco Control*, Vol 9, No. 2 (2000), 136, Exhibit AUS-106, pp. 140-141; U.S. Department of Health and Human Services, National Institutes of Health, *Tobacco Control Monograph No. 19: The Role of the Media in Promoting and Reducing Tobacco Use* (June 2008), Exhibit AUS-77.

¹⁴² Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 69.

¹⁴³ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 34.

¹⁴⁴ Expert Report of J.P. Dubé (9 March 2015), Exhibit AUS-11, para 31.

such, are particularly sensitive to rewards and social status linked to peer approval.¹⁴⁵ Adolescents and young adults can face challenging transitions and it is common for them to have heightened concerns about fitting in with peer groups, to experience heightened levels of sensation seeking, risk-taking and rebelliousness, and to have increased anxiety and depression.¹⁴⁶

93. Dr Biglan notes that the process by which young people initiate smoking and the factors which influence their initiation are well understood, explaining that initiation is a:

gradual progression in which young people become receptive to cigarette marketing, become willing to try smoking, begin to experiment with cigarettes, and, within the first 100 cigarettes, become addicted to them.¹⁴⁷

94. In particular, the evidence suggests that young people are more motivated to begin smoking because they perceive that smoking a specific brand will enable them to fulfil important psychological needs¹⁴⁸ and can be a ticket to social acceptance. Professor Slovic suggests that these needs, and the prospects of fun, excitement and adventure which are seemingly attached to smoking, outweigh any consideration of the potential risks that smoking entails.¹⁴⁹ This, he says, makes young people even more susceptible to marketing which links positive associations and feelings both with the activity of smoking and with particular brands.

95. Tobacco industry marketing has long sought to link tobacco products to the fulfilment of adolescent psychological needs, such as the need for positive masculine or feminine image, reducing psychological distress, being rebellious or sensation seeking.¹⁵⁰ Research in 2000 for proposed new packaging designs for Alpine in Australia found that their target market, young white collar women aged between 18

¹⁴⁵ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 50.

¹⁴⁶ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 19.

¹⁴⁷ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 9.

¹⁴⁸ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 11.

¹⁴⁹ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 90.

¹⁵⁰ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 33.

and 24, was driven by status, and that the new packs were perceived as unique, modern, elegant, and attractive.¹⁵¹ The particular package design was found to:

Lift the smoker's image on key indicators of prime importance to the target market. Smokers of this product are seen as: sophisticated; fashion conscious; younger adult; confident; outgoing/sociable; more like me; most popular; [and] fairly innovative.¹⁵²

96. In sum, there is compelling evidence that the tobacco industry uses packaging to promote their products and that it considers packaging to be particularly effective in communicating to young people the themes and imagery that are important to them.

(c) Packaging as a cue for tobacco use

97. Packaging can also act as a cue for maintaining tobacco use – especially for those trying to quit, or those who have quit but are at risk of relapse.

98. Dr Thomas Brandon is Director of the Tobacco Research Intervention program at the H. Lee Moffitt Cancer Center and Research Institute, and has studied the effects of "cue reactivity" over a number of years. Dr Brandon finds that, not only is cue reactivity highly relevant in the case of those attempting to quit and those at risk of relapse, it is also a significant contributor to tobacco use and dependence, including the maintenance of ongoing tobacco use and post-cessation relapse.¹⁵³

99. Dr Brandon notes that a product such as a cigarette or its packaging can become a conditioned stimulus, and thus act as a cue for tobacco use – with particular significance for maintenance of smoking behaviour, cessation and relapse. In the case of cigarettes, he considers:

It is easy to see why a cigarette can acquire conditioned stimulus status. The cigarette usually appears shortly before nicotine

¹⁵¹ Philip Morris, "CPC Submission - Alpine Cigarettes (Australia)" (2000), Bates No. 2079065302, Exhibit AUS-107, s.9.2; Philip Morris, "Qualitative research – Alpine Creative Presentation" (1998), Bates No. 2504102678, Exhibit AUS-108.

¹⁵² Philip Morris, "CPC Submission - Alpine Cigarettes (Australia)" (2000), Bates No. 2079065302, Exhibit AUS-107, Section 9.2.1.

¹⁵³ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 24.

delivery, it is salient (indeed, it must be noticed in order to be smoked), and it is reliably paired with smoking.¹⁵⁴

100. Dr Brandon applies the same characteristics to tobacco packaging more broadly: A branded cigarette pack would appear to meet all three criteria [for conditioned stimulus status], second only to the cigarette itself. The pack is nearly always present immediately before an individual smokes; branding is designed to attract the attention of, and be memorable to, the consumer; and there is near-perfect pairing between handling a pack and smoking.¹⁵⁵

101. For non-plain packaged tobacco products, the relationship between brand and marketing imagery, positive associations and behaviour is strong,¹⁵⁶ and the triggering effects of these visual cues linger even after the physiological effects of tobacco addiction have passed. Such cues will, over time, trigger the behaviour they are associated with¹⁵⁷ – namely, smoking.

102. The effect of packaging as a cue is not limited to regular smokers and those attempting to quit smoking. Sir Cyril Chantler confirmed that appealing to smokers at the conscious and unconscious level makes them susceptible to visual triggers to smoke their next cigarette, and that these cues were an important part of establishing nicotine addiction.¹⁵⁸ The functions of tobacco packaging as a cue or a trigger are therefore relevant even during initiation.

F. TOBACCO PLAIN PACKAGING HAS BEEN RECOMMENDED AS A MEANS OF IMPLEMENTING THE FCTC

103. The FCTC came into force on 28 February 2005 and has 180 Parties, making it one of the most rapidly and widely embraced treaties in the United Nations system.

¹⁵⁴ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 43.

¹⁵⁵ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 59.

¹⁵⁶ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 13.

¹⁵⁷ Expert report of N. Tavassoli (10 March 2015), Exhibit AUS-10, Section 5.

¹⁵⁸ C. Chantler, *Standardised packaging of tobacco: A Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.21.

Australia, Honduras and Ukraine are Parties to the FCTC, and Cuba is a signatory.

The WHO describes the FCTC as follows:

The WHO FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health. In the first paragraph of the preamble to the WHO FCTC the Parties express their determination "to give priority to their right to protect public health". The preamble to the Convention also reflects the concerns of the international community with respect to tobacco consumption and the body of scientific evidence showing the risks associated with tobacco.¹⁵⁹

104. The implementation of tobacco plain packaging is recommended in the Guidelines for implementation of two provisions of the FCTC, Article 11 (concerning the packaging and labelling of tobacco products) and Article 13 (concerning tobacco advertising, promotion and sponsorship). Article 11 of the FCTC requires Parties to implement measures to eliminate the propensity of tobacco packaging to mislead consumers about the health effects of smoking and to require health warnings on tobacco packaging.¹⁶⁰ Article 13 requires Parties to implement comprehensive bans on tobacco advertising, promotion and sponsorship.¹⁶¹

105. The COP to the FCTC adopted evidence-based guidelines for the implementation of both Articles 11 and 13 in 2008.¹⁶² The WHO highlights the importance of the Guidelines and notes that they are:

intended to assist Parties in meeting their obligations and in increasing the effectiveness of measures adopted.¹⁶³

106. The Guidelines were drafted by a working group of the Parties to the FCTC based on "available scientific evidence and the experience of the Parties themselves in

¹⁵⁹ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 13.

¹⁶⁰ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 11.

¹⁶¹ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 13.

¹⁶² *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11; *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 13.

¹⁶³ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 22.

implementing tobacco control measures."¹⁶⁴ The working group of Parties responsible for drafting the Guidelines for Article 11 included Australia, as well as two of the complainants, Honduras and Ukraine.¹⁶⁵ Draft versions of the Guidelines were open for consultation with all Parties prior to their submission to the COP, which subsequently adopted the Guidelines *by consensus*.¹⁶⁶ The FCTC Conference of Parties has adopted nine Guidelines to Articles of the FCTC since 2007.¹⁶⁷

107. The Guidelines for the implementation of Article 11 recommend in relevant part that:

Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging).¹⁶⁸

108. The likely benefits of tobacco plain packaging were identified in the Guidelines, and are consistent with the objectives identified in Australia's tobacco plain packaging legislation:

This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.¹⁶⁹

¹⁶⁴ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 19.

¹⁶⁵ World Health Organization Framework Convention on Tobacco Control Conference of the Parties, *Elaboration of Guidelines for Implementation of Article 11 of the Convention, Provisional Agenda Item 4.4*, WHO Doc FCTC/COP3(7) (21 August 2008), Exhibit AUS-110.

¹⁶⁶ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 19.

¹⁶⁷ Guidelines have been prepared for Articles 5.3, 8, 9 and 10, 11, 12, 13, 14 and 6 and adopted by the COP at the second (2007), third (2008), fourth (2010), fifth (2012) and sixth (2014) sessions. See *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109; World Health Organization Framework Convention on Tobacco Control, *Guidelines for implementation of Article 6 of the WHO FCTC* (2014), Exhibit AUS-111.

¹⁶⁸ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11, para. 46.

¹⁶⁹ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11, para 46.

109. As noted in the Amicus Submission submitted by the WHO and FCTC Secretariat,¹⁷⁰ the status of these Guidelines is evidenced in their wording. Paragraph 1 of the Guidelines for Article 11 states:

Consistent with other provisions of the WHO Framework Convention on Tobacco Control and the intentions of the Conference of the Parties to the Convention, these guidelines are intended to assist Parties in meeting their obligations under Article 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures. Article 11 stipulates that each Party shall adopt and implement effective packaging and labelling measures within a period of three years after entry into force of the Convention for that Party.

110. Guidelines for Article 13 further emphasise the role of plain packaging in eliminating the effects of advertising and promotion on packaging, to give effect to Parties' obligations to implement a comprehensive ban on advertising, promotion and sponsorship:

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive.¹⁷¹

111. Similar to the Guidelines for Article 11, paragraph 1 of the Guidelines for Article 13 states:

The purpose of these guidelines is to assist Parties in meeting their obligations under Article 13 of the WHO Framework Convention on Tobacco Control. They draw on the best available evidence and the experience of Parties that have successfully implemented effective measures against tobacco advertising, promotion and sponsorship. They give Parties guidance for introducing and enforcing a comprehensive ban on tobacco advertising, promotion and sponsorship or, for those Parties that are not in a position to undertake a comprehensive ban owing to their constitutions or constitutional principles, for applying restrictions on tobacco

¹⁷⁰ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42.

¹⁷¹ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 13.

advertising, promotion and sponsorship that are as comprehensive as possible.

112. In addition to the FCTC Guidelines, the COP to the WHO adopted by consensus the *Punta del Este Declaration on Implementation of the FCTC* in 2010.¹⁷² As the Amicus Submission by the WHO and FCTC Secretariat notes:

In the preamble to the Declaration Parties recognize "that measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the power of sovereign States to regulate in the public interest, which includes public health."¹⁷³

113. The background context of Articles 11 and 13, in addition to the evidence-based development of the Guidelines are elaborated in the Amicus Submission of the WHO and the FCTC Secretariat,¹⁷⁴ as well as the submission of the Union for International Cancer Control and Cancer Council Australia.¹⁷⁵

G. AUSTRALIA'S TOBACCO PLAIN PACKAGING MEASURE

1. Development and implementation of the tobacco plain packaging measure

114. A rigorous and transparent policy development and legislative process preceded the adoption of Australia's tobacco plain packaging measure. The efficacy of the measure was debated, analysed and considered before its full implementation on 1 December 2012.

¹⁷² *Punta del Este Declaration on Implementation of the WHO Framework Convention on Tobacco Control*, Conference of the Parties to the WHO Framework Convention on Tobacco Control, fourth session, Punta del Este, Uruguay, 19 November 2011, FCTC/COP/4/DIV/6, Exhibit AUS-112.

¹⁷³ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 24.

¹⁷⁴ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, paras. 59-71.

¹⁷⁵ Union for International Cancer Control and Cancer Council Australia, *Written Submission of Non-Party Amici Curiae* (11 February 2015), Exhibit AUS-38, paras. 7.1-7.7.

(a) The development of the tobacco plain packaging measure

115. The Australian Government established the National Preventative Health Taskforce ("NPHT") in 2008 to develop a National Preventative Health Strategy to tackle the chronic disease caused by obesity, tobacco use, and excessive consumption of alcohol.¹⁷⁶ In reviewing the effect of tobacco use in Australia, and the control measures available to prevent tobacco related illness, the NPHT established a Tobacco Working Group comprising eminent Australian and international tobacco control experts, to review extensive Australian and international research.

116. A discussion paper released by the NPHT in 2008, accompanied by a "Technical Report" on tobacco prepared by the Tobacco Working Group,¹⁷⁷ identified the need to address the remaining forms of tobacco advertising and promotion in Australia, including tobacco packaging.¹⁷⁸ Following extensive consultation,¹⁷⁹ including with tobacco industry representatives, the NPHT submitted its final report, "Australia: the healthiest country by 2020" to the Australian Government on 30 June 2009.¹⁸⁰ The Report included recommendations that tobacco plain packaging be implemented as a key measure in ending the remaining forms of advertising and promotion of tobacco products in Australia.¹⁸¹

¹⁷⁶ Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020, National Preventative Health Strategy - Overview* (30 June 2009), Exhibit AUS-67.

¹⁷⁷ Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020. Technical report 2 - Tobacco control in Australia: Making smoking history* (2009), Exhibit AUS-52.

¹⁷⁸ Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020: Discussion Paper* (2008), Exhibit AUS-113, p xiii.

¹⁷⁹ Forty consultation sessions with almost 1000 stakeholders, including industry representatives See Australian Government National Preventative Health Taskforce, "Engagement and Consultation" (July, 2009), available at: <http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/engagement-and-consultation-11p> (last accessed 3 March 2015), Exhibit AUS-115.

¹⁸⁰ The report comprised five documents, including: "Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020, National Preventative Health Strategy - Overview* (30 June 2009), Exhibit AUS-67; Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020, National Preventative Health Strategy - the roadmap for action* (30 June 2009), Exhibit AUS-67; as well as three technical reports on obesity, tobacco control and alcohol. The Report was released publicly in September 2009.

¹⁸¹ Specifically, the NPHS Roadmap recommended that the Government "[l]egislate to eliminate all remaining forms of promotion including ... promotion through packaging ..." and

(continued)

117. Following this recommendation, on 29 April 2010, the Prime Minister and the Health Minister jointly announced the Australian Government's decision to introduce tobacco plain packaging by 1 July 2012.¹⁸² This announcement was followed by the Australian Government's release of its formal response to the NPHT's Report, on 11 May 2010, which confirmed the Government's decision to introduce tobacco plain packaging:

In a world first, the Government will remove one of the last remaining vehicles for the advertising of tobacco products by developing legislation to mandate plain packaging for tobacco products from 1 January 2012 with full implementation by 1 July 2012.¹⁸³

118. In September 2010, the Australian Government established an Expert Advisory Group on Plain Packaging which included international tobacco control experts and legal experts. The Government also commissioned work by GfK Bluemoon, a leading and respected custom research company, to undertake consumer and market research and prepare a research report to help inform the Government's approach to new graphic health warnings and the design of plain packaged tobacco products.¹⁸⁴ GfK Bluemoon carried out a number of phases of market testing on graphic health warnings and tobacco plain packaging to determine the most effective form of tobacco plain packaging.¹⁸⁵ This research informed the design of the tobacco

"[e]liminate promotion of tobacco products through design of packaging"; Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020, National Preventative Health Strategy - the roadmap for action* (30 June 2009), Exhibit AUS-67, key actions 3.1 and 3.4 respectively.

¹⁸² Tobacco plain packaging was announced as part of a suite of tobacco control measures, including a 25% increase to tobacco excise; record investments in anti-smoking social marketing campaigns; and restricting Australian internet advertising of tobacco products; Prime Minister Rudd and Health Minister Roxon, "Anti-Smoking Action", Media Release (29 April 2010), Exhibit AUS-115.

¹⁸³ Australian Government National Preventative Health Taskforce, *Taking preventative action - A response to Australia: the healthiest country by 2020* (15 May 2010), Exhibit AUS-116, p. 10.

¹⁸⁴ GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117.

¹⁸⁵ See, e.g. GfK Bluemoon, *Market Testing of Potential Health Warnings and Information Messages for Tobacco Product Packaging: Phase 1 Side of Pack Messages* (June 2010), Exhibit AUS-118; GfK Bluemoon, *Market Testing of Potential Health Warnings and Information Messages for Tobacco Product Packaging: Phase 2 Front and Back of Pack Graphic Health Warnings* (March 2011), Exhibit AUS-119; and GfK Bluemoon, *Market Research to Determine Effective Plain*

(continued)

plain packaging legislation ultimately proposed by the Government and adopted by the Australian Parliament.

(b) Implementing tobacco plain packaging – regulatory and legislative process

119. Australia implemented the tobacco plain packaging measure through the Australian Parliament following targeted, extensive consultations with the tobacco industry and retailers, and following consultation¹⁸⁶ on the Exposure Draft of the Tobacco Plain Packaging Bill ("TPP Bill").¹⁸⁷

120. The TPP Bill (2011) and the Trademarks Amendment Bill (2011)¹⁸⁸ were introduced in the House of Representatives on 6 July 2011. As is common in Australia's parliamentary democracy, the TPP Bill (2011) was referred to the House of Representatives Standing Committee on Health and Ageing for inquiry. Following receipt of extensive submissions,¹⁸⁹ and after conducting public hearings, the

Packaging of Tobacco Products (August 2011), Exhibit AUS-117. GfK Bluemoon "sought to identify one plain packaging design (colour, font type, font size) that would minimise appeal and attractiveness, whilst maximising perceived harm and the noticeability of the graphic health warnings". GfK Bluemoon concluded its plain packaging research in August 2011.

¹⁸⁶ Two hundred and sixty-five submissions from stakeholders, including the tobacco industry, public health organizations, nongovernment organizations and other interest individuals were received in response to the Commonwealth Department of Health and Ageing, *Consultation Paper: Tobacco Plain Packaging Bill 2011 Exposure Draft* (7 April 2011), Exhibit AUS-120.

¹⁸⁷ Commonwealth Department of Health and Ageing, *Consultation Paper: Tobacco Plain Packaging Bill 2011 Exposure Draft* (7 April 2011), Exhibit AUS-120.

¹⁸⁸ The *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth) was enacted at the same time as the *Tobacco Plain Packaging Act 2011* to ensure that applicants for trademark registration and registered owners of trademarks are not disadvantaged by the practical operation of the TPP Act. Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011, Explanatory Memorandum, Exhibit AUS-5, p. 2.

¹⁸⁹ Sixty two submissions are publicly available on the Inquiry into Tobacco Plain Packaging website; one submission is not publicly available because it is confidential; House of Representatives Standing Committee on Health and Ageing, "Inquiry into Tobacco Plain Packaging" (22 July 2011), available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa/.billtobaccopackage/index.htm (last accessed 6 March 2015), Exhibit AUS-121.

Committee concluded that the "evidence base as outlined by witnesses and submitters is sufficient for the initiative to proceed."¹⁹⁰

121. The Bill then passed the House of Representatives on 24 August 2011, before progressing to the Senate, where the Trademarks Amendment Bill 2011 was referred to the Senate Legal and Constitutional Affairs Legislation Committee, which also held public hearings and received extensive submissions, before recommending that the legislation be passed.

122. Finally, both the TPP Bill (2011) and the Trademarks Amendment Bill (2011) passed the Senate¹⁹¹ and the House of Representatives¹⁹² and subsequently received Royal Assent on 1 December 2011, becoming the TPP Act.¹⁹³ The TPP Regulations,¹⁹⁴ dealing with cigarette products, were made on 7 December 2011. After ongoing consultation with a range of stakeholders, including the tobacco industry, the TPPA Regulations,¹⁹⁵ incorporating the specifications for plain packaging of non-cigarette tobacco products, were made by the Governor-General in Council on 8 March 2012.

123. Tobacco plain packaging, through both the TPP Act and the TPP Regulations, was then implemented in two phases:

- 1 October 2012: all products manufactured or packaged in Australia for domestic consumption were required to comply with the tobacco plain packaging legislation; and

¹⁹⁰ House of Representatives Standing Committee on Health and Ageing, *Advisory Report on the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011* (August 2011), Exhibit AUS-122, para. 1.57.

¹⁹¹ Commonwealth, *Parliamentary Debates*, Senate (10 November 2011), Exhibit AUS-123, pp. 8916-8917.

¹⁹² Commonwealth, *Parliamentary Debates*, House of Representatives (21 November 2011), Exhibit AUS-124, pp. 12914-12915.

¹⁹³ TPP Act, Exhibit AUS-1.

¹⁹⁴ TPP Regulations, Exhibit AUS-3.

¹⁹⁵ *Tobacco Plain Packaging Amendment Regulation 2012* (No.1) (Cth), Exhibit AUS-125.

- 1 December 2012: all tobacco products sold, offered for sale, or otherwise supplied in Australia were required to comply with the tobacco plain packaging legislation.

124. Consistent with Australia's regulatory framework, the post-implementation review process for the tobacco plain packaging measure was commenced by December 2014.¹⁹⁶

2. Description of the measure – requirements of tobacco plain packaging

125. The tobacco plain packaging requirements are set out in the TPP Act and the TPP Regulations. The measure also imposes requirements for the appearance of tobacco products. The tobacco plain packaging requirements apply to all tobacco products.

(a) Appearance of retail packaging: colour, shape and size

126. All outer surfaces of retail packaging of tobacco products, regardless of the shape, format and materials used, are required to be in a matt finish in a drab dark brown colour (Pantone 448C).¹⁹⁷ Inner surfaces of primary packaging (including cigarette packs or carton) must be either white or the colour of the packaging material in its natural state (prior to any printing or any colouration treatment, as long as the lining is not decorative).¹⁹⁸

127. All decorative ridges, textures or embellishments are prohibited on the packaging other than as permitted by the regulations, and the wrappers of retail packaging must be transparent and free from decoration.¹⁹⁹ This includes the prohibition of noise or scent (taken to constitute tobacco advertising and promotion)

¹⁹⁶ The Australian Regulatory Impact Analysis process allows for a post implementation review (PIR) in circumstances where, for one reason or another, a Regulatory Impact Statement (RIS) is not completed in relation a regulatory proposal. The PIR must commence within one to two years of the implementation. The PIR is a similar process to that of a RIS. See Australian Government, "Best Practice Regulation Handbook" (August 2007), pp. 32 and 36-37, Exhibit AUS-126.

¹⁹⁷ TPP Regulations, Exhibit AUS-3, Regulation 2.2.1.

¹⁹⁸ TPP Regulations, Exhibit AUS-3, Regulation 2.2.1.

¹⁹⁹ TPP Act, Exhibit AUS-1, Section 18(1).

on the retail packaging of tobacco production.²⁰⁰ Retail packaging is also prohibited from having a transparent or cut-out area that enables the tobacco products inside the packaging to be visible before the packaging is opened.²⁰¹ Finally, retail packaging must not have any inserts or onserts,²⁰² although, following consultation with industry, an exception was made for non-cigarette tobacco products to allow the use of inserts to avoid damage to the tobacco product during transportation or storage.²⁰³

128. Australia's tobacco plain packaging requirements mandate packaging dimensions for all tobacco products.²⁰⁴ This includes minimum and/or maximum dimensions for cigarette packs,²⁰⁵ cigar tubes,²⁰⁶ and all other primary packaging for tobacco products.²⁰⁷

(b) Appearance of retail packaging: removal of imagery and design

129. The retail packaging of tobacco products must not display any signs (or "marks") or trademarks such as logos, symbols, colours or other images, except brand, business or company name, and any variant name may be displayed on the retail packaging of a particular tobacco product²⁰⁸ (in compliance with standardised font, size and colour requirements²⁰⁹). Certain identifying marks as permitted by the TPP Regulations may also appear on the retail packaging of tobacco products. These marks include origin marks (an alphanumeric code or covert mark), calibration marks, measurement marks and trade descriptions (including country of origin), bar codes, fire risk statements, a locally made product statement, and a name, address and

²⁰⁰ TPP Act, Exhibit AUS-1, Section 24.

²⁰¹ TPP Regulations, Exhibit AUS-3, Regulation 2.1.6.

²⁰² TPP Act, Exhibit AUS-1, Section 23. TPP Act, Exhibit AUS-1, Section 4 defines "onsert" to mean "any thing affixed or otherwise attached to packaging (within the ordinary meaning of the word), but does not include the lining of a cigarette pack if the lining complies with the requirements of [the TPP] Act."

²⁰³ TPP Regulations, Exhibit AUS-3, Regulation 2.6.2.

²⁰⁴ TPP Regulations, Exhibit AUS-3, Regulation 2.1.1.

²⁰⁵ TPP Regulations, Exhibit AUS-3, Regulation 2.1.1(1).

²⁰⁶ TPP Regulations, Exhibit AUS-3, Regulation 2.1.4(2).

²⁰⁷ TPP Regulations, Exhibit AUS-3, Regulation 2.1.5.

²⁰⁸ TPP Act, Exhibit AUS-1, Section 20.

²⁰⁹ TPP Regulations, Exhibit AUS-3, Regulations 2.4.1 and 2.4.2.

telephone number.²¹⁰ Any brand, business or company name, or any variant name on cigar tubes or other primary packaging must not obscure any relevant legislative requirements, must appear only once on the cigar tube and must be across one line only.²¹¹ The display of trademarks or marks on the retail packaging of tobacco products that are permitted by the TPP Regulations must not constitute tobacco advertising and promotion; or provide access to tobacco advertising and promotion.²¹²

(c) Appearance of tobacco products

130. To ensure that no other design features detract from the impact of the tobacco plain packaging measure, the legislation also regulates the appearance of tobacco products themselves. The TPP Regulations stipulate that paper casing for cigarettes must be white, or white with an imitation cork tip, and any filter tip must be white.²¹³ An alphanumeric code may appear only once on the cigarette, and must appear in a certain form.²¹⁴

131. The TPP Regulations also mandate the appearance of cigars, allowing a single cigar band in drab dark brown (Pantone 448C) to be placed around the circumference of the cigar.²¹⁵ The band may include the brand, company or business name, and a variant name of the cigar; the name of the country in which the cigar was made or produced; and an alphanumeric code. Likewise, a bidi may have a single black thread around the circumference of each individual product.²¹⁶ Annexure A sets out in detail the requirements of the tobacco plain packaging measure.

²¹⁰ TPP Act, Exhibit AUS-1, Section 20; TPP Regulations, Exhibit AUS-3, Regulations 2.3.1-2.3.8.

²¹¹ TPP Regulations, Exhibit AUS-3, Regulations 2.4.3 and 2.4.4.

²¹² TPP Regulations, Exhibit AUS-3, 2.3.1 (5)(c).

²¹³ TPP Regulations, Exhibit AUS-3, Regulations 3.1.1 and 3.1.3.

²¹⁴ TPP Regulations, Exhibit AUS-3, Regulation 3.1.2.

²¹⁵ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1.

²¹⁶ TPP Regulations, Exhibit AUS-3, Regulation 3.2.2.

(d) Examples of plain packaging as applied to tobacco products in the Australian market



Figure 4: Example of Australia's tobacco plain packaging measure as applied to cigarettes



Figure 5: Comparison of cigarette packaging in Australia before and after the introduction of tobacco plain packaging



Figure 6: A visual example of tobacco plain packaging as applied to two types of cigar packaging

(e) Tobacco plain packaging necessarily applies to all tobacco products

132. Consistent with Australia's comprehensive approach to tobacco control, and recognising that all tobacco products are harmful and addictive, the tobacco plain packaging measure applies to all tobacco products.²¹⁷ The requirements for the plain

²¹⁷ Tobacco product is defined as meaning "processed tobacco, or any product that contains tobacco, that: (a) is manufactured to be used for smoking, sucking, chewing or snuffing; and (b) is not included in the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*."; TPP Act, Exhibit AUS-1, Section 4.

packaging of non-cigarette tobacco products resemble as closely as practicable the plain packaging requirements for cigarettes.

(f) The tobacco plain packaging measure is separate from graphic health warnings

133. Consistent with its practice of reviewing and refreshing tobacco control measures, on 29 April 2010, at the same time that the Australian Government announced its decision to introduce tobacco plain packaging, the Government also announced a decision to update and expand the graphic health warnings on tobacco product packaging.²¹⁸ On 22 December 2011, the *Competition and Consumer (Tobacco) Information Standard 2011* (the Standard) was made under the *Competition and Consumer Act 2010* (Cth).²¹⁹ This Standard required updated and larger health warnings on all tobacco products, including warning statements and corresponding graphics,²²⁰ explanatory messages and information messages. Effective from 1 December 2012, the size of graphic health warnings was increased from 30% to 75% of the front surface for most tobacco products, remained at 90% for the back surface of cigarette packaging and increased to 75% on the back surface of packaging for most other tobacco products.²²¹ The explanatory messages required as part of the health warning on most tobacco products provide additional information about the health risks identified in the warning statement and advice of the toll-free Quitline number. There are currently two sets of seven graphic health warnings, which are rotated annually for cigarette products. Cigars sold singly have also been required to be supplied in retail packaging with health warnings since 1 December 2012.²²² The cigar warnings currently include a set of five text warnings for cigars sold

²¹⁸ Prime Minister Rudd and Health Minister Roxon, "Anti-Smoking Action", Media Release (29 April 2010), Exhibit AUS-115.

²¹⁹ *Competition and Consumer Act 2010* (Cth), Exhibit AUS-127, Schedule 2, item 134.

²²⁰ Note that the packaging of bidis, smokeless tobacco and single cigar tubes, while updated under the *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, are not required to include graphic health warnings.

²²¹ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128.

²²² *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Section 2.1.

individually in cigar tubes and a set of five graphic health warnings for all other cigar retail packaging (including single cigars not sold in tubes).²²³ The current graphic health warnings for cigarettes and cigars are reproduced below:²²⁴

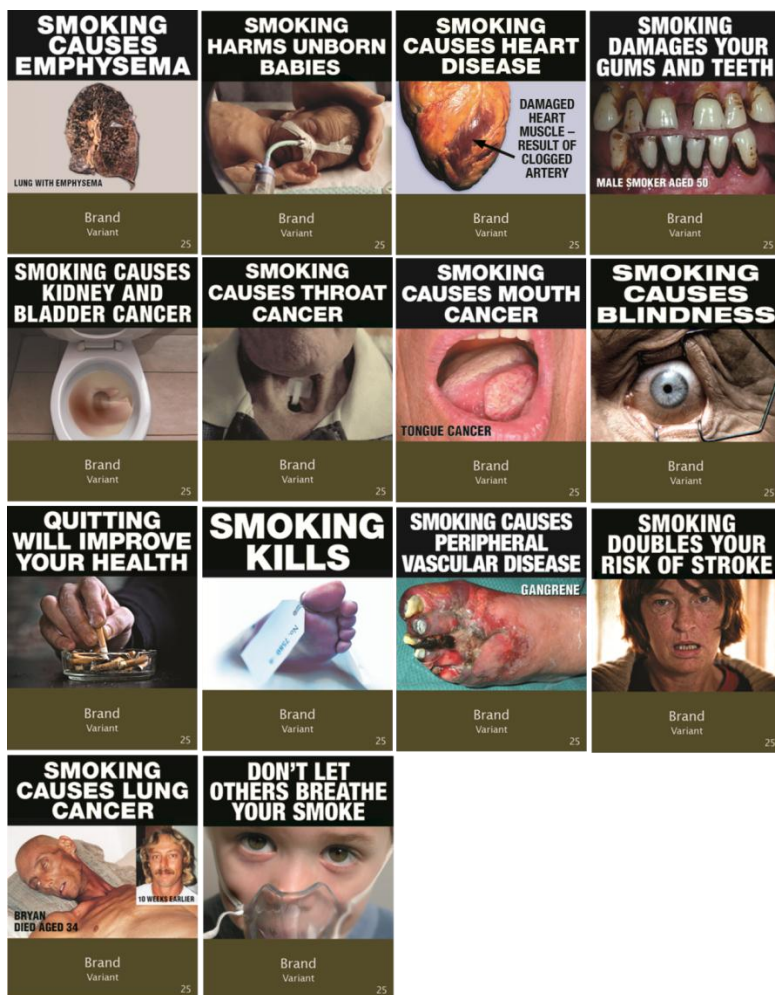


Figure 7: Current Australian graphic health warnings as applied to the front of cigarette packaging

²²³ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Sections 2, 5, 6, 9.

²²⁴ Noting that graphic health warnings also apply to other products, which are not reproduced here.



Figure 8: Current Australian graphic health warnings as applied to some cigar packaging

(g) The tobacco plain packaging measure preserves the rights of trademark owners

134. The TPP Act specifically provides that its operation will not prevent the owner of a trademark from registering or maintaining the registration of a trademark under Australia's *Trade Marks Act 1995* (Cth) ("Trade Marks Act").²²⁵ The tobacco plain packaging measure also does not affect the rights that flow from registration, including the rights of trademark owners to prevent infringement of their trademarks granted under the Trade Marks Act. Nor does it affect the rights granted to trademark owners under other statutory mechanisms or at common law in Australia.²²⁶ The operation of the TPP Act with respect to the Trade Marks Act is explained in detail in Part IV.CIV.C.1.

H. OBJECTIVES OF THE TOBACCO PLAIN PACKAGING MEASURE

135. The objectives of Australia's tobacco plain packaging measure are set out in section 3 of the TPP Act. Specifically, section 3 provides that:

3 Objects of this Act

(1) The objects of this Act are:

(a) to improve public health by:

(i) discouraging people from taking up smoking, or using tobacco products; and

(ii) encouraging people to give up smoking, and to stop using tobacco products; and

(iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and

(iv) reducing people's exposure to smoke from tobacco products; and

²²⁵ TPP Act, Exhibit AUS-1, Section 28.

²²⁶ TPP Act, Exhibit AUS-1, Section 28; Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, Clause 4.

(b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.

(2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:

(a) reduce the appeal of tobacco products to consumers;
and

(b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and

(c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.²²⁷

136. Subsection 3(1) of the TPP Act therefore sets out the *general* objects of the Act. These general objects concerning smoking behaviour are shared by all comprehensive tobacco control strategies,²²⁸ and are the means by which to improve public health overall. Indeed, discouraging uptake, encouraging quitting, and discouraging relapse will necessarily result in a reduction of exposure to smoke, furthering public health by benefitting even non-smokers.

137. It is widely accepted, and the complainants do not dispute, that all tobacco products are harmful to human health, and that measures aimed at reducing tobacco use (including smoking) and its harms are measures directed towards "the protection of human health".²²⁹ The Appellate Body has characterised the protection of public

²²⁷ TPP Act, Exhibit AUS-1, Section 3.

²²⁸ See Centers for Disease Control and Prevention, "Best Practices for Comprehensive Tobacco Control Programs –2014" (2014), available at: http://www.cdc.gov/tobacco/stateandcommunity/best_practices/ (last accessed 2 March 2015), Exhibit-50, p. 9. See also Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018 — A Strategy to Improve the Health of all Australians by Reducing the Prevalence of Smoking and its Associated Health, Social and Economic Costs, and the Inequalities it Causes* (2012), Exhibit AUS-129, p. 11.

²²⁹ In *US – Clove Cigarettes*, the Panel stated, "[w]e have already concluded that the objective of the ban on clove cigarettes is to reduce youth smoking. It is self-evident that measures to reduce youth smoking are aimed at the protection of human health, and Article 2.2 of the TBT Agreement explicitly mentions the 'protection of human health' as one of the 'legitimate objectives' covered by that provision." See Panel Report, *US – Clove Cigarettes*, para. 7.347. The GATT panel in *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes* found that "smoking amounts to a serious risk to human health and accordingly, measures aimed at reducing the consumption of

(continued)

health as "both vital and important in the highest degree."²³⁰ It is not challenged by the complainants in this dispute that the public health objectives of the tobacco plain packaging measure are legitimate.²³¹

138. As the introductory words of subsection 3(2) indicate, it is the Parliament's intention that tobacco plain packaging will "contribute to" achieving the objectives of improving public health and giving effect to the FCTC, through three *specific* objectives. Subsection 3(2) sets out these specific objectives of the tobacco plain packaging measure to: reduce the appeal of tobacco products to consumers; increase the effectiveness of health warnings; and reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

139. In the Explanatory Memorandum which accompanied the introduction of the TPP Bill 2011 into the Australian Parliament, the Government outlined the rationale for the tobacco plain packaging measure, which articulated the relationship between the specific and general objects of the TPP Bill as follows:

The rationale for plain packaging

This Bill will prevent tobacco advertising and promotion on tobacco products and tobacco product packaging in order to:

- reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;

cigarettes fall within the scope of GATT Article XX (b)." See GATT Panel Report, *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes*, para 73.

²³⁰ Panel Report, *EC — Asbestos*, para. 172 (citing Appellate Body Report, *Korea — Various Measures on Beef*, para. 162.)

²³¹ Honduras' first written submission, para. 851: "Honduras, therefore, does not dispute the legitimacy of Australia's public health objective pursued through the measures at issue"; Indonesia's first written submission, para. 389: "Indonesia does not dispute that measures to reduce smoking prevalence protect public health and is not challenging the legitimacy of the objective pursued by Australia's PP measures."; Ukraine's first written submission, para 3: "Ukraine does not call into question the legitimacy of Australia's health objective or its ambitious level of protection."; Dominican Republic's first written submission, para 139: "The need for effective tobacco control is, therefore, not in question. As Australia has pointed out on numerous occasions in this dispute, the health consequences and attendant social costs of tobacco consumption are considerable, and it is every government's right – and obligation – to adopt tobacco control measures that promote public health"; and Cuba's first written submission, para. 3.

- increase the noticeability and effectiveness of mandated health warnings;
- reduce the ability of the tobacco product and its packaging to mislead consumers about the harms of smoking; and
- through the achievement of these aims in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.²³²

140. The Explanatory Memorandum refers specifically to the Guidelines for implementation of Articles 11 and 13 of the FCTC, which recommend that Parties consider introducing plain packaging.²³³ The Minister for Health highlighted Australia's commitment to the FCTC during the Australian Parliament's consideration of the TPP Bill 2011, stating:

Our legislation will give effect to commitments under the World Health Organization FCTC, which recommends that plain packaging be considered as part of comprehensive bans on tobacco advertising and as a way of ensuring that consumers are not misled about the dangers of smoking.

141. The implementing legislation and regulations, the Explanatory Memorandum and legislative history of the measure as well as its overall design, structure and operation,²³⁴ and the measure's objectives – which include giving effect to Australia's obligations under the FCTC – each clearly describes how the measure is intended to contribute, as part of Australia's comprehensive strategy of tobacco control measures, to achieving Australia's overall objective of protecting human health.

²³² Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p. 2; See also World Trade Organization, Australia's Notification to the Committee on Technical Barriers to Trade, G/TBT/N/AUS/67 (8 April 2011), Exhibit AUS-130; and World Trade Organization, Australia's Notification of Laws and Regulations under Article 63.2 of the TRIPS Agreement, IP/N/1/AUS/4 (26 November 2012), Exhibit AUS-131.

²³³ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, page 2.

²³⁴ The Appellate Body has stated that in order to make an objective and independent assessment of the objective that a Member seeks to achieve, the panel must undertake an "examination of the text of the measure, its design, architecture, structure, legislative history, as well as its operation", Appellate Body Report, *EC – Seal Products*, para. 5.144; Appellate Body Report, *US – COOL*, para. 371; Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

I. TOBACCO PLAIN PACKAGING FULFILS ITS OBJECTIVES

1. The mediational model of the tobacco plain packaging measure

142. Professor Geoff Fong has reviewed the way in which subsections 3(1) and 3(2) operate together to contribute to improving public health. Professor Fong notes that:

the Act is explicit in identifying the 'mechanisms' by which its Objects could be achieved...[specifying] a casual chain model that identifies the public health objectives that the plain packaging measure is designed to achieve, and also the specific mechanisms through which those public health objectives are achieved.²³⁵

143. The achievement of the specific objectives ('mechanisms') of subsection 3(2) of the TPP Act are therefore the *direct means* of contributing to the objective of improving public health under subsection 3(1) of the TPP Act. Indeed, Professor Fong states that:

One can make reasonable and confident predictions that if the plain packaging measure is shown to decrease appeal and/or increase the effectiveness of health warnings and/or decrease the ability of the package to mislead consumers about the harmfulness of tobacco products, the Objectives of the Act will likely be achieved. If the Objectives of the Act are achieved then this will lead to positive short-term and longer-term public health outcomes.²³⁶

²³⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 14-15.

²³⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para 90.

144. Professor Fong depicts the operation of the TPP Act:

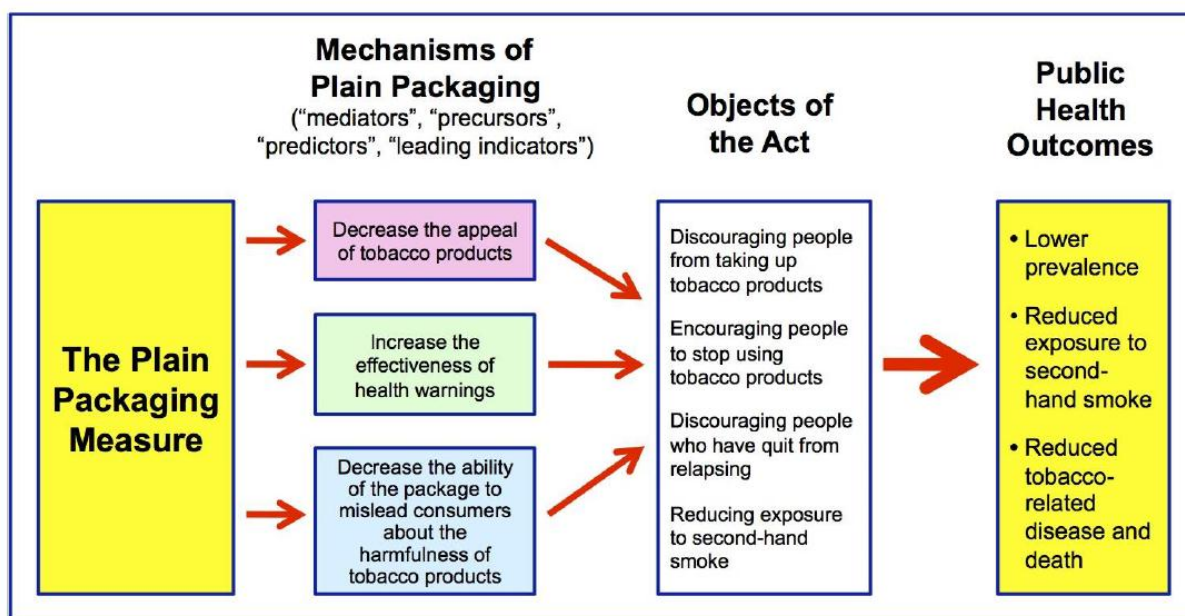


Figure 9: Professor Fong's depictions of the TPP Act²³⁷

2. The importance of behavioural intentions in measuring the effectiveness of tobacco control policies

145. The 2012 United States Surgeon General Report reviewed the most effective means by which to evaluate evidence of the effectiveness of tobacco control policies to understand how these policies will ultimately affect the smoking behaviour of consumers. According to the 2012 Report, and confirmed by the opinions of experts²³⁸ from a range of fields including marketing, psychology and public health, theoretical models of behavioural intention are "immediate precursors to behaviour and are one of the strongest predictors of future behaviour."²³⁹

²³⁷ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para 88

²³⁸ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, paras. 100-104; Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 161; Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 88-117.

²³⁹ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General* (2012), Exhibit AUS-76, p. 512.

146. Professor Fong states that tobacco control policies are best measured by their influence on "downstream psychosocial variables such as knowledge, beliefs, attitudes and intentions, and on subsequent tobacco use behaviours."²⁴⁰ Measuring these variables is an approach used globally by marketing companies, including the tobacco industry,²⁴¹ as well as academics in the study of consumer behaviour.²⁴²

147. Thus, the most appropriate approach to discerning the effects of the tobacco plain packaging measure in the early stages of its introduction was to rely upon experiments and surveys which consider drivers of choice, attitudes and, ultimately, the elicitation of behavioural intentions. There is strong empirical evidence supporting each of the three specific objectives under subsection 3(2) of the TPP Act, the achievement of which will contribute, as part of Australia's comprehensive strategy of tobacco control measures, to Australia's overall objective of protecting human health.

3. The tobacco plain packaging measure improves public health through the achievement of the specific objectives under subsection 3(2) of the TPP Act

(a) Tobacco plain packaging reduces the appeal of tobacco products

i. Tobacco plain packaging reduces the attractiveness of tobacco packaging

148. Graphic and structural packaging design influences thoughts, feelings and behaviour.²⁴³ A study by Kotnowski and Hammond in 2013, following review of industry research on package structure, concluded that:

²⁴⁰ G.T. Fong, K.M. Cummings, R. Borland, G. Hastings, A. Hyland, G.A. Giovino, D. Hammond, M.E. Thompson, "The conceptual framework of the International Tobacco Control (ITC) Policy Evaluation Project", *Tobacco Control*, Vol.15 (*Suppl III*), iii3-iii11, (2006), Exhibit AUS-132, p.i10.

²⁴¹ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, Section 5.4.

²⁴² B.H. Sheppard, J. Hartwick, P.R. Warshaw. "The theory of reasoned action: a meta-analysis of past research with recommendations for modifications and future research", *Journal of Consumer Research*, Vol. 15, No. 3 (1988), 325, Exhibit AUS-133; P. Sheeran, "Intention-behavior relations: a conceptual and empirical review", *European Review of Social Psychology*, Vol. 12, No. 1, (2002), Exhibit AUS-134, p. 1-36.

²⁴³ R. Borland and S. Savvas, "Effects of stick design features on perceptions of characteristics of cigarettes", *Tobacco Control* (2012), Exhibit AUS-135; R. Borland, S. Savvas, F. Sharkie and K.

(continued)

Consumer studies consistently found that pack shape, size and opening style influenced perceptions of reduced product harm, and were often used to communicate a "lighter" product. Slim, rounded, oval and booklet packs were found to be particularly appealing among young adults, and several studies demonstrated increased purchase interest for tobacco products presented in novel packaging shape or opening. Evidence from consumer tracking reports and company presentations indicate that pack innovations in shape or opening method increased market share of brands²⁴⁴

149. An Australian study by Borland et al²⁴⁵ found similar results, concluding that young adult smokers rated certain pack shapes as more attractive – in particular noting that standard square packs were seen as less attractive than rounded or bevelled pack shapes. Professor Fong states that:

In addition, smokers differentiated the perceived quality of the cigarettes within a pack based on pack shape and opening, with the rounded and bevelled packs seen as containing higher quality cigarettes than rectangular packs, and a slide-out mechanism rated higher than the standard flip-top. This study shows that pack shapes and openings can affect smokers' ratings of pack appeal and the attributes of cigarettes contained within packs.²⁴⁶

150. It is therefore logical that removal of these types of innovative packaging shapes and sizes (such as lipstick packs, ipod nano packs, purse packs) would reduce the appeal of tobacco products through the standardization of packaging shapes and sizes.²⁴⁷

Moore, "The impact of structural packaging design on young adult smokers' perceptions of tobacco products", *Tobacco Control*, Vol. 22, (2013), 97, Exhibit AUS-136; A. Ford, A.N. MacKintosh, C. Moodie, S. Richardson, G. Hastings, "Cigarette pack design and adolescent smoking susceptibility: a cross-sectional survey", *BMJ Open*, (2013), Exhibit AUS-137; K. Kotnowski, *The impact of standardized cigarette packaging among young women in Canada: A discrete choice experiment*. Master of Science in Health Studies and Gerontology thesis, University of Waterloo: Canada, (2013), Exhibit AUS-138.

²⁴⁴ K. Kotnowski and D. Hammond, "The impact of cigarette pack shape, size and opening: evidence from tobacco company documents", *Addiction*, Vol. 108, No. 9 (2013), 1658, Exhibit AUS-139, 1658.

²⁴⁵ R. Borland, S. Savvas, F. Sharkie and K. Moore, "The impact of structural packaging design on young adult smokers' perceptions of tobacco products", *Tobacco Control*, Vol. 22, (2013), 97, Exhibit AUS-136.

²⁴⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 227.

²⁴⁷ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 299-302.



Figure 10: Examples of innovative packaging used in Australia prior to the introduction of the tobacco plain packaging measure²⁴⁸

²⁴⁸ A review done by the Cancer Council Victoria, Australia, of the packaging of tobacco products provides further examples: Quit Victoria, Cancer Council Victoria, Australia, *The Packaging of Tobacco Products in Australia* (September 2013), Exhibit AUS-89.

151. Systematic reviews of the literature,²⁴⁹ in addition to numerous empirical studies,²⁵⁰ find that plain packaged tobacco products are rated as substantially less attractive overall than the equivalent non-plain packaged packs, particularly by young smokers.²⁵¹ This was also the case for particular segments of the population, such as women targeted with female design elements on packs associated with greater levels

²⁴⁹ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angusa, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140; C. Moodie, G. Hastings and A. Ford, "A brief review of plain packaging research for tobacco products", *Institute for Social Marketing* (2009), Exhibit AUS-141.

²⁵⁰ Centre for Health Promotion, University of Toronto, *Effects of plain packaging on the image of tobacco products among youth* (1993), Exhibit AUS-142; S. Bondy, A. Paglia and M.J. Kaiserman, "Tobacco purchasing and marketing", *Youth Smoking Survey*, Technical Report, Ottawa, ON: Health Canada (1994), Exhibit AUS-143; J. d'Avernas, D. Northrup, M. Foster, et al., *Cigarette packaging and event marketing increases the attractiveness of smoking: A study of youth*, Working Papers Series No. 28 (1997), Exhibit AUS-144; I. Rootman and B.R. Flay, "A study on youth smoking: plain packaging, health warnings, event marketing and price reductions", *University of Toronto, Centre for Health Promotion* (1995), Exhibit AUS-145; D.A. Northrup and J. Pollard, "Plain packaging of cigarettes, event marketing to advertise smoking, and other tobacco issues: a survey of grade seven and grade nine Ontario students", *Institute for Social Research, York University* (1995), Exhibit AUS-146; P. Beede, R. Lawson and M. Shepherd, "The promotional impact of cigarette packaging: a study of adolescent responses to cigarette plain packs", *Department of Marketing, University of Otago: New Zealand*, (1990), Exhibit AUS-147; J. Hoek, C. Wong, P. Gendall, J. Louviere and K. Cong, "Effects of Dissuasive Packaging on Young Adult Smokers", *Tobacco Control*, Vol. 20 (2011), Exhibit AUS-148, p. 183-188; M.A. Wakefield, D. Germain and S.J. Durkin, "How does increasingly plainer cigarette packaging influence adult smokers' perceptions about brand image? An experimental study", *Tobacco Control*, Vol. 17, (2008), Exhibit AUS-149, p. 416-21; M. Bansal-Travers, D. Hammond, P. Smith and K.M. Cummings, "The impact of cigarette pack design, descriptors, and warning labels on risk perception in the U.S", *American Journal of Preventive Medicine*, Vol. 40, No.6 (2011), Exhibit AUS-150, p. 674-682; R.J. Donovan, *Smokers' and non-smokers' reactions to standard packaging of cigarettes*. University of Western Australia (1993), Exhibit AUS-151; K. Gallopel-Morvan, C. Moodie, D. Hammond, F. Eker, E. Beguinot and Y. Martinet, "Consumer perceptions of cigarette pack design in France: a comparison of regular, limited edition and plain packaging", *Tobacco Control*, Vol. 21, No. 5 (2012), Exhibit AUS-152, p. 502-506.

²⁵¹ P. Beede, R. Lawson and M. Shepherd, "The promotional impact of cigarette packaging: a study of adolescent responses to cigarette plain packs", *Department of Marketing, University of Otago: New Zealand*, (1990), Exhibit AUS-147, p. 22; P. Beede and R. Lawson, "Brand Image Attraction: the Promotional Impact of Cigarette Packaging", *New Zealand Family Physician*, Vol. 18, (1991) 175, Exhibit AUS-153, p. 176; Centre for Health Promotion, University of Toronto, *Effects of plain packaging on the image of tobacco products among youth* (1993), Exhibit AUS-142, p. 13 and see also 14, 16, Figures 1 – 4 at 18 – 19 and 25; I. Rootman and B.R. Flay, "A study on youth smoking: plain packaging, health warnings, event marketing and price reductions", *University of Toronto, Centre for Health Promotion* (1995), Exhibit AUS-145, p. 7; M.A. Wakefield, D. Germain and S.J. Durkin, "How does increasingly plainer cigarette packaging influence adult smokers' perceptions about brand image? An experimental study", *Tobacco Control*, Vol. 17, (2008), Exhibit AUS-149, p. 420; D. Germain, M.A. Wakefield and S.J. Durkin, "Adolescents' Perceptions of Cigarette Brand Image: Does Plain Packaging Make a Difference? ", *Journal of Adolescent Health*, (2009), Exhibit AUS-154, p. 4-5; C. Moodie, A.M. Mackintosh, G. Hastings and A. Ford, "Young adult smokers' perceptions of plain packaging: a pilot naturalistic study", *Tobacco Control*, Vol. 20, (2011), Exhibit AUS-155, p. 369, 371-2.

of attractiveness,²⁵² as well as subjects from a range of cultures and demographics.²⁵³

Moodie et al, in a literature review in 2012, summarised the evidence and found that:

In terms of attractiveness, plain packs were perceived as less attractive, exciting, fashionable, cool, stylish, appealing, nice and colourful than branded packs, and were less likely to be chosen in preference tests. Studies that tested a range of branded and unbranded packs found that packs became more negatively rated as progressively more brand elements were removed.²⁵⁴

152. By altering consumers' positive perceptions of tobacco products, tobacco plain packaging brings about a reduction in the overall appeal of tobacco products and positive perceptions of those who smoke them.

ii. Tobacco plain packaging reduces positive perceptions of taste

153. Branding, package design, package shape and other elements such as package descriptors can affect taste perceptions of products.²⁵⁵ The impact of packaging elements on taste is particularly strong among children,²⁵⁶ and studies have shown that children significantly prefer the taste of consumer products from those packages

²⁵² J. Doxey and D. Hammond, "Deadly in pink: The impact of cigarette packaging among young women", *Tobacco Control*, Vol. 20, No. 5 (2011), Exhibit AUS-156, p. 353-360; D. Hammond, J. Doxey, S. Daniel and M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine and Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157, p. 579-588.

²⁵³ D. Hammond, S. Daniel and C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52 (2013), Exhibit AUS-158, p. 151-157; M.A. Al-hamdani, *A survey on the effects of progressive removal of brand imagery elements from cigarette packs on the perception of adult university students*. Master's Degree in Health Administration Thesis, Dalhousie University: Canada (2011), Exhibit AUS-159; C.M. White, D. Hammond, J.F. Thrasher and G.T. Fong, "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study", *BMC Public Health*, Vol. 12, No. 737 (2012), Exhibit AUS-160; G. Von Hal, S. Van Roosbroeck, B. Vriesacker, M. Arts, S. Hoeck and J. Fraeyman, "Flemish adolescents' perceptions of cigarette plain packaging: a qualitative study with focus group discussions", *BMJ Open*, (2012), Exhibit AUS-161; K. Gallopel-Morvan, P. Gabriel, M. Le Gall-Ely, S. Rieunier and B. Urien, "Plain packaging and public health: the case of tobacco", *Journal of Business Research*, Vol. 66, No.1 (2012), Exhibit AUS-162, p. 133-136; J. Hoek, P. Gendall, H. Gifford, G. Pirikahu, J. McCool, G. Pene, R. Edwards and G. Thomson, "Tobacco branding, plain packaging, pictorial warnings and symbolic consumption", *Qualitative Health Research*, Vol. 22, No. 5 (2012), Exhibit AUS-163, p. 630-639.

²⁵⁴ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140, p. 84.

²⁵⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras.184-189.

²⁵⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 187.

with design elements (rather than plain packs).²⁵⁷ Perceptions of taste therefore play a critical role in initiating consumer behaviour, and are especially important for non-essential goods such as tobacco products.²⁵⁸ Numerous studies have shown a clear link between tobacco packaging, including packaging colour²⁵⁹ and the size of warning labels, and taste perceptions.²⁶⁰

154. Internal industry documents²⁶¹ confirm the effect that tobacco product packaging has on taste, showing that changes to pack structure can enhance taste-related perceptions and that particular packaging styles could, for example, communicate smooth taste.²⁶² These findings highlight the importance of standardising all features of a tobacco pack including structure, styles and colour. Professor Fong states that:

These industry studies found that package colour and descriptor terminology affected taste perceptions. For example, cigarettes in red packaging were perceived to taste stronger, and cigarettes in white packages were perceived to taste lighter. It was found that,

²⁵⁷ C.A. Roberto, J. Baik, J.L. Harris, K.D. Brownell, "Influence of Licensed Characters on Children's Taste and Snack Preferences", *Pediatrics*, Vol. 126, No. 1 (2010), Exhibit AUS-164, pp. 91-92.

²⁵⁸ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 184.

²⁵⁹ D. Hammond and C. Parkinson, "The impact of cigarette package design on perceptions of risk", *Journal of Public Health*, Vol. 31, No. 3 (2009), Exhibit AUS-165; M. Wakefield, C. Morley, J.K. Horan and K.M. Cummings, "The cigarette pack as image: new evidence from tobacco industry documents", *Tobacco Control*, Vol. 11, Suppl 1 (2002), Exhibit AUS-93; National Cancer Institute (United States), "The role of the media in promoting and reducing tobacco use", *Tobacco Control Monograph*, No. 19 (2008), Exhibit AUS-19; D. Hammond, M. Dockrell, D. Arnott, A. Lee and A. McNeill, "Cigarette pack design and perceptions of risk among UK adults and youth", *European Journal of Public Health*, Vol. 19, No. 6 (2009), Exhibit AUS-166.

²⁶⁰ Createc, *Effects of modified packaging through increasing the size of warnings on cigarette packages: quantitative study of Canadian youth smokers and vulnerable non-smokers* (April 2008), Exhibit AUS-167.

²⁶¹ See, e.g. Philip Morris, "Virginia slims rounded corners name/pack test" (1998), Bates No. 2072462986-2072463039, Exhibit AUS-168; Philip Morris, "New parliament pack test" (1998), Bates No. 2073127722-2073127776, Exhibit AUS-169; Philip Morris, "Merit pack test—final report" (1999), Bates No. 2071530536-2071530565, Exhibit AUS-170; S. Perry, B. Sutherland, "Salem A&A study. April 3, 2002, Presented by Steve Perry, executive vice president. Betsy Sutherland, vice president" (2002), Bates No. 529786375-529786584, Exhibit AUS-171.

²⁶² K. Kotnowski and D. Hammond, "The impact of cigarette pack shape, size and opening: evidence from tobacco company documents", *Addiction*, Vol. 108, No. 9 (2013), 1658, Exhibit AUS-139, p. 108.

generally, taste perception is reduced significantly when cigarettes are presented in plain packages.²⁶³

155. Tobacco plain packaging operates to reduce significantly positive taste perceptions²⁶⁴ and create negative perceptions of the taste and the experience of the tobacco product overall.²⁶⁵ Tobacco products in plain packaging are perceived to taste worse, be less smooth, and/or be stronger tasting,²⁶⁶ even though the physical characteristics of tobacco products were not changed under the conditions of the research. Given that taste is an important measure of product appeal and likeability, tobacco plain packaging directly reduces appeal by reducing positive taste associations.²⁶⁷

²⁶³ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 231.

²⁶⁴ J.R. DiFranza, D.M. Clark and R.W. Pollay, "Cigarette package design: opportunities for disease prevention", *Tobacco Induced Diseases*, Vol. 1, No. 2 (2002), Exhibit AUS-92; C. Moodie, G. Hastings and A. Ford, "A brief review of plain packaging research for tobacco products", *Institute for Social Marketing* (2009), Exhibit AUS-141.

²⁶⁵ M. Wakefield, "Welcome to cardboard country: how plain packaging could change the subjective experience of smoking", *Tobacco Control*, Vol. 20, No. 5 (2011), Exhibit AUS-172; A. Ford, A.N. MacKintosh, C. Moodie, S. Richardson and G. Hastings, "Cigarette pack design and adolescent smoking susceptibility: a cross-sectional survey", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-137.

²⁶⁶ C. Moodie, A.M. Mackintosh, G. Hastings and A. Ford, "Young adult smokers' perceptions of plain packaging: a pilot naturalistic study", *Tobacco Control*, Vol. 20, (2011), Exhibit AUS-155; C.M. White and D. Hammond, "The impact of cigarette package design on young women in Brazil: Brand appeal and perceptions of health risk." (20 June 2011), Exhibit AUS-173; C.M. White, D. Hammond, J.F. Thrasher and G.T. Fong, "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study", *BMC Public Health*, Vol. 12, No. 737 (2012), Exhibit AUS-160; D. Hammond, S. Daniel and C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52 (2013), Exhibit AUS-158; C. Moodie, A. Ford, A.M. Mackintosh, G. Hastings, "Young people's perceptions of cigarette packaging and plain packaging: an online survey", *Nicotine Tobacco Research*, Vol. 14, No. 1 (2012), Exhibit AUS-174; R. Borland and S. Savvas, "Effects of stick design features on perceptions of characteristics of cigarettes", *Tobacco Control* (2012), AUS-135; R. Borland and S. Savvas, "The effects of variant descriptors on the potential effectiveness of plain packaging." *Tobacco Control*, Vol. 23, No. 1 (2013), Exhibit AUS-175.

²⁶⁷ J. d'Avernas, D. Northrup, M. Foster, et al., *Cigarette packaging and event marketing increases the attractiveness of smoking: A study of youth*, Working Papers Series No. 28 (1997), Exhibit AUS-144; K. Gallopel-Morvan, C. Moodie and J.M. Rey, "Demarketing cigarettes through plain cigarette packaging and perceptions of different plain pack colours", *Actes du Congrès International de l'AFM* (2010), Exhibit AUS-176; M. Bansal-Travers, D. Hammond, P. Smith and K.M. Cummings, "The impact of cigarette pack design, descriptors, and warning labels on risk perception in the U.S", *American Journal of Preventive Medicine*, Vol. 40, No.6 (2011), Exhibit AUS-150; D. Germain, M.A. Wakefield and S.J. Durkin, "Adolescents' Perceptions of Cigarette Brand Image: Does Plain Packaging Make a Difference? ", *Journal of Adolescent Health*, (2009), Exhibit AUS-154.

iii. Tobacco plain packaging reduces positive perceptions of smokers

156. In reducing package attractiveness overall, there is strong empirical evidence showing that the tobacco plain packaging measure reduces positive perceptions of smokers.²⁶⁸ This evidence is particularly strong for young people.²⁶⁹

157. The tobacco industry has designed advertising and brand logos, imagery, colours and names targeted to various segments of the population of potential young smokers. Indeed, studies on tobacco packaging have elicited such reactions as "glamour, slimness, and attractiveness",²⁷⁰ "trendy, young and cool",²⁷¹ "masculine, sociable and confident",²⁷² and "attractive, nice and flashy".²⁷³

158. In direct contrast, studies show that packs without brand imagery, descriptors and other design elements, convey that the smoker of the brand is "boring" and

²⁶⁸ I. Rootman and B.R. Flay, "A study on youth smoking: plain packaging, health warnings, event marketing and price reductions", *University of Toronto, Centre for Health Promotion* (1995), Exhibit AUS-145; J. d'Avernas, D. Northrup, M. Foster, et al., *Cigarette packaging and event marketing increases the attractiveness of smoking: A study of youth*, Working Papers Series No. 28 (1997), Exhibit AUS-144.

²⁶⁹ K. Gallopel-Morvan, C. Moodie and J.M. Rey, "Demarketing cigarettes through plain cigarette packaging and perceptions of different plain pack colours", *Actes du Congrès International de l'AFM* (2010), Exhibit AUS-176.

²⁷⁰ J. Doxey and D. Hammond, "Deadly in pink: The impact of cigarette packaging among young women", *Tobacco Control*, Vol. 20, No. 5 (2011), Exhibit AUS-156, p. 357; D. Hammond, J. Doxey, S. Daniel and M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine and Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157; D. Hammond, C. White, W. Anderson, D. Arnott and M. Dockrell, "The perceptions of UK youth of branded and standardized, 'plain' cigarette packaging", *European Journal of Public Health*, Vol. 24, No. 4 (2013), Exhibit AUS-177, p. 537.

²⁷¹ P. Gendall, J. Hoek, R. Edwards and J. McCool, "A cross-sectional analysis of how young adults perceive tobacco brands: implications for FCTC signatories", *BMC Public Health*, Vol. 12, No. 796 (2012), Exhibit AUS-178, p. 7.

²⁷² D. Germain, M.A. Wakefield and S.J. Durkin, "Adolescents' Perceptions of Cigarette Brand Image: Does Plain Packaging Make a Difference? ", *Journal of Adolescent Health*, (2009), Exhibit AUS-154, p. 4; M.A. Wakefield, D. Germain and S.J. Durkin, "How does increasingly plainer cigarette packaging influence adult smokers' perceptions about brand image? An experimental study", *Tobacco Control*, Vol. 17, (2008), Exhibit AUS-149.

²⁷³ K. Gallopel-Morvan, C. Moodie and J.M. Rey, "Demarketing cigarettes through plain cigarette packaging and perceptions of different plain pack colours", *Actes du Congrès International de l'AFM* (2010), Exhibit AUS-176, p. 10.

"dull",²⁷⁴ "unsociable and unattractive",²⁷⁵ "unglamorous and unsophisticated",²⁷⁶ and "uncool".²⁷⁷ The evidence demonstrates that young people will feel embarrassed and less accepted carrying tobacco plain packs,²⁷⁸ that they do not want to carry such packs,²⁷⁹ and that they believe that such packs will discourage young people from smoking.²⁸⁰

159. Given these strong findings, Dr Biglan concludes that:

it is hard to see how [plain packaged] Australian packs can function as a badge of solidarity among young people who are striving to feel and be seen as cool, sophisticated, glamorous and popular.²⁸¹

160. Similarly, the tobacco industry has sought to position cigars as "sophisticated" or "cool". Today, cigars are promoted by youth celebrity rappers, such as "Snoop

²⁷⁴ R.J. Donovan, *Smokers' and non-smokers' reactions to standard packaging of cigarettes*. University of Western Australia (1993), Exhibit AUS-151, p. 84878.

²⁷⁵ M.A. Wakefield, D. Germain and S.J. Durkin, "How does increasingly plainer cigarette packaging influence adult smokers' perceptions about brand image? An experimental study", *Tobacco Control*, Vol. 17, (2008), Exhibit AUS-149, p. 420.

²⁷⁶ J. Doxey and D. Hammond, "Deadly in pink: The impact of cigarette packaging among young women", *Tobacco Control*, Vol. 20, No. 5 (2011), Exhibit AUS-156; D. Hammond, S. Daniel and C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52 (2013), Exhibit AUS-158.

²⁷⁷ C. Moodie, A. Ford, A.M. Mackintosh, G. Hastings, "Young people's perceptions of cigarette packaging and plain packaging: an online survey", *Nicotine Tobacco Research*, Vol. 14, No. 1 (2012), Exhibit AUS-174, p. 101.

²⁷⁸ C. Moodie, A.M. Mackintosh, G. Hastings and A. Ford, "Young adult smokers' perceptions of plain packaging: a pilot naturalistic study", *Tobacco Control*, Vol. 20, (2011), Exhibit AUS-155, p. 369.

²⁷⁹ C. Moodie, A. Ford, A.M. Mackintosh, G. Hastings, "Young people's perceptions of cigarette packaging and plain packaging: an online survey", *Nicotine Tobacco Research*, Vol. 14, No. 1 (2012), Exhibit AUS-174, p. 101.

²⁸⁰ M. Bansal-Travers, D. Hammond, P. Smith and K.M. Cummings, "The impact of cigarette pack design, descriptors, and warning labels on risk perception in the U.S", *American Journal of Preventive Medicine*, Vol. 40, No.6 (2011), Exhibit AUS-150; Environics Research Group, *Consumer Research on the Size of Health Warning Messages – Quantitative Study of Canadian Youth* (June 2008), Exhibit AUS-179; K. Gallopel-Morvan, C. Moodie, D. Hammond, F. Eker, E. Beguinot and Y. Martinet, "Consumer perceptions of cigarette pack design in France: a comparison of regular, limited edition and plain packaging", *Tobacco Control*, Vol. 21, No. 5 (2012), Exhibit AUS-152; D. Hammond, M. Dockrell, D. Arnott, A. Lee and A. McNeill, "Cigarette pack design and perceptions of risk among UK adults and youth", *European Journal of Public Health*, Vol. 19, No. 6 (2009), Exhibit AUS-166.

²⁸¹ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para.119.

Dogg" or "Jay-Z".²⁸² Many kinds of cigars and small cigars are packaged in colourful, shiny, and stylish packaging; and are increasingly becoming a "badge" of solidarity among certain segments of youths²⁸³ and females,²⁸⁴ in the same way that they had been seen as a symbol of prestige among traditional male smokers for many years. Indeed, Cuba's own evidence indicates that 30% of smokers of large handmade cigars started to smoke before the age of 24.²⁸⁵ Nearly half of all large handmade cigar smokers surveyed by the Vision One survey commissioned by Cuba had started smoking these products in their 20s.²⁸⁶ Clearly, and when coupled with initiation rates of other cigar products such as small cigars and cigarillos, cigars are no longer the domain of traditional male smokers. Rather, cigar products are increasingly associated with an upscale status, luxury, affluence, sophistication and style,²⁸⁷ and the image of cigar smokers has adapted in recent years to reflect the changing consumer market:

Whereas in the past, cigar smokers were typically older, male, staid, and conservative, the contemporary cigar smoker is portrayed in the media and promotional materials as young, independent, vibrant, rebellious and frequently female.²⁸⁸

161. The tobacco plain packaging measure ensures that tobacco packaging *substantially reduces* the facilitation of social acceptance and group solidarity,²⁸⁹ thereby reducing the ability of tobacco packaging advertising in Australia to fulfil the psychological needs of young people. Indeed, compared to previous packaging, tobacco plain packs are believed by young smokers and non-smokers to be more

²⁸² A. Richardson, O. Ganz and D. Vallone, 'The cigar ambassador: how Snoop Dogg uses Instagram to promote tobacco use', *Tobacco Control*, Vol. 23 (2014), 79 and M. Fine, 'The Musical Mogul', *Cigar Aficionado* (June 2009), available at: http://www.cigaraficionado.com/webfeatures/show/id/Cover-The-Music-Mogul_6238 (last accessed 4 March 2015) Exhibit AUS-180.

²⁸³ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 131-145.

²⁸⁴ G. Kostygina, S.A. Glantz and P.M. Ling, 'Tobacco industry use of flavours to recruit new users of little cigars and cigarillos', *Tobacco Control*, Vol. 0 (2014), Exhibit AUS-181, p. 4.

²⁸⁵ Cuba's first written submissions, para. 248.

²⁸⁶ Cuba's first written submissions, para. 250.

²⁸⁷ L.D. Wenger, R.E. Malone, A. George and L.A. Bero, 'Cigar magazines: Using tobacco to sell a lifestyle', *Tobacco Control*, Vol. 10, No. 3 (2001), Exhibit AUS-182, p. 279.

²⁸⁸ M.S. Jamner, 'Cigar smoking among college students: Prevalence and correlates', *Preventive Medicine*, Vol. 29, No. 3 (1999), 187, Exhibit AUS-183, p. 188

²⁸⁹ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para.178.

appropriate for "old people" and less acceptable to be seen using,²⁹⁰ because they are rated as significantly less trendy and stylish and their users perceived as as less sociable and outgoing.²⁹¹ This was so, even where the brand in question was one favoured by young consumers²⁹² or where it had been used to target particular segments of the population (including young women).²⁹³

162. Thus plain packaging of tobacco products reduces the ability of tobacco packaging/brand imagery to appeal to the psychological needs of young consumers.

iv. Overall, the reduction of appeal of tobacco packaging affects consumer intentions and behaviour

163. As discussed above, the tobacco plain packaging measure reduces the appeal of tobacco products through the elimination of innovative packaging elements specifically designed to increase positive perceptions of both tobacco products in general, and individual brands. A change in these cognitive variables (and thus, overall appeal) is associated with stronger intentions to quit the use of tobacco products, and reduced intentions to start tobacco use.²⁹⁴

164. Because intentions are strongly related to measuring future behaviour, the attitudes, perceptions and beliefs of consumers – most particularly young consumers – provide strong evidence of the effect of the tobacco plain packaging measure.²⁹⁵ There is substantial evidence to suggest that a reduction in the appeal of tobacco

²⁹⁰ R.J. Donovan, *Smokers' and non-smokers' reactions to standard packaging of cigarettes*. University of Western Australia (1993), Exhibit AUS-151, p. 84887.

²⁹¹ M.A. Wakefield, D. Germain and S.J. Durkin, "How does increasingly plainer cigarette packaging influence adult smokers' perceptions about brand image? An experimental study", *Tobacco Control*, Vol. 17, (2008), Exhibit AUS-149, p. 416.

²⁹² Centre for Health Promotion, University of Toronto, *Effects of plain packaging on the image of tobacco products among youth* (1993), Exhibit AUS-142, p. 16.

²⁹³ J. Doxey and D. Hammond, "Deadly in pink: The impact of cigarette packaging among young women", *Tobacco Control*, Vol. 20, No. 5 (2011), Exhibit AUS-156; D. Hammond, J. Doxey, S. Daniel and M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine and Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157.

²⁹⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 22-25.

²⁹⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 72-74.

products would directly result in lower initiation among youth,²⁹⁶ a reduction in the acceptance of tobacco products, and purchase among youth,²⁹⁷ young females,²⁹⁸ and a general population sample.²⁹⁹ Upon reviewing the evidence supporting the conclusion that tobacco plain packaging reduces appeal, Professor Fong concludes:

There is... solid empirical evidence suggesting that the tobacco plain packaging measure will have an impact on reducing appeal across a variety of domains. This includes lowering perceptions of attractiveness of the pack, reducing positive perceptions of product taste and quality, increasing perceptions of harmfulness of the product... and reducing false beliefs about the ease of quitting

²⁹⁶ P. Beede and R. Lawson, "Brand Image Attraction: the Promotional Impact of Cigarette Packaging", *New Zealand Family Physician*, Vol. 18, (1991) 175, Exhibit AUS-153; M.E. Goldberg, J. Liefeld, G. Kindra, J. Madill-Marshall, J. Lefebvre, N. Martohardjono and H. Vredenburg, "When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products", *Health Canada* (March 1995), Exhibit AUS-183; J. d'Avernas, D. Northrup, M. Foster, et al., *Cigarette packaging and event marketing increases the attractiveness of smoking: A study of youth*, Working Papers Series No. 28 (1997), Exhibit AUS-144; Centre for Health Promotion, University of Toronto, *Effects of plain packaging on the image of tobacco products among youth* (1993), Exhibit AUS-142; Environics Research Group, *Consumer Research on the Size of Health Warning Messages – Quantitative Study of Canadian Youth* (June 2008), Exhibit AUS-179; D. Hammond, M. Dockrell, D. Arnott, A. Lee and A. McNeill, "Cigarette pack design and perceptions of risk among UK adults and youth", *European Journal of Public Health*, Vol. 19, No. 6 (2009), Exhibit AUS-166.

²⁹⁷ K. Gallopel-Morvan, C. Moodie, D. Hammond, F. Eker, E. Beguinot and Y. Martinet, "Consumer perceptions of cigarette pack design in France: a comparison of regular, limited edition and plain packaging", *Tobacco Control*, Vol. 21, No. 5 (2012), Exhibit AUS-152; D. Hammond, J. Doxey, S. Daniel and M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine and Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157; D. Hammond, S. Daniel and C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52 (2013), Exhibit AUS-158; C.M. White, D. Hammond, J.F. Thrasher and G.T. Fong, "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study", *BMC Public Health*, Vol. 12, No. 737 (2012), Exhibit AUS-160; C.M. White and D. Hammond, "The impact of cigarette package design on young women in Brazil: Brand appeal and perceptions of health risk." (20 June 2011), Exhibit AUS-173; K. Kotnowski, *The impact of standardized cigarette packaging among young women in Canada: A discrete choice experiment*, Master of Science in Health Studies and Gerontology thesis, University of Waterloo: Canada, (2013), Exhibit AUS-138; R. Borland and S. Savvas, "The effects of variant descriptors on the potential effectiveness of plain packaging." *Tobacco Control*, Vol. 23, No. 1 (2013), Exhibit AUS-175.

²⁹⁸ D. Hammond, S. Daniel and C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52 (2013), Exhibit AUS-158; C.M. White, D. Hammond, J.F. Thrasher and G.T. Fong, "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study", *BMC Public Health*, Vol. 12, No. 737 (2012), Exhibit AUS-160; C.M. White and D. Hammond, "The impact of cigarette package design on young women in Brazil: Brand appeal and perceptions of health risk." (20 June 2011), Exhibit AUS-173; K. Kotnowski, *The impact of standardized cigarette packaging among young women in Canada: A discrete choice experiment*, Master of Science in Health Studies and Gerontology thesis, University of Waterloo: Canada, (2013), Exhibit AUS-138.

²⁹⁹ R. Borland and S. Savvas, "The effects of variant descriptors on the potential effectiveness of plain packaging." *Tobacco Control*, Vol. 23, No. 1 (2013), Exhibit AUS-175.

smoking. Research evidence also documents that adults and youth believe that plain packaging would lead to lowered initiation of smoking among youth and increased cessation among smokers.³⁰⁰

165. Importantly, there are findings that tobacco plain packaging will reduce curiosity about, and the appeal of, tobacco use amongst youth – and perhaps eliminate the ability of the tobacco pack to support the specific psychological needs of young consumers.³⁰¹ In a range of studies demonstrating behavioural intentions as linked with appeal, tobacco plain packs were selected less often than non-plain packaged packs,³⁰² were perceived as lower in quality and satisfaction,³⁰³ and were associated with lower ratings of enjoyment and satisfaction of tobacco use.³⁰⁴ A study by White *et. al.*,³⁰⁵ used survey data from school-based surveys of adolescents conducted in two Australian states in 2011 and 2013 (pre- and post- the introduction of tobacco plain packaging). The results measured key perceptions such as cigarette brand character ratings; perceived positive and negative image of cigarette packs; and other brand differences:

Seven to 12 months after the introduction of standardised packaging in Australia, the appeal of cigarette packs and brands to adolescents who had seen packs in the previous six months, had decreased significantly...The study suggests...the new controls on the cigarette packaging in Australia were starting to reduce the appeal of cigarette packs to adolescents and were beginning to reduce the pack's ability to communicate messages regarding

³⁰⁰ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 30.

³⁰¹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 273.

³⁰² D. Hammond, J. Doxey, S. Daniel and M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine and Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157; J. Hoek, C. Wong, P. Gendall, J. Louviere and K. Cong, "Effects of Dissuasive Packaging on Young Adult Smokers", *Tobacco Control*, Vol. 20 (2011), Exhibit AUS-148; I. Rootman and B.R. Flay, "A study on youth smoking: plain packaging, health warnings, event marketing and price reductions", *University of Toronto, Centre for Health Promotion* (1995), Exhibit AUS-145; J. d'Avernas, D. Northrup, M. Foster, et al., *Cigarette packaging and event marketing increases the attractiveness of smoking: A study of youth*, Working Papers Series No. 28 (1997), Exhibit AUS-144.

³⁰³ M.A. Wakefield, L. Hayes, S. Durkin and R. Borland, "Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-184, p. 1.

³⁰⁴ C.S. Moodie and A.M. Mackintosh, "Young adult women smokers' response to using plain cigarette packaging: a naturalistic approach", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-185, p. 1.

³⁰⁵ White et al, "Has the introduction of plain packaging with larger graphic health warnings changed adolescents' perceptions of cigarette packs and brands?" *Tobacco Control*, Vol. 24 (2015), Exhibit AUS-186, ii42-49.

differences in ease of smoking between brands among adolescents.³⁰⁶

166. Likewise, tobacco plain packaging was found to have a direct effect on increased avoidant behaviours such as hiding or covering tobacco packs as well as cessation behaviours such as forgoing tobacco use around other people, thinking about reducing consumption and, ultimately, quitting.³⁰⁷ Professor Fong summarises this evidence:

Recent studies have shown that plain packaging lowers ratings of appeal, and have indicated a behavioural link to plain packaging such that plain packs are associated with lower ratings of enjoyment and satisfaction, forgoing cigarettes, smoking less around others, increased thoughts of cessation, lower demand, and reduced consumption.³⁰⁸

167. Professor Fong further notes that, while there are fewer studies on the effects of tobacco plain packaging on cigar smokers:

the similarity of the marketing strategies of cigar packaging to those of cigarette packaging by the industry is unmistakable. It is thus reasonable to conclude that plain packaging of cigars would have similar impact as in the domain of cigarettes. Specifically, it is reasonable to suggest, in the absence of strong findings from studies in the domain of cigars to the contrary, that plain packaging of cigars would reduce the appeal of cigars through banning those packaging strategies that are designed to increase appeal.³⁰⁹

168. The overall reduction in appeal of tobacco products will operate to discourage people, particularly youth and adolescents, from taking up smoking, thereby directly contributing to achieving the objective of improving public health under subsection 3(1) of the TPP Act.

³⁰⁶ White et al, "Has the introduction of plain packaging with larger graphic health warnings changed adolescents' perceptions of cigarette packs and brands?" *Tobacco Control*, Vol. 24 (2015), Exhibit AUS-186, p. ii48.

³⁰⁷ C.S. Moodie and A.M. Mackintosh, "Young adult women smokers' response to using plain cigarette packaging: a naturalistic approach", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-185, pp. 6-7.

³⁰⁸ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 33.

³⁰⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 304.

(b) Tobacco plain packaging increases the effectiveness of health warnings

i. Tobacco plain packaging increases the effectiveness of health warnings

169. There is now a significant body of evidence which supports the view that graphic health warnings have been effective in changing the behaviour of smokers.³¹⁰ Certainly there is no challenge by the complainants to Australia's increased graphic health warnings as an ineffective measure. Studies into the effectiveness of graphic health warnings indicate that effectiveness of the warnings can be greatly reduced by distraction caused by pack design.³¹¹ Packaging elements compete with health warning labels, drawing consumer attention away from the mandated health warnings,³¹² and also adversely affect consumer perceptions of risk about the severe health consequences of tobacco use.³¹³

170. The complainants claim that Australians are "fully informed" of the health risks of smoking³¹⁴ and rely upon the expert report of Professor Viscusi to assert that tobacco plain packaging is unlikely to have the desired impacts because awareness,

³¹⁰ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, Section 5.

³¹¹ Commonwealth Department of Health and Ageing, *Consultation Paper: Tobacco Plain Packaging Bill 2011 Exposure Draft* (7 April 2011), Exhibit AUS-120, p. 6; D. Hammond and C. Parkinson, "The impact of cigarette package design on perceptions of risk", *Journal of Public Health*, Vol. 31, No. 3 (2009), Exhibit AUS-165. See also, Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p. 2 citing, inter alia, D. Germain, M.A. Wakefield and S.J. Durkin, "Adolescents' Perceptions of Cigarette Brand Image: Does Plain Packaging Make a Difference? ", *Journal of Adolescent Health*, (2009), Exhibit AUS-154; C. Moodie and G. Hastings, "Making the Pack the Hero, Tobacco Industry Response to Marketing Restrictions in the UK: Findings from a Long-Term Audit", *International Journal of Mental Health and Addiction*, Vol. 9 (2011), Exhibit AUS-187; M. Wakefield, C. Marley, J.K. Horan, K.M. Cummings, "The cigarette pack as image: new evidence from tobacco industry documents", *Tobacco Control*, Vol. 11, Supp. I (2002), Exhibit AUS-93; and J. Hoek, C. Wong, P. Gendall, J. Louviere and K. Cong, "Effects of Dissuasive Packaging on Young Adult Smokers", *Tobacco Control*, Vol. 20 (2011), Exhibit AUS-148; C. Rommel, "The final warning", *World Tobacco* (January 2006) 16-18, Exhibit AUS-188.

³¹² C. Moodie and A. Ford, "Young adult smokers' perceptions of cigarette pack innovation, pack colour and plain packaging", *Australasian Marketing Journal*, Vol. 19, No. 3 (2011), Exhibit AUS-189.

³¹³ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, paras. 91-92.

³¹⁴ See, e.g. Cuba's first written submission, para. 227; and Ukraine's first written submission, paras. 47, 501.

knowledge, and risk beliefs are already so high that warnings and packaging cannot provide any new information.³¹⁵ Both of these assertions are incorrect.

171. First, Australia does not agree with the complainants that Australians are 'fully informed' of the health risks of smoking. As Professor Slovic outlines, knowledge of risk is "a multilayered concept"³¹⁶ and studies of Australians³¹⁷ found that even though people are sometimes "aware" that smoking can lead to adverse health consequences, they do not have even a basic understanding of the nature and severity of these consequences.³¹⁸ Moreover, adolescents have very little knowledge and understanding of nicotine addiction.³¹⁹ This is further compounded by what Professor Slovic terms "optimism bias", whereby those who exhibit an awareness of health risks caused by smoking often think that it applies to other people more than themselves.³²⁰ Therefore, informed, rational decision making requires deeper levels of knowledge about the risks of tobacco use than many Australians currently have.³²¹

172. Second, while the Australian Government has improved the Australian population's knowledge of the risks of smoking through the introduction of graphic health warnings,³²² this measure alone is not enough to ensure that Australians are "fully informed" of the risks of tobacco use. Branding and package design of tobacco products can exert powerful influences on behaviour which may not be consciously

³¹⁵ Expert Report of W.K. Viscusi, UKR-8.

³¹⁶ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 96.

³¹⁷ D. Hammond, G.T. Fong, A. McNeil, R. Borland and K.M. Cummings, "Effectiveness of cigarette warning labels in informing smokers about the risks of smoking - Findings from the ITC Four Country Survey", *Tobacco Control*, Vol. 15 (2006), Exhibit AUS-190; similar results have been found in New Zealand, see R.J. Gray, J. Hoek and R. Edwards, "A qualitative analysis of 'informed choice' among young adult smokers", *Tobacco Control*, (2014), Exhibit AUS-191.

³¹⁸ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 96.

³¹⁹ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 92.

³²⁰ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 98.

³²¹ D. Hammond, G.T. Fong, A. McNeil, R. Borland and K.M. Cummings, "Effectiveness of cigarette warning labels in informing smokers about the risks of smoking - Findings from the ITC Four Country Survey", *Tobacco Control*, Vol. 15 (2006), Exhibit AUS-190.

³²² R. Kennedy, M. Spafford, I Behm, D. Hammond, G Fong and R. Borland, "Positive impact of Australian 'blindness' tobacco warning labels: Findings from the ITC four country survey", *Clinical and Experimental Optometry* 95 (2012), Exhibit AUS-192, pp. 590-598.

recognised,³²³ but which can influence understandings and perceptions of risks of smoking. Professor Slovic, a psychologist specialising in human behaviour in situations of risk, observes that:

Tobacco advertising and promotion, of which the pack is a part, have been designed to play a key role in this process [initiation] by exposing young people to massive amounts of positive imagery associated with smoking. Research in psychology and cognitive neuroscience as well as marketing studies done for and by the tobacco industry demonstrate how powerful such imagery can be in suppressing perception of risk and manipulating behaviour. Imagery and affective feelings are never mentioned by Professor Viscusi as motivators of smoking.³²⁴

173. The misperception of risk is compounded in relation to non-cigarette tobacco products. There is a misperception that cigars are a "safe alternative"³²⁵ because they are considered more natural and less harmful than cigarettes,³²⁶ despite cigars delivering nicotine in concentrations comparable to cigarettes and smokeless tobacco.³²⁷ Miller *et. al.* note that:

Cigars and cigarillos were consistently viewed as less harmful and distinct from cigarettes, all of which is consistent with the way cigars have been positioned.³²⁸

174. The tobacco plain packaging measure was designed to standardize pack elements which suppress risk perception and to ensure that the warnings on packs were both noticeable and presented in such a way as to have an influence on

³²³ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 102.

³²⁴ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 90.

³²⁵ A. Brooks, E.M. Gaier Larkin, S. Kishore, S. Frank, "Cigars, cigarettes, and adolescents", *American Journal of Health Behaviour*, Vol. 32, No.6 (2008), 640, Exhibit AUS-193, p. 647.

³²⁶ US Department of Health and Human Services, Youth use of Cigars: Patterns of Use and Perceptions of Risk, Office of Inspector General June Gibbs Brown, (February 1999), Exhibit AUS-194, pp. 19-22; R.E. Malone, V. Yergev and C. Pearson, "Cigar risk perception in focus groups of Urban African American Youth", *Journal of Substance Abuse*, Vol. 13, No. 4 (2001), Exhibit AUS-195.

³²⁷ National Cancer Institute (United States), *Cigars: Health Effects and Trends, Tobacco Control Monograph No. 9* (1998), Exhibit AUS-33, p. 11.

³²⁸ Miller et al, "'You're made to feel like a dirty filthy smoker when you're not, cigar smoking is another thing all together': Responses of Australian cigar and cigarillo smokers to plain packaging", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-102, p. 7; See also R.J. O'Connor, A. McNeill, R. Borland, D. Hammond, B. King, C. Boudreau, K.M. Cummings, "Smokers' beliefs about the relative safety of other tobacco products: Findings from the ITC Collaboration", *Nicotine and Tobacco Research*, Vol. 9, No. 10 (2007) 1033, Exhibit AUS-196.

consumer perceptions and smoking behaviour – adolescent experimentation with smoking usually happens without conscious consideration of the risks. Indeed, one tobacco industry memorandum acknowledged that "the cigarette 'decision process' is non-existent or at best superficial."³²⁹ Even for addicted smokers, branding and packaging designs can draw attention away from, or positively undermine, health warnings on packs.

175. Optimal combinations of the size of graphic health warnings with tobacco plain packaging were adopted by the Australian Government following testing and recommendations from commissioned research.³³⁰ As a result, the tobacco plain packaging measure increases the effectiveness of health warnings in a number of ways that are further outlined below: by increasing the visual attention paid to health warnings, making them more prominent and salient; by removing the distraction caused by branding to better communicate the health effects of tobacco use; by increasing perceptions about the believability and seriousness of health warnings; and by increasing consumer recall of health warnings to foster a deeper understanding of the health effects of tobacco use.

ii. Tobacco plain packaging increases the visual attention paid to health warnings, making them more prominent and salient

176. The overall weight of the evidence, as reviewed by Professor Fong, strongly indicates that tobacco plain packaging leads to a greater noticeability of health warnings,³³¹ particularly when operating together with the increased size of the graphic health warnings.³³² This is largely because the visual interference and

³²⁹ R.J. Reynolds, "Camel Advertising Development 'White Paper'" (1986), Bates No. 506768775, Exhibit AUS-197, p. 6.

³³⁰ GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, Study 5 and 6, pp. 132-188.

³³¹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 351.

³³² GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, p. 152.

competition of brand images are greatly reduced, making the health warnings more prominent and salient.³³³ Professor Fong states that:

A basic principle ... in the psychology of attention is that a perceiver is more likely to attend to any given object if the background has no, or few, objects that would compete for attention. Thus, it is reasonable to assume that removing positive imagery of the branding of the pack would increase the ability and motivation to think carefully about the warning label.³³⁴

177. Where positive imagery and the appeal of tobacco products are greatly reduced, studies have shown that there is an increased ability to notice the health warning on plain packaged tobacco products.³³⁵ Compared with non-plain packaged tobacco packs, plain packages have been found to increase visual attention (measured by eye tracking methods) to health warnings for non-smokers, adolescent experimenters and weekly smokers.³³⁶ A study from 2010 found particularly strong effects for youth, indicating that the salience of warnings is considerably higher for plain packaged tobacco products than for non-plain packaged packs, and noted:

[T]he findings highlight the value of plain packs for improving the prominence of health warnings, and thus efficiency, as warnings that are not salient cannot be effective...For branded cigarette packs the logos, trademarks, colours and other executional cues may consume cognitive resources by attractive attention and thus reducing the resources required for processing health warnings.³³⁷

³³³ R. Borland, S. Savvas, F. Sharkie and K. Moore, "The impact of structural packaging design on young adult smokers' perceptions of tobacco products", *Tobacco Control*, Vol. 22, No. 2, (2011) 97, Exhibit AUS-136, p. 5.

³³⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 315.

³³⁵ J. d'Avernas, D. Northrup, M. Foster, et al., *Cigarette packaging and event marketing increases the attractiveness of smoking: A study of youth*, Working Papers Series No. 28 (1997), Exhibit AUS-144; Centre for Behavioural Research in Cancer, *Health warnings and contents labelling on tobacco products* (1992), Exhibit AUS-198; G. Von Hal, S. Van Roosbroeck, B. Vriesacker, M. Arts, S. Hoeck and J. Fraeyman, "Flemish adolescents' perceptions of cigarette plain packaging: a qualitative study with focus group discussions", *BMJ Open*, (2012), Exhibit AUS-161.

³³⁶ M.R. Munafo, N. Roberts, L. Bauld and U. Leonards, "Plain packaging increases visual attention to health warnings on cigarette packs in non-smokers and weekly smokers but not daily smoker", *Addiction*, Vol. 106, No. 8 (2011), Exhibit AUS-199, pp. 1505-1510; O.M. Maynard, M.R. Munafo and U. Leonards, "Visual attention to health warnings on plain tobacco packaging in adolescent smokers and non-smokers", *Addiction*, Vol. 108, No. 2, (2012), Exhibit AUS-200, pp. 413-419.

³³⁷ K. Gallopel-Morvan, C. Moodie and J.M. Rey, "Demarketing cigarettes through plain cigarette packaging and perceptions of different plain pack colours", *Actes du Congrès International de l'AFM* (2010), Exhibit AUS-176, p. 10.

178. Furthermore, tobacco plain packaging removes the confounding effects of packaging that encourage the suppression of risk,³³⁸ making it clear that smoking is dangerous. By reducing the positive imagery of tobacco product branding and innovative packaging, there is strong evidence to suggest that both users and non-users of tobacco products will be much more likely to think about the information conveyed by health warnings, thereby deepening consumer understanding about the severe consequences of tobacco addiction and use.³³⁹

179. For example, a 2008 study³⁴⁰ indicated that both young consumers and adults rated plain packages as more effective than non-plain packaged packs in informing smokers about the health risks of tobacco use. These findings were confirmed in 2013,³⁴¹ by a study which found that plain packaging resulted in differences of attention and depth of processing of health warnings as compared to non-plain packaged packs. Most recently, a 2014 study³⁴² found that plain tobacco packages, together with graphic health warnings, were less likely to be perceived as having a lower health risk, a smoother taste, and lower tar. Professor Fong concludes:

By reducing the positive imagery that branded packages of cigarettes create, there is good evidence that smokers and non-smokers will be more focused on the negative imagery of the health warnings, and be more likely to think about the risk information that they convey.³⁴³

³³⁸ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 99.

³³⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 348; Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, paras. 84-85.

³⁴⁰ Environics Research Group, *Consumer Research on the Size of Health Warning Messages – Quantitative Study of Canadian Youth* (June 2008), Exhibit AUS-179.

³⁴¹ C.S. Moodie and A.M. Mackintosh, "Young adult women smokers' response to using plain cigarette packaging: a naturalistic approach", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-185.

³⁴² D. Mays, R. Niaura, W. Evans, D. Hammond, G. Luta et al. "Cigarette packaging and health warnings: the impact of plain packaging and message framing on young smokers", *Tobacco Control* Vol. 24 (2015) Exhibit AUS-201.

³⁴³ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 341.

iii. Tobacco plain packaging increases perceptions about the believability and seriousness and enhances recall of health warnings

180. Furthermore, because tobacco plain packaging removes competition and interference between health warnings and positive images conveyed on and by tobacco packaging, tobacco plain packaging is likely to increase the believability and seriousness of the messages contained in the health warnings. While studies vary as to the extent of this effect, a significant percentage of youth believed that tobacco plain packaging enhanced the believability and seriousness of health warnings.³⁴⁴ Likewise, the tobacco plain packaging measure has also been found to increase consumer recall of health warnings on plain packs, compared with recall of health warnings on non-plain packaged packs.³⁴⁵

181. Australia submits that *any* increase in recall, believability and/or seriousness of health warnings will contribute to negating the positive associations conveyed by pack design, including brand imagery.

iv. Increase in effectiveness of health warnings affects consumer intentions and behaviour

182. The evidence presented above demonstrates that increased effectiveness of health warnings influences potential consumers to resist the uptake of tobacco products and influences current consumers to quit smoking. The personal health risks of tobacco use are an important motivator for consumers to cease using tobacco products,³⁴⁶ and the combination of plain packs with health warnings decreases

³⁴⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 336.

³⁴⁵ P. Beede and R. Lawson, "The effect of plain packages on the perception of cigarette health warnings", *Public Health*, Vol. 106, (1992), Exhibit AUS-202; M. Al-hamdani, "The effect of cigarette plain packaging on individuals' health warning recall", *Healthcare Policy*, Vol. 9, No. 3, (2013), Exhibit AUS-203.

³⁴⁶ T.R. Partos, R. Borland, H. Yong, J. Thrasher and D. Hammond, "Cigarette packet warning labels can prevent relapse: findings from the international tobacco control 4-country policy evaluation cohort study", *Tobacco Control*, Vol. 22, (2013), Exhibit AUS-204, pp. 48-49; K.D. McCaul, J.R. Hockeymeyer, R.J. Johnson, K. Zetocha, K. Quinlan, R. E. Glasgow, "Motivation to quit using cigarettes: A review", *Addictive Behaviors*, Vol. 31, (2006), Exhibit AUS-205.

positive perceptions of tobacco use and increases the understanding that tobacco use is a health risk.³⁴⁷

183. In a study following the implementation of the tobacco plain packaging measure in Australia, Wakefield *et. al.* found that more smokers noticed the health warnings, attributed more motivation to quit to the health warnings, and avoided specific health warnings when purchasing cigarettes.³⁴⁸ Similarly, in a study conducted for the Cancer Institute of New South Wales, Dunlop *et. al.* found a significant increase in the proportion of smokers reporting strong cognitive and emotional responses to the warnings, avoidant behaviours towards the warnings, salience of the warnings, and negative perceptions about the packs.³⁴⁹ The results were further confirmed by Yong *et. al.*, who found:

A large and significant increase in the percentage of smokers who reported noticing the warnings before other elements of the package (from 29% to 64%).³⁵⁰

184. Likewise, a study by Miller *et. al.* on non-cigarette tobacco products found that:

there were several indications that plain packaging and new [graphic health warnings] were challenging the views that cigars were less harmful. There were also strong indications that plain packaging and [graphic health warnings] were substantially reducing the perceived distinctions in prestige and desirability between cigars and cigarettes for cigar smokers. This is a key finding highlighting the influence of plain packaging and [graphic health warnings], and suggests a need to ensure tobacco control measures aimed at cigarettes include cigars.³⁵¹

³⁴⁷ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 121.

³⁴⁸ Wakefield *et al.*, "Australian adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-206.

³⁴⁹ S. Dunlop, T. Dobbins, J. Young, D. Perez and D. Currow, "Impact of Australia's introduction of tobacco plain packs on adult smokers' pack-related perceptions and responses: results from a continuous tracking survey", *BMJ Open*, Vol. 4, (2014), Exhibit AUS-207.

³⁵⁰ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 432.

³⁵¹ Miller *et al.*, "'You're made to feel like a dirty filthy smoker when you're not, cigar smoking is another thing all together.' Responses of Australian cigar and cigarillo smokers", *Tobacco Control* Vol. 24 (2015) Exhibit AUS-102, p. ii64.

185. Reducing design elements on tobacco packaging to detract from health warnings (and the serious and severe consequences of tobacco use³⁵²), has therefore already started to have its desired effect of changing attitudes, which is likely to encourage quitting behaviour.³⁵³ Tobacco plain packaging has also been found to contribute to the prevention of smoking relapse by consumers.³⁵⁴ This effect is clearly seen in early evidence: there was a 78% increase in the number of calls to Quitline associated with the introduction of the tobacco plain packaging measure;³⁵⁵ and an increased rate of quitting-related cognitions and actual quit attempts after the implementation of tobacco plain packaging among a national cohort sample of Australian smokers.³⁵⁶

³⁵² R. Borland and D. Hill, "Initial impact of the new Australian tobacco health warnings on knowledge and beliefs", *Tobacco Control*, Vol. 6 (1997), Exhibit AUS-208; D. Hammond, G.T. Fong, A. McNeil, R. Borland and K.M. Cummings, "Effectiveness of cigarette warning labels in informing smokers about the risks of smoking - Findings from the ITC Four Country Survey", *Tobacco Control*, Vol. 15 (2006), Exhibit AUS-190.

³⁵³ M.E. Goldberg, J. Liefeld, J. Madill and H. Vrendenburg, "The effect of plain packaging on response to health warnings" *American Journal of Public Health*, Vol. 89, No. 9 (1999), Exhibit AUS-209, pp. 1434-35; J. Hoek, C. Wong, P. Gendall, J. Louviere and K. Cong, "Effects of Dissuasive Packaging on Young Adult Smokers", *Tobacco Control*, Vol. 20 (2011), Exhibit AUS-148; Quit Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (August, 2011), Exhibit AUS-86; M.A. Wakefield, L. Hayes, S. Durkin and R. Borland, "Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-184; R. Borland, N. Wilson and G.T. Fong, D. Hammond, K.M. Cummings, H.H. Yong, W. Hosking, G. Hastings and J. Thrasher, "Impact of graphic and text warnings on cigarette packs-findings from Four Countries over five years", *Tobacco Control*, Vol.18, No. 5 (2009), Exhibit AUS-210; R. Borland, H. Yong, N. Wilson, G.T. Fong, D. Hammond, K.M. Cummings, W. Hosking and A. McNeill, "How reactions to cigarette packet health warnings influence quitting-findings from the ITC Four-Country Survey", *Addiction*, Vol. 104, (2009), 669, Exhibit AUS-211; D. Hammond, G.T. Fong, R. Borland, K.M. Cummings, A. McNeil and P. Driezen, "Text and graphic warnings on cigarette packages - Findings from the International Tobacco Control Four Country Study", *American Journal of Preventive Medicine*, Vol. 32, No. 3 (2007), Exhibit AUS-212; R. Borland, "Tobacco health warnings and smoking-related cognitions and behaviours", *Addiction*, Vol. 92, No. 11 (1997), Exhibit AUS-213; Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 345-339.

³⁵⁴ T.R. Partos, R. Borland, H. Yong, J. Thrasher and D. Hammond, "Cigarette packet warning labels can prevent relapse: findings from the international tobacco control 4-country policy evaluation cohort study", *Tobacco Control*, Vol. 22, (2013), Exhibit AUS-204.

³⁵⁵ J.M. Young, I. Stacey, T.A. Dobbins, S. Dunlop, A.L. Dessaix, D.C. Currow, "Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis", *Medical Journal of Australia*, Vol. 200, No. 1 (2014), 29, Exhibit AUS-214.

³⁵⁶ Durkin et al, "Short-term changes in quitting-related cognitions and behaviours after the implementation of plain packaging with larger health warnings: Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), Exhibit AUS-215.

186. In achieving the objective of subsection 3(2)(b) of the TPP Act, and increasing the effectiveness of health warnings, the tobacco plain packaging measure therefore directly contributes to the objective of improving public health under section 3(1) of the TPP Act.

(c) Tobacco plain packaging reduces the ability of the pack to mislead

187. The third objective set out in subsection 3(2) of the TPP Act is reducing the ability of the pack to mislead consumers. Consumers can be misled as to both the health consequences of tobacco use itself, and the relative harmfulness of different tobacco products and brands, including the level of harmfulness and addictiveness.³⁵⁷ When coupled with packaging innovations to detract from health warnings, the packaging of a tobacco product contributes to misleading consumers about the serious health consequences of using such products.

188. Such misperceptions have been compounded by the tobacco industry's deliberate attempts to market some types of brands of tobacco products as "safer" than others, by creating "light" or "low tar" cigarettes, which were previously marketed as having less distinct flavour and lower delivery of harmful chemicals compared with regular cigarettes. There is a large body of evidence that the tobacco plain packaging measure, by limiting the ability to use packaging design, colour and structural innovations through standardization of the packaging, reduces the ability of the retail packaging of tobacco products to mislead consumers (particularly young consumers) about the harmfulness of tobacco products.³⁵⁸

³⁵⁷ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 15.

³⁵⁸ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 408-409; National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use, Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77; United States Department of Health and Human Services: Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion and the Office on Smoking and Health, *Preventing tobacco use among youth and young adult: A report of the Surgeon General* (2012), Exhibit AUS-76; C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. hinds, I. Kwan, J. Thomas, G. Hastings, A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140; C. Moodie, K. Angus, M. Stead and L. Bauld, "Plain tobacco packaging research: an update" *Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling* (2013), Exhibit AUS-216.

i. Elimination of colour contributes to reducing the ability of the pack to mislead consumers

189. The use of colours and shading as a means to mislead consumers has been effective. A study of over 8,000 tobacco users from the United States, the United Kingdom, Canada and Australia found that smokers of gold, silver, blue or purple brands were more likely to believe their own brand might be "a little less harmful" compared to smokers of red or black brands.³⁵⁹ Likewise, studies have found that the use of blue, gold, and white is often used to convey mildness,³⁶⁰ while darker and richer colours were seen as conveying strong flavour.³⁶¹ As Professor Slovic points out by reference to tobacco industry documents, "[t]he lightness and purity that white packaging intended to symbolize was designed to reinforce the healthy image of products that were no safer to smoke than regular cigarettes."³⁶² In using colours to convey certain meanings, the design of tobacco product packages continues to reinforce misperceptions about the notion that some tobacco brands or types are less harmful than others.³⁶³

190. Consumers have an "associative" memory,³⁶⁴ linking brand descriptors or variants with certain images and colours (for example, there is a widely held association between the colour green and menthol flavoured cigarettes). While an undertaking entered into between the Australian Competition and Consumer Commission and the tobacco industry in Australia in 2006 resulted in the withdrawal

³⁵⁹ S. Mutti, D. Hammond, R. Borland, M. Cummings, R. O'Connor and G.T. Fong, "Beyond light and mild: cigarette brand descriptors and perceptions of risk in the International Tobacco Control (ITC) Four Country Survey", *Addiction*, Vol. 106, (2011), Exhibit AUS-217, p. 1168.

³⁶⁰ J.R. DiFranza, D.M. Clark and R.W. Pollay, "Cigarette package design: opportunities for disease prevention", *Tobacco Induced Diseases*, Vol. 1, No. 2, (2002), 92, Exhibit AUS-92; M.A. Wakefield, C. Morley, J.K. Horan and H.K. Cummings, "The cigarette pack as image: new evidence from tobacco industry documents", *Tobacco Control*, Vol. 11, No. Suppl, (2002), Exhibit AUS-93; National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use*, *Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77, p. 108.

³⁶¹ GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, p. 10.

³⁶² Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para.77.

³⁶³ National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use*, *Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77, p. 108.

³⁶⁴ Expert report of N. Tavassoli (10 March 2015), Exhibit AUS-10, paras. 66-68.

of descriptors such as "mild", "extra mild" and "light",³⁶⁵ the tobacco industry continued to use a variety of colours to help convey certain associations such as taste, harshness and product strength.³⁶⁶ For example, in Australia, differing tar strengths have been distinguished within brand families by colour, rather than their official brand variant name. *Winfield* opted to re-brand from *Winfield Filter* to *Winfield Red*, from *Winfield Extra Mild* to *Winfield Blue*, from *Winfield Super Mild* to *Winfield Gold*, and from *Winfield Special Mild* to *Winfield Sky Blue* (and also from *Winfield Ultra Mild* to *Winfield Grey*). Similarly, *Peter Jackson Extra Mild* changed to *Peter Jackson Blue* and *Peter Jackson Super Mild* to *Peter Jackson Gold*. Professor Tavassoli notes that similar tactics were used in other jurisdictions, where *Pall Mall Filter* and *Pall Mall Lights* became *Pall Mall Red* and *Pall Mall Blue*.³⁶⁷ In the examples below, the respective colours of the packs (red and blue) remained constant, thereby perpetuating the association of the coloured pack with a light or mild cigarette, even though those descriptors could no longer be used. Thus, as Professor Tavassoli points out, the ban on misleading descriptors "may have been only partially effective, based on the learned associative meaning of colour."³⁶⁸



Figure 11: *Winfield* circa 2004 compared with circa 2010

³⁶⁵ Expert report of R. Sims (24 February 2015), Exhibit AUS-22, paras. 4.4-4.15.

³⁶⁶ Expert report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 67.

³⁶⁷ Expert report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 67.

³⁶⁸ Expert report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 67.



Figure 12: Peter Jackson circa 2002 compared with 2004 – "Ultramild" to "Fine Flavour" and "Ultimate" to "Finesse"

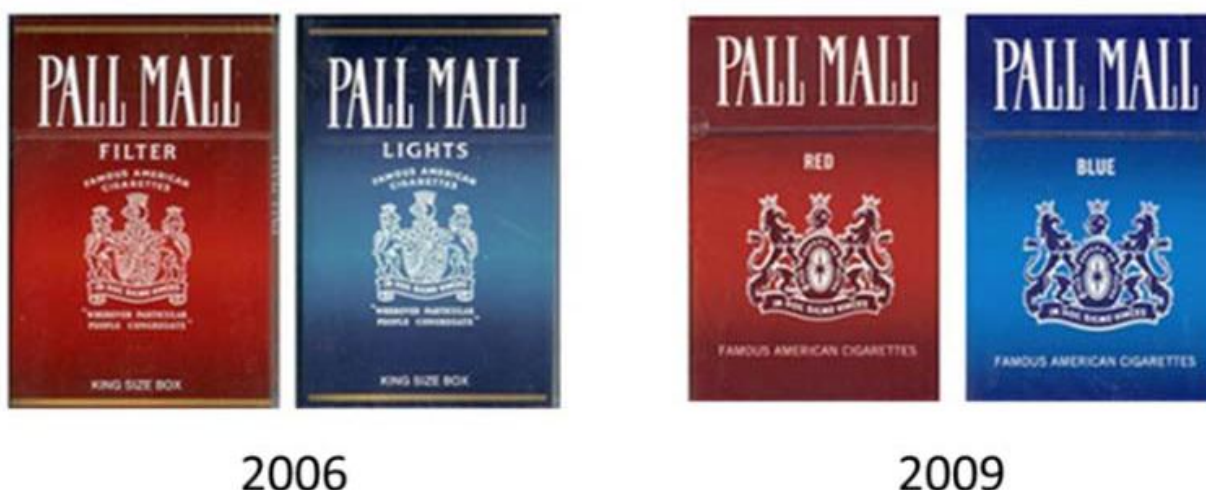


Figure 13: Pall Mall Filter and Lights, circa 2006, compared with Pall Mall Red and Blue, circa 2009

191. In this way, the package design and colouring used for "light" or "low-tar" products has been an important component of the overall strategy to mislead consumers into believing certain brands or product types are less harmful.³⁶⁹

³⁶⁹ L.I. Labrecque, V.M. Patrick and G.R. Milne, "The Marketers' Prismatic Palette: A review of color research and future directions", *Psychology and Marketing*, Vol. 30, No. 2, (2013), Exhibit

(continued)

Strategies such as brand variant names or descriptors, combined with colour and shading on packaging assist to establish a "gradient of 'lightness'" across brands, types and varieties of tobacco products.³⁷⁰ A review of the evidence by the NCI Monograph highlights tobacco industry documents which clearly describe use of colours and shading to create perceptions of reduced strength by the tobacco industry.³⁷¹

192. In developing the tobacco plain packaging measure, the Australian Government commissioned studies specifically to review the impact that pack colour and design may have in misleading consumers. The research confirmed earlier findings, concluding that darker colours were seen to contain cigarettes which were more "harmful to health" and "harder to quit". Conversely, lighter colours were seen to be less "harmful to health", and "easier to quit".³⁷² Drab dark brown (the colour ultimately chosen for the implementation of the tobacco plain packaging measure) was rated as containing tobacco products that are harder to quit, and were most harmful to health.³⁷³

ii. Plain packaging removes the design and structural features of tobacco product packaging which mislead consumers

193. Tobacco plain packaging also reduces false beliefs about the harmfulness of product types or brands or variants by standardising the package structure.³⁷⁴ Package designs, and structural features of packaging, are powerful tools through which the

AUS-218, pp. 187-202; National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use, Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77.

³⁷⁰ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 384; National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use, Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77; D. Hammond, M. Dockrell, D. Arnott, A. Lee and A. McNeill, "Cigarette pack design and perceptions of risk among UK adults and youth", *European Journal of Public Health*, Vol. 19, No. 6 (2009), Exhibit AUS-166; D. Hammond and C. Parkinson, "The impact of cigarette package design on perceptions of risk", *Journal of Public Health*, Vol. 31, No. 3 (2009), Exhibit AUS-165.

³⁷¹ National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use, Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77, p. 108.

³⁷² GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, pp. 10 and 97-100.

³⁷³ GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, p. 12.

³⁷⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 411.

tobacco industry has reinforced the marketing, promotion and advertising of less harmful tobacco products.³⁷⁵

194. Unique and creative package designs, in addition to special shapes, opening styles, and filters, have been used to differentiate brands and product types based on their harmfulness in the minds of consumers.³⁷⁶ For example, research studies have demonstrated that package structural design can mislead consumers about product strength – whereby narrow "perfume" type packs are portrayed as a fashion accessory rather than a health risk;³⁷⁷ small packs with "super slims" are portrayed to offer lower levels of addiction; and more masculine packs are suggestive of being heavier or stronger.³⁷⁸ Other product characteristics, such as the colour of the tipping paper, also convey the sense in the minds of consumers that particular products are less harmful.³⁷⁹ The importance of standardising pack designs and structure was noted by Borland *et. al.*:

The only viable solution is to prohibit engineering features that contribute to increased product attractiveness particularly of rated strength, especially when they do not actually reduce actual exposures and thus, do not affect product harmfulness.³⁸⁰

195. The misleading effect of packaging is also evident across tobacco product types, and a study in Australia on the effect of tobacco plain packaging on cigar products linked the standardisation of package structure and colour design to the perception that those products in plain packaging were more harmful.³⁸¹

³⁷⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 397.

³⁷⁶ National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use, Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77, p. 108.

³⁷⁷ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140, p. 84.

³⁷⁸ GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, p. 48.

³⁷⁹ R. Borland and S. Savvas, "The effects of variant descriptors on the potential effectiveness of plain packaging." *Tobacco Control*, Vol. 23, No. 1 (2013), Exhibit AUS-175.

³⁸⁰ R. Borland and S. Savvas, "The effects of variant descriptors on the potential effectiveness of plain packaging." *Tobacco Control*, Vol. 23, No. 1 (2013), Exhibit AUS-175, p. 62.

³⁸¹ GfK Bluemoon, *Market research to determine impact of plain packaging on other tobacco products* (December 2011), Exhibit AUS-219, p. 5.

iii. Overall, the reduction of the ability of the pack to mislead affects consumer intentions and behaviour

196. The effect of the tobacco plain packaging measure in reducing brand and product category appeal and regulating pack design and structure, contributes to reducing false beliefs held by consumers about the 'relative harmfulness' of tobacco product types and brands and variants.³⁸² By requiring that drab dark brown be utilised for all tobacco product packaging (and thus removing the effect of colour and design elements on perceptions of harm for smoking and non-smoking adults,³⁸³ youth,³⁸⁴ and young women³⁸⁵), and by standardizing package designs, the tobacco plain packaging measure reduces the ability of the tobacco package to mislead consumers and potential consumers – particularly youth. As Professor Fong notes:

The plain packaging measure serves as an important tobacco control measure because it restricts unique packaging design and structure. By removing branding elements such as imagery and unique package designs, there is strong evidence to suggest that the plain packaging measure will have the effect of reducing the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.³⁸⁶

197. Tobacco plain packaging reduces the opportunities to mislead consumers about the health risks of individual products. This is of particular relevance in the case of non-cigarette tobacco products, which are still consistently viewed as less harmful and distinct from cigarettes³⁸⁷ - reflecting the influence of long-term tobacco industry

³⁸² Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 409.

³⁸³ K. Gallopel-Morvan, C. Moodie, D. Hammond, F. Eker, E. Beguinot and Y. Martinet, "Consumer perceptions of cigarette pack design in France: a comparison of regular, limited edition and plain packaging", *Tobacco Control*, Vol. 21, No. 5 (2012), Exhibit AUS-152, pp. 502-506.

³⁸⁴ C. Moodie, A. Ford, A.M. Mackintosh, G. Hastings, "Young people's perceptions of cigarette packaging and plain packaging: an online survey", *Nicotine Tobacco Research*, Vol. 14, No. 1 (2012), Exhibit AUS-174.

³⁸⁵ C.M. White, *The impact of cigarette package design on young women in Brazil: Brand appeal and perceptions of health risk*, Master of Science Thesis, University of Waterloo: Canada (2011), Exhibit AUS-173.

³⁸⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 413.

³⁸⁷ Miller et al, "'You're made to feel like a dirty filthy smoker when you're out, cigar smoking is another thing all together': Responses of Australian cigar and cigarillo smokers to plain packaging," *Tobacco Control* Vol. 24 (2015), Exhibit AUS-102.

marketing of non-cigarette products as being pure and not addictive.³⁸⁸ Specifically, Professor Fong considers that it was reasonable to expect that plain packaging would decrease the ability of non-cigarette tobacco packaging to mislead consumers about the health effects of cigars.³⁸⁹

198. Reducing of the ability of tobacco products to mislead consumers about the relative harmfulness of brands, or product types, means that tobacco plain packaging will contribute to discouraging initiation and encouraging cessation of tobacco use. Where consumers are fully informed of the real risks and serious consequences of tobacco use, they are more likely to engage in quitting behaviour.³⁹⁰ A study by Wakefield *et. al.* which focused on the post-implementation period of the tobacco plain packaging measure found that:³⁹¹

³⁸⁸ A.D. DeSantis and S.E.Morgan, "Sometimes a cigar [magazine] is more than just a cigar [magazine]: pro-smoking arguments in Cigar Aficionado 1992-2000", *Health Communication*, Vol. 15, No. 4, (2003), 457, Exhibit AUS-220, pp. 464-467.

³⁸⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 66.

³⁹⁰ M.E. Goldberg, J. Liefeld, J. Madill and H. Vredenburg, "The effect of plain packaging on response to health warnings" *American Journal of Public Health*, Vol. 89, No. 9 (1999), Exhibit AUS-209, pp. 1434-1435; M.E. Goldberg, J. Liefeld, G. Kindra, J. Madill-Marshall, J. Lefebvre, N. Martohardjono and H. Vredenburg, "When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products", (March 1995), Expert Panel Report, Exhibit-221; J. Hoek, C. Wong, P. Gendall, J. Louviere and K. Cong, "Effects of Dissuasive Packaging on Young Adult Smokers", *Tobacco Control*, Vol. 20 (2011), Exhibit AUS-148; Quit Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (August, 2011), Exhibit AUS-86; M.A. Wakefield, L. Hayes, S. Durkin and R. Borland, "Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-184; R. Borland, N. Wilson and G.T. Fong, D. Hammond, K.M. Cummings, H.H. Yong, W. Hosking, G. Hastings and J. Thrasher, "Impact of graphic and text warnings on cigarette packs- findings from Four Countries over five years", *Tobacco Control*, Vol.18, No. 5 (2009), Exhibit AUS-210; R. Borland, H. Yong, N. Wilson, G.T. Fong, D. Hammond, K.M. Cummings, W. Hosking and A. McNeill, "How reactions to cigarette packet health warnings influence quitting-findings from the ITC Four-Country Survey", *Addiction*, Vol. 104, (2009), 669, Exhibit AUS-211; D. Hammond, G.T. Fong, R. Borland, K.M. Cummings, A. McNeil and P. Driezen, "Text and graphic warnings on cigarette packages - Findings from the International Tobacco Control Four Country Study", *American Journal of Preventive Medicine*, Vol. 32, No. 3 (2007), Exhibit AUS-212; R. Borland, "Tobacco health warnings and smoking-related cognitions and behaviours", *Addiction*, Vol. 92, No. 11 (1997), Exhibit AUS-213.

³⁹¹ Wakefield et al, "Australian adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-206.

there was *increased appreciation* after plain packaging that brands do not differ in harm...³⁹² (emphasis added).

199. Such "increased appreciation", and the change in beliefs and perceptions, is likely to be followed by behavioural impacts. Professor Fong states that:

[B]y removing colour, design and structural elements of the packaging that implies lightness, or other characteristics that have been demonstrated to create misperceptions that such products are less harmful, the following behavioural impact is likely: (a) current smokers of regular (non-light) brands who are health-concerned may be more likely to understand and believe that light cigarettes are not less harmful and therefore may be more likely to quit smoking rather than switching from regular to light cigarettes; (b) current smokers already smoking light cigarettes may be more likely to understand and believe that their own brand is not less harmful and therefore may be encouraged to quit; and (c) non-smokers may be less likely to start to smoke and experimental smokers may be less likely to progress to increase their frequency and quantity of smoking because they are more likely to understand and believe that certain brands are not less harmful than others, and that there is no health benefit to smoking a light brand compared to a regular brand.³⁹³

200. Therefore, by reducing the ability of the tobacco pack to mislead, the tobacco plain packaging measure works together with other tobacco control policies such as public education efforts and health warnings to continue to inform consumers as to the harmfulness of all tobacco product types as well as to encourage cessation behaviour. This directly contributes to the public health objectives of the tobacco plain packaging measure, as set out under subsection 3(1) of the TPP Act.

4. Overall, the evidence shows the tobacco plain packaging measure is effective

201. In addition to the significant body of studies which establish that the tobacco plain packaging measure can have measurable impacts on intentions, there is also a strong emerging body of direct behavioural evidence in Australia.

³⁹² Wakefield et al, "Australian adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-206, p. ii23.

³⁹³ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 52.

202. Zacher *et. al.* conducted two studies³⁹⁴ which observed smoking behaviour in outdoor restaurant, bar and café settings before and after the implementation of the tobacco plain packaging measure in Australia. In both studies, the authors found a "significant decline" in the extent to which a pack was placed face up, as well as a significant increase in the degree to which packs were concealed by phones, wallets or other items. In addition, not only was there a significant decline in pack display across the three year study period, but there was also a significant decline in the number of patrons smoking. As Dr Biglan concludes:

When taken together with studies where participants rated their liking for packs, their perceptions of the cigarettes, their perceptions of smokers of the pack, or the likelihood that packaging would reduce youth interest in smoking, these studies indicate that the beneficial impact of plain packaging and graphic health warnings are detectable...Indeed the results of these studies are consistent with the impact of plain packs on attitudes toward smokers of plain packs and this consistency demonstrates that the observed impact of plain packs on attitudes and perceptions do, in fact, predict actual behavior toward cigarettes contained in plain packs.³⁹⁵

203. These results are further confirmed by work done by the Cancer Council Victoria, which shows that the specific objectives of plain packaging *are being achieved*. Using multivariate logistic regression analyses, Wakefield *et. al.* compared responses from continuous tracking surveys of cigarette smokers during the pre-plain packaging period, and during the first year of implementation of the Australian tobacco plain packaging measures, and found:³⁹⁶

Compared to a six-month baseline period, the study found the new packs to be associated with *rapid and substantial changes in the*

³⁹⁴ M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo and M. Wakefield, "Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips" *Addiction*, Vol. 109, (2014), Exhibit AUS-222; and M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo and M. Wakefield, "Personal pack display and active smoking at outdoor café strips: Assessing the impact of plain packaging 1 year post implementation." *Tobacco Control* Vol. 24 (2015) Exhibit AUS-223.

³⁹⁵ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 111.

³⁹⁶ Wakefield et al, "Australian adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-206.

direction of reduced appeal which were sustained throughout the first year of full implementation,³⁹⁷ (emphasis added)

Our study also found *consistent improvements in health warning effectiveness outcomes*, including more noticing of warnings, motivation to quit attributed to the warnings, and avoidant behavioural responses.³⁹⁸ (emphasis added).

204. Additional studies show that the achievement in relation to the three mechanisms also provides evidence of behavioural changes in relation to quitting and cessation. Brennan *et. al.*³⁹⁹ showed the degree to which the appeal of the pack, health concerns and more frequently, reactions to health warnings directly predicted thoughts and behaviours of quitting. Durkin *et. al.*⁴⁰⁰ studied the occurrence of quitting related outcomes in relation to the timing of the introduction and full implementation of tobacco plain packaging, and concluded that:

These findings provide some of the strongest evidence to date that implementation of plain packaging with larger graphic health warnings was associated with increased rates of quitting cognitions, micro-indicators of concern and quit attempts among adult cigarette smokers.⁴⁰¹

205. These most recent studies of the tobacco plain packaging measure only operate to further support the existing significant body of evidence. This evidence demonstrates that the tobacco plain packaging measure is having an effect on consumer behaviour.

³⁹⁷ Wakefield et al, "Australian adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-206, p. ii23.

³⁹⁸ Wakefield et al, "Australian adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-206, p. ii23.

³⁹⁹ Brennan et al, "Are quitting-related cognitions and behaviours predicted by proximal responses to plain packaging with larger health warnings? Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), Exhibit AUS-224.

⁴⁰⁰ Durkin et al, "Short-term changes in quitting-related cognitions and behaviours after the implementation of plain packaging with larger health warnings: Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), Exhibit AUS-215.

⁴⁰¹ Durkin et al, "Short-term changes in quitting-related cognitions and behaviours after the implementation of plain packaging with larger health warnings: Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), Exhibit AUS-215, p. ii27.

J. THE COMPLAINANTS' CONTENTIONS ARE WITHOUT FOUNDATION

206. In response to the body of evidence supporting the effectiveness of the tobacco plain packaging measure, as outlined above, the complainants rely on a series of unfounded contentions. Whether explicitly or implicitly, the complainants' arguments are based on the following propositions:

- Packaging does not function as advertising;
- The evidence supporting the tobacco plain packaging measure is unreliable;
- The FCTC Guidelines recommending that Parties adopt tobacco plain packaging have no rational basis and are somehow not relevant to the dispute; and
- The realities of the Australian tobacco market are not relevant.

1. The complainants' assertion that packaging does not function as advertising is fundamentally incorrect

207. The complainants claim that packaging is not advertising. They cling to this counterintuitive argument because if packaging *is* advertising, then the tobacco plain packaging measure is a logical extension of the unchallenged prohibitions and restrictions on tobacco advertising and promotion that Australia had in place prior to the adoption of the measure. If these pre-existing prohibitions and restrictions on tobacco advertising and promotion serve a rational purpose – and they do – then so does the tobacco plain packaging measure.

208. The complainants' argument that packaging is not advertising is unpersuasive. This argument is directly rebutted by numerous statements from the tobacco industry itself about its use of tobacco packaging as advertising, as outlined in detail above. Indeed, not all of the complainants are prepared to take on the burden of proving that packaging does not function as advertising. For example, Cuba "does not dispute that

both advertising and the use of branding on packaging can be classified within the same overarching category of tobacco companies 'marketing activity'." ⁴⁰²

209. Furthermore, it is difficult to reconcile the complainants' argument that tobacco packaging is not used as a marketing tool with the complainants' simultaneous contention that packaging communicates brand image to consumers; persuades them that a product is a premium product; and convinces them to pay more for that product. ⁴⁰³

210. Australia notes that while the complainants assert that packaging is not a form of advertising ⁴⁰⁴ on the basis that it does not fit neatly within the "4Ps" of the marketing mix, this point is directly contradicted by the tobacco industry itself. British American Tobacco, for example, states on its website:

All marketing is based on the fundamental "5 Ps": product, price, packaging, promotion and place... For many years, cigarette packs changed very little. Now though, we are meeting increasing consumer interest in packaging and we have launched a stream of packaging innovations. These include compact packs, side-opening packs, packs that open like wallets, waterproof packs, re-sealable packs to keep the contents fresher and packs with rounded edges. Innovations vary across our brands and markets, enabling us to adapt offerings to local preferences. Our focus is on relevance to the consumer, speed to market and being continuously ready to improve. ⁴⁰⁵

211. Regardless of how the complainants have sought to characterise the role that packaging plays in the marketing mix, there cannot be any serious dispute about the role of packaging as a persuasive marketing tool. This role as a marketing tool is heightened in a dark market like Australia, where the pack is one of the last avenues

⁴⁰² Cuba's first written submission, para. 197.

⁴⁰³ Relying on the Expert Report of J.B. Steenkamp, Exhibit DR-HON-5; and the Expert Report of R.S. Winer, Exhibit UKR-9.

⁴⁰⁴ Honduras' first written submission, para. 341; Dominican Republic's first written submission, para. 660 and following paragraphs.

⁴⁰⁵ British American Tobacco, "How we market our products: A targeted approach", http://www.bat.com/group/sites/UK__9D9KCY.nsf/vwPagesWebLive/DO9EBFUJ?opendocumentandSKN=1 (last accessed 5 March 2015), Exhibit AUS-225.

for tobacco companies to market their products. Any claim to the contrary by the complainants is pure assertion.

2. The complainants' dismissal of the body of evidence supporting the plain packaging measure is unfounded

(a) The complainants' critique of the literature is unfounded

212. The complainants assert that the literature supporting the tobacco plain packaging measure is "flawed",⁴⁰⁶ "limited",⁴⁰⁷ and "speculative".⁴⁰⁸ These assertions are based on the expert reports commissioned by the complainants by Professor Inman; Kleijnen Systematic Reviews; and Professor Klick.

213. This assertion must be rejected. The body of evidence supporting tobacco plain packaging is extensive, comprehensive, and reliable, as is evident from the preceding sections of Australia's submission. In addition, the suggestion that these three reports commissioned by the complainants (i.e. on behalf of the tobacco industry) as part of this dispute are sufficient to contradict the overwhelming weight of evidence in support of tobacco plain packaging (over many years, by numerous independent and reputable researchers from Australia and many other countries) is far-fetched. It also would have enormous implications for the way governments around the world regulate for the health and safety of their citizens and the steps they would have to take before implementing new regulations.

214. Part V.B.2 and Annexure E of this submission elaborates upon the failure of the complainants and their experts to properly consider the evidence supporting the tobacco plain packaging measure. However, and from the outset, Australia submits that the weight of this evidence supports the effectiveness of the tobacco plain packaging measure by demonstrating that the measure contributes to the goal of improving public health through three specific mechanisms (reducing appeal of

⁴⁰⁶ Honduras' first written submission, para. 462.

⁴⁰⁷ Cuba's first written submission, para. 170.

⁴⁰⁸ Ukraine's first written submission, para. 610.

tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead).

(b) The complainants' assertions that there is no link between consumer intentions and behaviour is incorrect

215. Furthermore, and as part of their attack on the literature supporting the tobacco plain packaging measure, the complainants argue that the significant body of evidence showing that tobacco plain packaging has the power to affect beliefs, perceptions and intentions is irrelevant because non-behavioural variables are not a key indicator of consumer behaviour. These arguments are used to support the complainants' contention that tobacco plain packaging has not affected smoking prevalence, and cannot do so. Arguments dismissing the relevance of non-behavioural variables are mistaken.

216. Contrary to the complainants' arguments, non-behavioural variables are commonly relied on in consumer, psychology, and marketing research journals and textbooks,⁴⁰⁹ and are considered strong predictors of behaviour in tobacco control, especially in relation to quit attempts.⁴¹⁰ In addition, and importantly, early evidence in relation to the tobacco plain packaging measure shows that intentions do predict behavioural change in consumers.⁴¹¹ The combination of the significant body of

⁴⁰⁹ Including journals of which Professor Inman, commissioned by the complainants, is an editor, such as the *Journal of Consumer Behavior*, *Journal of Consumer Psychology*, and *Journal of Marketing Research*.

⁴¹⁰ A. Hyland, R. Borland, Q. Li, H.H. Yong, A. McNeill, G.T. Fong, R.J. O'Connor, K.M. Cummings, "Individual-level predictors of cessation behaviours among participants in the International Tobacco Control (ITC) Four Country Survey", *Tobacco Control*, Vol. 15, No. III (2006), Exhibit AUS-226; L. Li, G. Feng, Y. Jiang, H.H. Yong, R. Borland, G.T. Fong, "Prospective predictors of quitting behaviours among adult smokers in six cities in China: Findings from the International Tobacco Control (ITC) China Survey", *Addiction*, Vol. 106, No. 7, (2011), Exhibit AUS-227.

⁴¹¹ D. Hammond, J. Doxey, S. Daniel and M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine and Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157, C.M. White, D. Hammond, J.F. Thrasher and G.T. Fong, "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study", *BMC Public Health*, Vol. 12, No. 737 (2012), Exhibit AUS-160; D. Hammond, S. Daniel and C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52 (2013), Exhibit AUS-158; M.C. Rousu and J.F. Thrasher, "Demand reduction from plain and pictorial cigarette warning labels: Evidence from experimental auctions", *Applied Economic Perspective and Policy*, Vol. 35, No. 1, (2013), 171, Exhibit AUS-228;

(continued)

evidence showing changes in intentions and attitudes of consumers, with the most recent evidence showing changes in behaviour of consumers, answers the arguments of the complainants about the use of non-behavioural variables.

3. The complainants' suggestion that the FCTC Guidelines have no rational basis is implausible

217. As is clear from the submissions above, this dispute concerns Australia's attempt to improve the public health of its citizens, and in doing so to give effect to its obligations in the FCTC. The complainants have sought to downplay the importance of the FCTC, and some have even gone so far as to cast aspersions on the way in which the FCTC Secretariat conducts itself.⁴¹² This is not only contrived, but inappropriate.

218. The Amicus Submission of the WHO and the FCTC Secretariat highlights the public health significance of disputes concerning tobacco control measures implemented by sovereign states. The WHO and the FCTC Secretariat state that:

International efforts by WHO and other actors to highlight the risks associated with tobacco consumption and to assist WHO Member States in addressing those risks have also evolved over time. This evolution reflects both the regulatory environment in which tobacco companies operate and also the increasing importance of tobacco control to public health and the international community.⁴¹³

219. Through these international efforts, the WHO and FCTC Secretariat have engaged with the vast majority of States in the world. Ukraine and Honduras were both members of the Working Group that developed the Guidelines for the implementation of Article 11 – the very same Guidelines that recommend that Parties consider adopting tobacco plain packaging measures.

J.F. Thrasher, M.C. Rousu, D. Hammond, A. Navarro, J.R. Corrigan, "Estimating the impact of pictorial health warnings and 'plain' cigarette packaging: evidence from experimental auctions among adult smokers in the US", *Health Policy*, Vol. 102, No. 1, (2011), 41, Exhibit AUS-229.

⁴¹² Dominican Republic's first written submission, paras. 190-194.

⁴¹³ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 7.

220. The complainants are essentially asking the Panel to conclude that the 130 countries which moved, by consensus, to adopt the Guidelines for the implementation of Articles 11 and 13 which recommended adopting plain packaging requirements, did so with *no rational basis*. Clearly there is no rational basis for the complainants' contention.

221. The complainants have provided no evidence, nor sought to explain *why* an international organization such as the WHO, and the FCTC Secretariat, should be sidelined in this dispute. Australia submits that this is contrary to the fundamental tenets upon which the international system is based, and that the complainants attempts to downplay the role of the WHO and the FCTC highlights the tenuous nature of their claims.

4. The complainants' claims disregard the realities of the Australian tobacco market

222. Furthermore, the complainants have failed to take into account the realities of the Australian tobacco market. The complainants set forth significant allegations regarding the effect of the tobacco plain packaging measure, but have failed to produce *any* plausible evidence that the measure has had a limiting effect on trade for imported products in Australia.

223. While these failings are expanded upon in Part V below, it is pertinent from the outset to note that the Australian tobacco market is an oligopoly, dominated by three of the largest tobacco companies in the world. Between them, British American Tobacco Australia; Philip Morris Australia; and Imperial Tobacco supply over 99% of factory made cigarettes by volume in Australia.⁴¹⁴ Additionally, each of these companies has moved to supply the Australian market with imported products, or will do so by the end of 2015.

⁴¹⁴ Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, para. 3.2. [Contains SCI]

224. Moreover, the complainants' allegations fail to properly take into account Australia's dark market in respect of the purchase and sale of tobacco products. As outlined extensively above, Australia has a comprehensive ban on the advertising and promotion of tobacco products, including restrictions on how tobacco products may be marketed and displayed at the point of sale. The complainants' description of the effects of the tobacco plain packaging measure frequently fail to account for the fact that, based on these pre-existing and unchallenged restrictions, a consumer will not see tobacco packages until after they have made the decision to purchase the product (as described in more detail in Part IV.D.3(b)).

225. The complainants have ignored the realities of the Australian tobacco market, and have failed to show any change in competitive conditions as a result of the tobacco plain packaging measure. This fundamentally undermines the legal claims brought against Australia, which Australia outlines in more detail in Part V.

III. ORDER OF ANALYSIS

226. Australia will now turn to addressing the complainants' legal claims and arguments in detail. Australia will respond in Part IV to the complainants' claims under the TRIPS Agreement, before turning to the complainants' claims under Article 2.2 of the TBT Agreement in Part V. Australia notes that the complainants are no longer advancing arguments under Article 2.1 of the TBT Agreement (and Articles III:4 of the GATT 1994 and 3.1 of the TRIPS Agreement). Finally, Australia will respond to Cuba's claim that the tobacco plain packaging measure is inconsistent with Article IX:4 of GATT 1994 in Part VI.

IV. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH THE TRIPS AGREEMENT

A. INTRODUCTION

227. The complainants' legal claims under the TRIPS Agreement attempt to wring interpretations from certain TRIPS Agreement and Paris Convention provisions on trademarks and geographical indications that are unsupported by the text. Dispensing with the Vienna Convention rules of treaty interpretation, the complainants urge the Panel to rewrite the text of these provisions to imply the existence of a positive "right of use" in favour of trademark owners. Given the importance ascribed by the complainants to this "right of use", the drafters of the TRIPS Agreement would surely have provided for such a right expressly in the text. As the drafters did not do so, Australia submits that the Panel should decline to read the asserted right into the text at the behest of the complainants in this dispute.

228. Article 20 of the TRIPS Agreement is the *only* provision cited by the complainants that directly speaks to a trademark owner's *use* of a trademark. Contrary to the complainants' assertions, however, Article 20 is not expressed as an "exception" to the rights conferred under Part II, Section 2 of the TRIPS Agreement. The only "rights conferred" with respect to trademark owners are the negative rights of exclusion provided in Article 16, which protect the position of trademark owners in relation to other traders in the market. These negative rights do not delimit the public regulatory relationship between owners of trademarks and sovereign governments. Through their claims in this dispute, the complainants are inviting the Panel to take the negative rights of exclusion expressly provided in the TRIPS Agreement and turn them into a *sub silentio* positive "right of use".

229. The Panel should reject the complainants' invitation. As Australia will demonstrate in Part B below and in the rest of the sections of the submission that follow, the complainants' claims under Articles 2.1, 15, 16, 20, 22, and 24 of the

TRIPS Agreement, founded in the complainants' "right of use" theory, are unsupported by the ordinary meaning of these provisions.

230. In Part C, Australia will address the complainants' claims under Article 15, Article 2.1 (incorporating Article 6*quinquies* A(1) of the Paris Convention), and Article 16 of the TRIPS Agreement. Australia will explain that the complainants' claims under these provisions not only require the Panel to imply a "right of use" into the TRIPS Agreement, but also require the Panel to ignore the import of section 28 of the TPP Act, the implications of which the complainants fail to confront in any meaningful way.

231. In Part D, Australia will address the complainants' claim that the tobacco plain packaging measure is inconsistent with Article 20 of the TRIPS Agreement. The complainants allege that the tobacco plain packaging measure is inconsistent with Article 20 because the measure imposes special requirements which unjustifiably encumber the use of trademarks in the course of trade. Australia will demonstrate that the complainants have failed to establish that the tobacco plain packaging measure imposes any encumbrance upon the use of trademarks in the course of trade, and, in any event, that their proposed interpretations of the term "unjustifiably" cannot be reconciled with a proper interpretation of that term under Article 31 of the Vienna Convention.

232. In Part E, Australia will address the complainants' claims with respect to unfair competition under Articles 2.1 (incorporating Article 10*bis* of the Paris Convention), and 22.2(b) of the TRIPS Agreement. The complainants' claims attempt to recast the "unfair competition" provisions to prohibit Members from imposing any restrictions on the use of signs, including trademarks and geographical indications, and any measures that could affect any "aspect of competition". Australia will demonstrate that, properly interpreted, these provisions do not support the complainants' claims, but rather discipline the conduct of market actors in relation to rival competitors and potential consumers.

233. Finally, in Part F, Australia will address the complainants' claims in relation to the protection of geographical indications under Article 24.3 of the TRIPS

Agreement. The complainants' claims fail to address the scope of Article 24.3, which applies specifically to measures adopted to "implement" Part II, Section 3 of the TRIPS Agreement, and obligates Members not to diminish the level of protection provided to specific geographical indications as compared with the level of protection that existed prior to 1 January 1995.

234. Before turning to a detailed examination of each of the complainants' claims, however, Australia believes that it is useful to examine at a general level the validity of the complainants' contention that a "right of use" must be read into the relevant provisions of the TRIPS Agreement and the Paris Convention. In the section that follows, Australia will demonstrate that the complainants' contention is unsupported by the relevant text, context, or the object and purpose of the TRIPS Agreement.

B. THE COMPLAINANTS' CONTENTION THAT THERE IS A "RIGHT OF USE" IN THE TRIPS AGREEMENT IS UNSUPPORTED BY THE RELEVANT TEXT, CONTEXT, OR OBJECT AND PURPOSE OF THE TRIPS AGREEMENT

235. The foundation for each of the complainants' claims under the TRIPS Agreement is that Members are obligated under the relevant provisions to grant registered trademark owners a positive "right of use" with respect to their trademarks and geographical indications. The complainants offer various theories as to why this "right of use" must be inferred from the TRIPS Agreement. For example, the complainants contend that the "legitimate interest" of a trademark owner in using its trademark must be protected under the TRIPS Agreement as if it were a positive "right", even though Article 17 of the TRIPS Agreement makes clear – as a prior panel has found – that the "legitimate interests" of a trademark owner are distinct from the negative rights of exclusion that Members are required to confer under the Agreement.⁴¹⁵ The complainants maintain that, given the existence of this alleged "right of use" under the TRIPS Agreement, Members retain only limited scope to implement regulations that affect the use of trademarks.

⁴¹⁵ See fn 435.

236. In support of this argument, the complainants largely ignore the plain text of the TRIPS Agreement and the Paris Convention, as interpreted in accordance with the applicable rules of treaty interpretation under the Vienna Convention. Instead, the complainants appeal to conceptions of the functions of trademarks in a competitive market and the "economic value" of trademarks. In making these arguments, the complainants seek to have the Panel ignore the fact that the plain text of the relevant provisions of the TRIPS Agreement, interpreted in their context and in light of the object and purpose of the Agreement as a whole, makes clear that these provisions are concerned with *rights in respect of registration* and *negative rights of exclusion*, not *rights of use*.

237. Article 15 of the TRIPS Agreement sets out the "Protectable Subject Matter" with respect to Part II, Section 2 (Trademarks). Article 15.1 defines *what* may constitute a trademark, and provides that those signs that are capable of constituting a trademark shall be *eligible for registration* as trademarks. Article 2.1 (incorporating Article 6*quinquies* A(1) of the Paris Convention) provides that where a trademark is already duly registered in the country of origin, a Member cannot refuse to *register* that trademark in its territory "as is", even if the trademark would otherwise not comply with the domestic law of that Member concerning the permissible *form* of trademarks. Article 15.4 states that the nature of the goods (or services) to which a trademark is to be applied shall in no case form an obstacle to *registration* of the trademark.

238. After Article 15 defines *what* may constitute a trademark, and the impermissible obstacles in relation to the *registration* of such a trademark, Article 16 provides the "Rights Conferred" on the owners of registered trademarks. Article 16.1 obliges Members to provide the owner of a registered trademark an "exclusive right to prevent" the use of certain signs by third parties in the course of trade where such use would result in a likelihood of confusion. Article 16.3 requires Members to grant to owners of registered "well known" trademarks negative rights of exclusion to prevent certain uses by third parties. By virtue of Article 17, however, Members are permitted to provide "exceptions" to the exclusive "rights conferred" under Article 16, provided

that the exceptions are limited and that the "legitimate interests" of the owners of the trademarks and third parties are taken into account.

239. Following Article 17 of the TRIPS Agreement, Article 18 provides the minimum "Term of Protection" for a trademark.

240. Article 19 of the TRIPS Agreement discusses the "Requirement of Use". Article 19 provides that if use is required to maintain registration, such registration may be cancelled only after an uninterrupted period of at least three years of non-use. In particular, it acknowledges that government regulations may prevent the owner of a trademark from using a trademark that is duly registered.

241. The final relevant provision under Part II, Section 2 of the TRIPS Agreement is Article 20, entitled "Other Requirements". Article 20 provides that "the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements".

242. Members' obligations in relation to "Geographical Indications" follow the trademarks provisions of the TRIPS Agreement, and are found in Part II, Section 3. Article 22.2(b) provides that in respect of geographical indications, Members shall provide the legal means for interested parties to prevent any use that constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention. Article 24.3 provides that a Member shall not diminish the protection of geographical indications that existed in the Member immediately prior to the date of entry into force of the WTO Agreement.

243. None of the provisions relied upon by the complainants in Part II, Sections 2 and 3 of the TRIPS Agreement provide a trademark owner or owner of a geographic indication with a "right of use". With the exception of Article 20, these provisions are concerned with what constitutes a trademark, what is required in order to register a trademark, and what rights of exclusion flow as a consequence of that registration. Despite the fact that the plain text of these provisions does not support their case, the complainants assert that a "right of use" must be located therein.

244. For example, the first claim in this dispute that is pursued by all five of the complainants is a claim under Article 15.4 of the TRIPS Agreement. Article 15.4, in its entirety, provides that "[t]he nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to *registration* of the trademark."⁴¹⁶ By its terms, Article 15.4 restricts a Member's ability to deny *registration* of a trademark, but not a Member's ability to restrict or prohibit the *use* of a sign or trademark.⁴¹⁷ This is the only conclusion that is consistent with the text of the provision, and the only conclusion consistent with the fact that Article 15.4 replicates the text of Article 7 of the Paris Convention.⁴¹⁸

245. The TRIPS Agreement requires WTO Members to comply with the 1967 version of the Paris Convention.⁴¹⁹ As the complainants' own expert, Professor Dinwoodie, acknowledges in his report, "one must interpret the text of the Paris Convention and the TRIPS Agreement 'in a way that reconciles the texts of those two treaties and avoids a conflict between them, given that they form the overall framework for multilateral [trademark] protection.'"⁴²⁰

246. In light of the fact that the Paris Convention forms the substantive foundation of the TRIPS Agreement, it is highly relevant that WIPO⁴²¹ has repeatedly explained that the Paris Convention does not provide a right to use a trademark.⁴²² In fact,

⁴¹⁶ Emphasis added.

⁴¹⁷ Furthermore, this provision contemplates that Members may regulate goods as a class in such a way as to prevent the use of trademarks – so long as registration of a trademark is not prevented.

⁴¹⁸ Unlike Article 7 of the Paris Convention, Article 15.4 includes a reference to "services", a distinction that is not relevant in the current dispute. H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as Revised at Stockholm in 1967* (WIPO Publications, 1969), Exhibit HON-39, p. 128: "[Article 7] would also *apply when the use of trademarks is prohibited for any category of goods* or when the sale of goods is subject to a monopoly or concession".

⁴¹⁹ See Article 2.1 of the TRIPS Agreement.

⁴²⁰ Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 24.

⁴²¹ WIPO is a global forum for intellectual property and agency of the United Nations with 188 Member States (including each of the complainants) and is responsible for the administration of the Paris Convention.

⁴²² For example, Mr Arpad Bogsch, Director-General of WIPO for more than twenty years, has explained:

Article 7 [of the Paris Convention] does not address the question of permission to use a registered mark. ... Therefore, countries party to the Paris Convention remain free to regulate the sale

(continued)

WIPO expressly confirmed that such a right of use is absent from the Paris Convention *in the context of proposed regulations for the plain packaging of tobacco products*.⁴²³ Specifically, in response to questions from a law firm that was representing a tobacco company over 20 years ago, WIPO explained:

... The Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted.

If a national law does not exclude trademarks for certain kinds of products from registration, but only limits the use of such trademarks, this would not constitute a violation of the Paris Convention.⁴²⁴

When another law firm raised the same question with WIPO on behalf of its tobacco company client in 1994, WIPO reinforced its original view:

... countries party to the Paris Convention remain free to regulate or prohibit the sale of certain types of goods, and the fact that a mark has been registered for such goods does not give the right to the holder of the registration to be exempted from any limitation or prohibition of use of the mark decided by the competent authority of the country where the mark is registered.

In conclusion, it does not seem that Article 7 of the Paris Convention could serve as a basis for challenging existing or

of certain types of goods and the fact that a mark has been registered for such goods *does not give the right to the holder of the registration to be exempted from any limitation of using the mark* which may be decided by the competent authority of the country where the mark is registered.

Mr A. Bogisch, the Director-General of WIPO at the time, made this statement in response to a request from Dr H Nakajima, the Director-General of WHO, in a letter dated 22 February 1995. See N.E. Collishaw, "Tobacco Control and the Paris Convention for the Protection of Industrial Property", *Tobacco Control*, Vol. 5, (1996), Exhibit AUS-230, p. 165. (emphasis added)

⁴²³ Letters from D.A. Latham, of Lovell, White, Durant to L. Baeumer, Director Industrial Property Law Department, WIPO (25 March 1994), Bates No. 502592823, Exhibit AUS-231; (15 April 1994) Bates No. 502592645, Exhibit AUS-232; (29 June 1994) Bates No. 502592513, Exhibit AUST-233. Letter from D.A. Latham of Lovell, White, Durrant, to J. Smithson, Rothmans International Services Limited (6 July 1994) attaching Letter from L. Baeumer, Director, Industrial Property Law Department, WIPO to D.A. Latham of Lovell, White, Durrant, (5 July 1994), Bates No. 502592535-502592536, Exhibit AUS-234.

⁴²⁴ Letter from D.A. Latham of Lovell, White, Durrant, to J. Smithson, Rothmans International Services Limited (6 July 1994) attaching Letter from L. Baeumer, Director, Industrial Property Law Department, WIPO to D. A. Latham of Lovell, White, Durrant, (5 July 1994), Bates No. 502592535-502592536, Exhibit AUS-234.

planned requirement of Paris Union member States regarding the plain packaging of tobacco products.⁴²⁵

247. The complainants' claims in this dispute require the Panel to believe that although the Paris Convention does not "contain any obligation to the effect that the use of a registered trademark must be permitted", and although it is undisputed that no such right was explicitly added to the TRIPS Agreement in 1994, such a "right of use" must nonetheless be read into its provisions.⁴²⁶

248. Australia's expert, Professor Correa,⁴²⁷ explains in his report that this proposition is untenable. Professor Correa explains that it is "not conceivable" that the drafters of the TRIPS Agreement agreed to create a right to use a trademark - a right that was nonexistent under the Paris Convention - but did not do so explicitly.⁴²⁸ Professor Correa states that "[a]lthough the TRIPS Agreement expanded the trademark-related rules of the Paris Convention, it did not go beyond the Convention *in respect of the claimed right to use of a trademark*."⁴²⁹ If the TRIPS negotiators had intended to recognize a right to use a trademark, Professor Correa explains that such a "right of use" would have been "spelled ... out, for instance, in Article 16 of the Agreement, which specifically deals with 'rights conferred'."⁴³⁰

⁴²⁵ Letter from L. Baeumer, Director Industrial Property Law Department, WIPO to R. Oman, Mudge, Rose, Guthrie, Alexander and Ferdon (31 August 1994), Bates No. 515446013-515446015, Exhibit AUS-235. See also N.E. Collishaw, "Tobacco Control and the Paris Convention for the Protection of Industrial Property", *Tobacco Control*, Vol. 5, (1996), Exhibit AUS-230, p. 165. Collishaw refers to correspondence dated 22 February 1994 from Mr A Bogsch, Director-General of WIPO to Dr H Nakajima Director-General of WHO, and notes: "What are the implications of this judgment for the development of national tobacco control policies? Simply put, the Paris Convention presents no impediment to member states that wish to implement WHO recommendations calling for bans on direct and indirect tobacco advertising, and for prominent warnings on packaging of tobacco products."

⁴²⁶ This would include those provisions, like Article 15.4, which are identical in all relevant respects to their predecessors in the Paris Convention.

⁴²⁷ Professor Correa is Director of the Center for Interdisciplinary Studies on Industrial Property and Economics at the Law Faculty, University of Buenos Aires, and was a participant in the Uruguay Round negotiations concerning intellectual property rights.

⁴²⁸ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 5.

⁴²⁹ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 41.

⁴³⁰ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 43.

249. As noted by Professor Correa, the rights in Article 16 of the TRIPS Agreement are "the only substantive rights 'guaranteed' by the TRIPS Agreement" in respect of trademarks.⁴³¹ Article 16.1 obliges Members to provide the owner of a registered trademark an "exclusive right to prevent" the use of certain signs by third parties in the course of trade where such use would result in a likelihood of confusion, and Article 16.3 requires Members to grant to owners of registered "well known" trademarks certain negative rights of exclusion to prevent certain uses by third parties. In relation to these "substantive rights", the panel in *EC – Trademarks and Geographical Indications (Australia)* explained that the rights that are granted to owners of registered trademarks under Article 16 are *negative* rights of exclusion, not *positive* rights of use.⁴³² Indeed, the panel in that dispute explained that "[i]f the drafters had intended to grant a positive right, they would have used positive language."⁴³³

250. The panel in *EC – Trademarks and Geographical Indications (Australia)* was also careful to distinguish between the "rights conferred" under Article 16 of the TRIPS Agreement and the "legitimate interests" referenced in Article 17. The panel explained that:

The function of trademarks can be understood by reference to Article 15.1 as distinguishing goods and services of undertakings in the course of trade. Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings. Taking account of that legitimate interest will also take account of the trademark owner's interest in the economic

⁴³¹ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 52.

⁴³² Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.611 at fn 564, ("Article 16.1 of the TRIPS Agreement only provides for a negative right to prevent all third parties from using signs in certain circumstances."). This is consistent with the fact that the "rights conferred" in relation to each of the other covered forms of intellectual property under the TRIPS Agreement are also expressed as negative rights to "prevent" actions by third parties. Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 42.

⁴³³ See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.610. Dr Correa explains that the panel's statement in respect of Article 24.5 of the TRIPS Agreement is equally applicable to the trademark-related provisions Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 45.

value of its mark arising from the reputation that it enjoys and the quality that it denotes.⁴³⁴

However, the panel made clear that "legitimate interests" are not synonymous with "rights conferred". The panel explained:

Read in context, the "legitimate interests" of the trademark owner are contrasted with the "rights conferred by a trademark", which also belong to the trademark owner. Given that Article 17 creates an exception to the rights conferred by a trademark, the "legitimate interests" of the trademark owner must be something different from full enjoyment of those legal rights.⁴³⁵

251. It is certainly the case that a Member must "take account of" the "legitimate interests" of a trademark owner, if, under Article 17, a Member creates *exceptions* to the negative rights of exclusion guaranteed under Article 16 of the TRIPS Agreement. However, as explained by the panel in *EC – Trademarks and Geographical Indications (Australia)*, this does not elevate these "legitimate interests" to "rights" that must themselves be protected.

252. Nor are "rights of use" found in Article 20 of the TRIPS Agreement, the provision most emphasized by the complainants in their first written submissions. Article 20, entitled "Other Requirements", is unique among the provisions in Part II, Section 2 of the TRIPS Agreement. Unlike the provisions in Articles 15 and 16 of Section 2, which only address the use of trademarks insofar as that use is relevant to the rights with respect to registration and negative rights of exclusion conferred by these provisions, Article 20 speaks directly to a trademark owner's use of a trademark. In distinguishing Article 20 from the prior provisions in Section 2, Mr Nuno Pires de Carvalho explains that the TRIPS Agreement does not "focus[] exclusively on the rights of trademark owners to say 'no'."⁴³⁶ Rather, Article 20 "contain[s] provisions

⁴³⁴ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664.

⁴³⁵ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.662. The panel in *Canada – Pharmaceutical Patents* drew a similar distinction in the context of Article 30 of the TRIPS Agreement, when the panel explained that "equating 'legitimate interests' with legal interests makes no sense at all." Panel Report, *Canada – Pharmaceutical Patents*, para. 7.68.

⁴³⁶ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 252. Mr Carvalho is the Director of the Intellectual Property and Competition Policy Division of WIPO.

that may have a direct impact on the use of the signs themselves."⁴³⁷ Specifically, as noted above, Article 20 provides that "the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements".

253. Unlike Article 17 of the TRIPS Agreement, however, Article 20 is *not* expressed as an "exception" to the private "rights" conferred on trademark owners under the TRIPS Agreement.⁴³⁸ As explained by Carvalho:

Article 20 ... is about external exceptions to rights, rather than internal ones. Article 17, for example, deals with internal exceptions to the extent it permits exceptions to rights conferred. Article 20, like Article 8.1, has nothing to do with the rights conferred, but with the possibility of using the protected asset - something that is generally left to the freedom of economic and business operators, in regimes that are market-oriented.⁴³⁹

254. Carvalho explains that Article 20 is about "government regulation and its limits."⁴⁴⁰ Article 20 governs the relationship between a government as a regulator and all traders and trademark owners, rather than the relationship between competing traders. Article 20, therefore, "does not supersede the rights of WTO Members to organize their economies as they see fit", "[n]or does Article 20 provide, explicitly or implicitly, that WTO Members are obliged to recognize the right to use trademarks, even if the commercialization of the goods is permitted."⁴⁴¹ As Article 20 does not operate as an exception to rights, in the way that Article 17 does, and because Article 20 does not contain an obligation to consider "legitimate interests", it imposes

⁴³⁷ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 252.

⁴³⁸ If there were a positive right to use a trademark in the TRIPS Agreement, then Article 20 would effectively be redundant under the complainants' own interpretation, because Article 17 already provides for exceptions to "the rights conferred by a trademark".

⁴³⁹ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 318-319.

⁴⁴⁰ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 319.

⁴⁴¹ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 319. See also pp. 323-333: "[Article 20] ... does not refer to the rights of trademark owners ... but to the use of the mark itself. Governments have the right to prohibit the commercialization of certain goods or services. That is their prerogative which cannot be challenged by means of intellectual property rules. If they resort to that prerogative, trademark owners do not have the right to positive use the mark they conserve nevertheless the right to exclude others from using it."

only a limited restriction on a government's ability to regulate the use of trademarks, as Australia will discuss in Part D.

255. The fact that the rights conferred under the TRIPS Agreement are negative rights of exclusion and not positive "rights of use" is also confirmed by the "objectives" and "principles" of the TRIPS Agreement.⁴⁴² These provisions state:

Article 7 Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

256. In reference to Article 8, the panel in *EC – Trademarks and Geographical Indications (Australia)* noted:

These principles reflect the fact that the agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of *negative rights to prevent certain acts*. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives *lie outside the scope of intellectual property rights* and do not require an exception under the TRIPS Agreement.⁴⁴³

257. The purpose of the grant of exclusive, negative rights to owners of intellectual property under the TRIPS Agreement (such as in Article 16 with respect to

⁴⁴² The panel in *Canada – Pharmaceutical Products* explained when interpreting Article 30 of the TRIPS Agreement that "[b]oth the goals and limitations stated in Articles 7 and 8.1 must be borne in mind...". See Panel Report, *Canada – Pharmaceutical Patents*, para. 7.26.

⁴⁴³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246. (emphasis added)

trademarks) is to guarantee priority *over other traders in the market*.⁴⁴⁴ Thus, the protections granted under the TRIPS Agreement delimit the *private, competitive* relationship between traders in the market. In so doing, these negative rights do not delimit the *public, regulatory* relationship between owners of intellectual property and sovereign governments.⁴⁴⁵

258. Consistent with this understanding, the panel in *EC – Trademarks and Geographical Indications (Australia)* explained that "the right to *use* a trademark is a right that Members may provide *under national law*".⁴⁴⁶ Members retain the flexibility to implement measures that affect the *use* of intellectual property under the TRIPS Agreement, because such measures "lie outside the scope of intellectual property rights".⁴⁴⁷ This is evidenced by reference to Article 19.1 of the TRIPS Agreement, which expressly contemplates that Members can and do regulate goods and services in such a way that constitutes an obstacle to the use of trademarks.⁴⁴⁸

259. In sum, the legal protections that must be granted to registered trademark owners under the TRIPS Agreement are negative rights to prevent third parties from using certain signs, not positive rights to use trademarks on products in the market. As explained by Carvalho:

Like all other industrial property rights dealt with by the TRIPS Agreement, trademark rights are also primarily described in a negative manner. Trademark rights are rights to exclude, rather than to use. In principle, the right to use a certain sign in a certain

⁴⁴⁴ As noted by Peter Van den Bossche, "IP rights, it should be noted, confer negative rights, i.e. the right to exclude others from the use of the protected subject-matter for a particular period of time. They do not confer positive rights, such as the right to produce or market the product embodying the IP right." P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd ed. (Cambridge University Press, 2013), Exhibit AUS-237, pp. 952-3.

⁴⁴⁵ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 43.

⁴⁴⁶ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.611. (emphasis added)

⁴⁴⁷ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246. See H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property As Revised at Stockholm in 1967* (WIPO Publications, 1969), Exhibit HON-39, p. 128.

⁴⁴⁸ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, paras. 83-84, 98.

field of commerce, industry or services results from economic freedom, not from industrial property law.⁴⁴⁹

260. Australia submits that accepting the complainants' claims in this dispute would require the Panel to ignore the fact that the TRIPS Agreement provisions make clear on their face that "[t]rademark rights are rights to exclude, rather than to use." The Panel would be required to conflate the "economic functions" of trademarks with the legal rights granted to trademark owners under the TRIPS Agreement, a notion repeatedly advocated by the complainants in their submissions. Ukraine maintains, for example, that the Panel should accept its argument because "[p]lain packaging is inconsistent with the *economic rationale* underlying trademark law."⁴⁵⁰

261. Australia does not contest that trademark owners have legitimate interests or that trademarks have economic value. However, neither of these propositions is at issue in this dispute. Rather, the question before the Panel is whether the complainants have demonstrated that there is a *right* to use a trademark in the provisions of the TRIPS Agreement on which their claims depend. In support of this essential proposition, the complainants rely on the reports provided by Professor Dinwoodie and Judge Schwebel. As Dr Correa has explained in detail in his report, however, neither of these opinions is persuasive.

⁴⁴⁹ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 249. See also UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, (Cambridge University Press, 2005), Exhibit AUS-238, p. 236: "As with other IPRs, the trademark right is a "negative right" entitling the owner to "prevent all third parties". As noted by Peter Van den Bossche, "IP rights, it should be noted, confer negative rights, i.e. the right to exclude others from the use of the protected subject-matter for a particular period of time. They do not confer positive rights, such as the right to produce or market the product embodying the IP right." P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd ed. (Cambridge University Press, 2013), Exhibit AUS-237, pp. 952-3; M. Davison, "Plain Packaging of Tobacco and the "Right" to Use a Trade Mark", *European Intellectual Property Review*, No. 8 (2012), Exhibit AUS-239, p. 498. "There is no right to use a trade mark under either the Paris Convention (Paris) or the TRIPS Agreement (TRIPS). Vehemently wishing it otherwise will not make it so."; T. Voon and A. Mitchell, "Implications of WTO Law for Plain Packaging of Tobacco Products" in A. Mitchell, T. Voon, J. Liberman and G. Ayres (eds.), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Elgad Edward Publishing, 2012), Exhibit AUS-240, p. 116 "...trademark rights are negative rights: 'rights to exclude, rather than to use'".

⁴⁵⁰ Ukraine's first written submission, para. 11.

262. In his report, Professor Dinwoodie agrees that "the overall context - including the lack of any general guarantee of rights accorded the owner of a trade mark - suggests that the registration provisions of the Paris Convention did not articulate a right to use a mark."⁴⁵¹ After reaching this conclusion, Professor Dinwoodie highlights three "developments worth noting" between the Paris Convention and the TRIPS Agreement.⁴⁵² He explains that Article 16.1 "defined for the first time the minimum rights guaranteed to be available to the owners of trade marks generally", that Article 16.3 "augmented the rights afforded to well known marks", and that Article 15 "shifted the focus of what could be a trade mark from categories of subject matter to the concept of distinctiveness".⁴⁵³ It is on the basis of these three "developments" that Professor Dinwoodie divines a right of use in the TRIPS Agreement, without any supporting evidence in the text of the provisions themselves. In relation to Professor Dinwoodie's analysis, Professor Correa explains that "[e]xclusive rights represent a drastic derogation of the principle of free circulation of ideas and knowledge that could only be mandated in the TRIPS Agreement through express provisions. They cannot be implicitly read in the text nor derived from the context."⁴⁵⁴

263. Judge Schwebel's report is even less convincing. Australia is surprised that the complainants chose to rely on the expertise of Judge Schwebel to author an expert report on the meaning of the TRIPS Agreement. While Judge Schwebel is a noted figure in the international legal community, of his own admission he is "not a specialist in international trade law", nor a "practitioner of the TRIPS".⁴⁵⁵ What is particularly perplexing about Judge Schwebel's report, as noted by Professor Correa, is that Judge Schwebel appears to suggest that there is no need to consider the specific provisions in the TRIPS Agreement addressing trademarks in order to reach the

⁴⁵¹ Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 47. Dinwoodie notes that "very little of the [Paris Convention] addressed anything beyond the question of registration." Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 31.

⁴⁵² Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 35.

⁴⁵³ Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 35.

⁴⁵⁴ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 42.

⁴⁵⁵ Expert Report of S.M. Schwebel (29 September 2014), Exhibit UKR-2, para. 30.

conclusion that "the Agreement *assumes* that the owner of a registered trademark has the right to use that trademark".⁴⁵⁶ Judge Schwebel, like Professor Dinwoodie, fails to apply a proper Vienna Convention analysis and instead attempts to derive a positive "right of use" from contextual considerations alone. In particular, Judge Schwebel "infers" a right to use a trademark from the reference in the Preamble of the TRIPS Agreement to "private rights". As Professor Correa explains, however, this inference is without foundation:

The fact that a right is "private" only tells us that it is held by an individual or an entity acting under private law and that it may be enforced in courts. It also tells us that there is no obligation on the State to act ex-officio in case of infringement. But that concept doesn't tell us anything about the type and scope of the rights conferred.⁴⁵⁷

264. Ultimately, the problem with the complainants' expert reports is not merely their lack of rigour, but rather the fact that no amount of analysis could possibly overcome the fact that there is no textual support for the "right of use" that the complainants are trying to read into the TRIPS Agreement. This is fatal to the arguments made by the complainants in relation to their TRIPS claims, as Australia will proceed to demonstrate in greater detail in the sections that follow.

C. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH THE TRIPS AGREEMENT AND PARIS CONVENTION PROVISIONS ON THE REGISTRATION OF TRADEMARKS AND THE "RIGHTS CONFERRED" IN RELATION TO REGISTERED TRADEMARKS

1. Introduction

265. As Australia has demonstrated in Part B above, the trademark provisions of the TRIPS Agreement provide rights with respect to registration and negative rights of

⁴⁵⁶ Expert Report of S.M. Schwebel (29 September 2014), Exhibit UKR-2, para. 12 (emphasis added). Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 94.

⁴⁵⁷ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 89.

exclusion. The complainants' contention that the relevant provisions of the TRIPS Agreement provide trademark owners with a "right of use" is unfounded.

266. In relation to their claims under Article 15, Article 2.1 (incorporating Article 6*quinquies* A(1) of the Paris Convention), and Article 16 of the TRIPS Agreement, the complainants appear to recognize that the plain text of the provisions does not support their claims. Instead, they argue that the right to use a registered trademark is *implicit* in these provisions. The complainants maintain that in the absence of such a "right of use", the rights that *are* contained in these provisions are not sufficiently protected. Specifically, the complainants argue that because the tobacco plain packaging measure inhibits the right to use certain trademarks, it also inhibits the rights of registration and exclusion that are in fact contained in Articles 15, 2.1, and 16 of the TRIPS Agreement.

267. The complainants are mistaken. The tobacco plain packaging measure ensures that a trademark owner's inability to use certain trademarks on tobacco products and their retail packaging does not affect a trademark owner's otherwise existing right to register a trademark under the Trade Marks Act, or to prevent others from using identical or similar signs. Specifically, subsection 28(1) of the TPP Act, entitled "Effect on the *Trade Marks Act 1995* of non-use of trade mark as a result of this Act" provides (in relevant part):

(1) For the purposes of the Trade Marks Act 1995, and the regulations made under that Act, an applicant for the registration of a trade mark in respect of tobacco products is taken to intend to:

- (a) use the trade mark in Australia in relation to those products; or
- (b) authorise another person to use the trade mark in Australia in relation to those products; or
- (c) assign the trade mark to a body corporate that is about to be consisted with a view to the body corporate using the trade mark in Australia in relation to those products

if the applicant would intend to do so but for the operation of this Act.⁴⁵⁸

268. Further, subsection 28(2) of the TPP Act provides that the Act "does not have the effect that the use of a trademark in relation to tobacco products would be contrary to law", which would otherwise constitute grounds for rejection of an application to register a trademark under the Trade Marks Act.

269. The TPP Act also ensures that the provisions of the TPP Act cannot form an obstacle to the maintenance of the registration of a trademark. Subsection 28(3) provides that in relation to the provisions under the Trade Marks Act on revocation of the acceptance of an application for registration (section 38) and revocation of registration (section 84A), the operation of the TPP Act does not mean that it is "reasonable or appropriate":

- (a) not to register the trade mark; or
- (b) to revoke the acceptance of an application for registration of the trade mark; or
- (c) to register the trade mark subject to conditions or limitations; or
- (d) to revoke the registration of the trade mark.⁴⁵⁹

270. Further, subsection 28(4) of the TPP Act provides that if there is an application to remove a trademark from the register on the basis of non-use, an opponent to that application is taken to have rebutted the application if the opponent establishes that the registered owner would have used the trademark, but for the operation of the TPP Act.

271. The effect of section 28 of the TPP Act is clearly explained in the Explanatory Memorandum to the TPP Bill 2011 as follows:

[section] 28 preserves a trade mark owner's ability to protect a trade mark, and to register and maintain registration of a trade mark. To this end, [section] 28 provides for the way various provisions of the Trade Marks Act 1995 and the Trade Marks

⁴⁵⁸ TPP Act, Exhibit AUS-1, Section 28.

⁴⁵⁹ TPP Act, Exhibit AUS-1, Section 28(3).

Regulations 1995 will operate in relation to the provisions of the Bill. For example, a tobacco manufacturer that applies for the registration of a trade mark in respect of tobacco products is taken to intend to use the trade mark in Australia, if it would use it on the products or retail packaging, but for the operation of the Bill. Similarly, if someone applies for removal of a trade mark from the register, alleging that the trade mark has not been used, this allegation will be rebutted by evidence that the registered owner would have used the trade mark, but for the operation of the Bill.⁴⁶⁰

272. Furthermore, as part of the package of legislation implementing the tobacco plain packaging measure, Australia amended the Trade Marks Act to insert a new provision that provides:

231A Regulations may make provision in relation to the Tobacco Plain Packaging Act 2011

(1) The regulations may make provision in relation to the effect of the operation of the Tobacco Plain Packaging Act 2011, and any regulations made under that Act, on: (a) a provision of this Act; or (b) a regulation made under this Act, including: (i) a regulation that applies a provision of this Act; or (ii) a regulation that applies a provision of this Act in modified form.

(2) Without limiting subsection (1), regulations made for the purposes of that subsection may clarify or state the effect of the operation of the Tobacco Plain Packaging Act 2011, and any regulations made under that Act, on a provision of this Act or a regulation made under this Act, including by taking or deeming: (a) something to have (or not to have) happened; or (b) something to be (or not to be) the case; or (c) something to have (or not to have) a particular effect.

(3) Regulations made for the purposes of subsection (1): (a) may be inconsistent with this Act; and (b) prevail over this Act (including any other regulations or other instruments made under this Act), to the extent of any inconsistency.

273. The Explanatory Memorandum to the amending Bill explains that the intention of the insertion of section 231A into the Trade Mark Act was so that:

if necessary, the government can quickly remedy any unintended interaction between the *Tobacco Plain Packaging Act 2011* (the Plain Packaging Act) and the *Trade Marks Act 1995* (the Trade Marks Act). The objective of any such exercise of power under the Bill will be to ensure that applicants for trade mark registration and

⁴⁶⁰ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, Chapter 2.

registered owners of trade marks are not disadvantaged by the practical operation of the Plain Packaging Act.⁴⁶¹

274. This provision has not been needed since the TPP Act came into full force and effect, but the safety net that it provides for registered trademark owners ensures that their existing rights will be unaffected by the operation of the tobacco plain packaging measure.

275. The complainants' attempts to explain why section 28 of the TPP Act does not adequately protect their rights of registration and exclusion under the TRIPS Agreement are frequently no more than sound bites. For example, Ukraine explains that section 28 is a "legal fiction".⁴⁶² Ukraine argues that "[c]reating fictions to circumvent domestic law cannot satisfy the substantive obligations of the TRIPS Agreement", but never explains *why* that must be the case. Instead, Ukraine simply pronounces that "fiction-based protection is failed protection".⁴⁶³ In doing so, Ukraine misrepresents the purpose and operation of section 28 of the TPP Act. Contrary to Ukraine's characterization of section 28 as a "legal fiction", the approach taken in section 28 of the TPP Act is exactly what is contemplated (and indeed required) by both Article 15.4 of the TRIPS Agreement, with respect to the obligation not to refuse to register certain trademarks, and Article 19.1, with respect to the obligation to maintain the registration of certain trademarks.⁴⁶⁴

276. When the complainants do attempt to engage with the substance of section 28, they argue that section 28 is deficient because it fails adequately to address non-inherently distinctive signs. For example, Honduras argues that "Section 28 does not explain how the Registrar could assess the distinctiveness of an inherently non-distinctive mark, absent evidence of the extent of its use".⁴⁶⁵ Indonesia maintains that

⁴⁶¹ Explanatory Memorandum to the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth), Exhibit AUS-5, Outline, p. 1.

⁴⁶² Ukraine's first written submission, para. 73. See also Dominican Republic's first written submission, para. 267; and Indonesia's first written submission, paras. 142 and 235.

⁴⁶³ Ukraine's first written submission, para. 73.

⁴⁶⁴ M. Davison, "Plain Packaging and the TRIPS Agreement: A Response to Professor Gervais", *Australian Intellectual Property Journal*, Vol. 23 (2013), 160, Exhibit AUS-241, p. 165.

⁴⁶⁵ Honduras' first written submission, para. 212.

"Section 28 affords no protection for non-inherently distinctive marks that are developed in the future."⁴⁶⁶

277. When the complainants refer to "non-inherently distinctive marks", which have not yet acquired distinctiveness through use (for whatever reason), they are referring to signs that are, pursuant to Article 15.1 of the TRIPS Agreement, not "capable of distinguishing" the relevant goods and therefore fall outside the definition of a "trademark" under the TRIPS Agreement. In advancing their arguments in relation to such non-inherently distinctive signs, the complainants never explain the basis for their assertion that the TRIPS Agreement requires Members to guarantee the use of non-inherently distinctive signs (or combinations of signs) so that these signs may *become* sufficiently distinctive to meet the definition of a trademark. Such an obligation is found nowhere in the provisions on which the complainants rely.

278. In the sections that follow, Australia will address each of the complainants' arguments under Articles 15, 2.1 (incorporating Article 6*quinquies* A(1) of the Paris Convention), and 16 of the TRIPS Agreement. As will become evident, the complainants' claims are consistently based on arguments that fail to address the precise effect of section 28 of the TPP Act, and that fail properly to distinguish between "trademarks" and "signs".

279. Before turning to a substantive rebuttal of these arguments, however, Australia notes that certain of the claims below are advanced only by one or two of the complainants. Australia believes that it is telling that in a dispute where the complainants' cases were evidently coordinated, these claims were deemed so far-fetched by some of the complainants that they were unwilling even to support an argument raised by a co-complainant. The first claim under Article 15.1, advanced by Ukraine alone, is a perfect example.

⁴⁶⁶ Indonesia's first written submission, para. 199.

2. Ukraine has failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 15.1 of the TRIPS Agreement

280. Article 15 of the TRIPS Agreement sets out the "Protectable Subject Matter" with respect to Part II, Section 2 ("Trademarks"). Article 15.1 provides:

Protectable Subject Matter

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

281. The scope of Article 15.1 is clear from its ordinary meaning, interpreted in its context and in light of the object and purpose of the TRIPS Agreement. Article 15.1 provides *what* may constitute a trademark and is therefore *eligible* for registration.⁴⁶⁷

282. The ordinary meaning of the term "capable" is "qualified", "having the ability, power or fitness for some specified purpose".⁴⁶⁸ The ordinary meaning of the term "constituting" is "make up, go to form; be the constituent parts or material of ... make (a thing) what it is; determine".⁴⁶⁹ Therefore, the first sentence of Article 15.1 provides a *definition* of a trademark, namely, "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings." Pursuant to Article 15.1, those signs or combinations of signs that meet

⁴⁶⁷ C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), Exhibit AUS-242, p. 175. "Article 15.1 of TRIPS defines the subject matter which is to be protected under trademark law."

⁴⁶⁸ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. No. 1, Exhibit AUS-243, p. 341.

⁴⁶⁹ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. No. 1, Exhibit AUS-243, p. 500.

this definition are "qualified" to "make up" or "determine" what a trademark "is".⁴⁷⁰ This sentence contains no obligation with respect to what a trademark *does*, only what it *is*. Article 15.1 leaves it to the discretion of a Member to determine as a matter of fact whether or not a sign meets the distinctiveness criterion.⁴⁷¹

283. The second sentence in Article 15.1 provides that a Member must ensure that those signs or combinations of signs that meet the definition of a trademark are *eligible for registration* in its territory.⁴⁷² However, Members "are not obliged to register any and every sign or combination of signs that meet those distinctiveness requirements."⁴⁷³ A Member may deny registration on other grounds, even if the sign is sufficiently distinctive to constitute a trademark.⁴⁷⁴

284. In *US – Section 211 Appropriations Act*, the Appellate Body confirmed this interpretation of the plain meaning of the obligations set forth in Article 15.1:

To us, the title of Article 15.1 – "Protectable Subject Matter" – indicates that Article 15.1 embodies *a definition of what can constitute a trademark*. WTO Members are obliged under Article 15.1 to ensure that those signs or combinations of signs that meet the distinctiveness criteria set forth in Article 15.1 – *and are, thus, capable of constituting a trademark* – are eligible for registration as trademarks within their domestic legislation.⁴⁷⁵

⁴⁷⁰ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.600: "Section 2 of Part II provides for the category of trademarks. Article 15.1 sets out the definition of the subject matter which is capable of constituting a trademark. These are signs that satisfy certain criteria." See also Honduras' first written submission, para. 155: "At the outset, Article 15 defines the *concept of a trademark*. To recall, the TRIPS Agreement is the first international treaty for the protection of intellectual property right that contains a definition of trademarks. ... Only trademarks that are distinctive will be protected." (original emphasis); and Indonesia's first written submission, para. 128: "Article 15.1 provides a definition of a 'trademark' for purposes of the TRIPS Agreement."

⁴⁷¹ C. Correa states: "The single criterion set out by Article 15.1 for the eligibility of a sign as a trademark is its capacity to distinguish the goods and services of one party from those of other parties." See C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), Exhibit AUS-242, p. 176.

⁴⁷² Indonesia's first written submission, para. 186: "Under Article 15.1 distinctiveness is the basic criterion for identifying trademarks eligible for registration."

⁴⁷³ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 159.

⁴⁷⁴ Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 158-159.

⁴⁷⁵ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 154. (emphasis added)

285. Accordingly, in order to establish a *prima facie* case of violation of Article 15.1, Ukraine would need to establish that Australia has failed "to ensure that those signs or combinations of signs that meet the distinctiveness criteria set forth in Article 15.1 – *and are, thus, capable of constituting a trademark* – are eligible for registration as trademarks" within its domestic legislation. Ukraine has failed to establish such a *prima facie* case.

286. Instead, Ukraine advances two implausible arguments under Article 15.1. First, Ukraine submits that Australia's tobacco plain packaging measure violates the "first sentence" of Article 15.1 because only one type of "distinctive sign" can "act as a trademark" (word "marks"), whereas other categories of "distinctive signs" (design and other "marks") cannot.⁴⁷⁶ Second, Ukraine claims that by preventing the use of certain "distinctive signs", the tobacco plain packaging measure prevents these "distinctive signs" from performing the functions that convert these "distinctive signs" into trademarks. Therefore the measure prevents these "distinctive signs" from "constituting a trademark".⁴⁷⁷

287. By suggesting that the first sentence of Article 15.1 imposes an obligation on Members to guarantee the use of all "distinctive signs", Ukraine is attempting to import terms into Article 15.1 that are not found in the text. The first sentence of Article 15.1 does not obligate Members to guarantee the use of any signs or trademarks. The purpose of Article 15.1 is to provide the definition of a trademark and the eligibility requirement for the registration of signs that meet this definition. Whether or not a trademark is actually registered, and whether or not it can be used after it is registered, are matters that fall outside the scope of the first sentence of Article 15.1.⁴⁷⁸

⁴⁷⁶ Ukraine's first written submission, para. 147. Australia notes that Ukraine attempts to blur the distinction between "signs" and "trademarks" by referring to "distinctive signs" in order to avoid using the term "trademark" (as this would presumably expose the circularity in its argument).

⁴⁷⁷ Ukraine's first written submission, para. 147.

⁴⁷⁸ See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 155:

This Article states that such signs or combinations of signs "shall be *eligible* for registration" as trademarks. It does not say that they "shall be registered". To us, these are distinctions with a difference. And, as we have said, supporting these distinctions is the fact that the title of this

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288. The Trade Marks Act defines a trademark as "a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person."⁴⁷⁹ Consistent with Article 15.1, a sign that meets this definition "constitutes" a trademark in Australia, and this definition is unaffected by the operation of the tobacco plain packaging measure. Furthermore, the tobacco plain packaging measure does not change the fact that in order to be *eligible* for registration as a trademark in Australia, a sign must at least meet the definition of a trademark under the Trade Marks Act.

289. Australia's measure is not in violation of Article 15.1, properly interpreted. Ukraine's claim rests on a fundamental misinterpretation of this provision, supported by none of the other complainants in this dispute, and must be rejected.

3. Honduras has failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 2.1 of the TRIPS Agreement incorporating Article 6quinquies A(1) of the Paris Convention

290. Honduras claims that the tobacco plain packaging measure is inconsistent with Article 6quinquies A(1) of the Paris Convention, incorporated in Article 2.1 of the TRIPS Agreement,⁴⁸⁰ because trademarks registered in a country of origin outside of

Article speaks of subject matter as "protectable", and not of subject matter "to be protected". In this way, the title of Article 15 expresses the notion that the subject matter covered by the provision is subject matter that *qualifies* for, but is not necessarily *entitled to*, protection.

⁴⁷⁹ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 17. Section 6 of the Trade Marks Act defines "sign" as including "the following or any combination of the following, namely, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent." *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 6.

⁴⁸⁰ Article 2.1 of the TRIPS Agreement provides that: "[i]n respect of Parts I, II and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)." The Appellate Body has confirmed that "...WTO Members, whether they are countries of the Paris Union or not, are obliged, under the *WTO Agreement*, to implement those provisions of the Paris Convention that are incorporated into the *TRIPS Agreement*." Appellate Body Report, *US – Section 211 Appropriations Act*, para. 125.

Australia are not "protected as is" in Australia.⁴⁸¹ As Australia will proceed to demonstrate, this claim is without merit.

291. Article 6*quinquies* A(1) of the Paris Convention provides:

Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate.

292. Article 6*quinquies* A(1) addresses the conditions that a Member may impose with respect to the acceptance of a particular category of trademarks for registration. Specifically, where a trademark is already duly registered in the country of origin, Article 6*quinquies* A(1) provides that a Member may not refuse to *register* that trademark in its territory, even if the trademark would not otherwise comply with the domestic law of that Member concerning the permissible *form* of the trademark.⁴⁸² For example, if a trademark registered in France is in French, a Member cannot refuse to register that trademark in its territory on the basis that the trademark is in French.⁴⁸³

293. The reference to "protected" in Article 6*quinquies* A(1) refers to the protection conferred as a result of the registration of a trademark – it does *not* set minimum standards with respect to *how* that trademark is to be protected. Rather,

⁴⁸¹ Honduras' first written submission, para. 263. Cuba states that it "endorses" and "incorporates" Honduras' submissions on Article 6*quinquies* A(1). Cuba's first written submission, para. 428. The remaining complainants (Ukraine, Indonesia and the Dominican Republic) have dropped the Article 6*quinquies* A(1) claims that were originally included in their panel requests.

⁴⁸² Panel Report, *US – Section 211 Appropriations Act*, para. 8.83.

⁴⁸³ See UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, (Cambridge University Press, 2005), Exhibit AUS-238, p. 231. "This rule was designed to prevent trademark registration authorities from requiring translation or other adaptations of marks to meet local preferences or rules." Indeed, Honduras itself initially acknowledges that the obligation in Article 6*quinquies* A(1) is that "WTO Members may not require that a trademark, already registered in the country of origin, *be modified or altered as a condition for acceptance for filing and protection* in their territory. WTO Members are obliged to accept for filing (and therefore to protect) a trademark *in the original form* in which it was registered in the country of origin." Honduras' first written submission, para. 261 (emphasis added). See also Honduras' first written submission, para. 149, which refers to Article 6*quinquies* A(1) as "the so-called '*telle quelle*' rule, which requires that marks be accepted for registration in the same form as they were registered in the country of origin". See also Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, paras. 28-29.

Article 6*quinquies* A(1) simply provides that a Member may not deny the registration of a trademark that is registered in the territory of another Member based on its form.⁴⁸⁴

294. In order to establish a *prima facie* case of violation under Article 6*quinquies* A(1), properly interpreted, Honduras would need to demonstrate that Australia's tobacco plain packaging measure prevents the *registration* of trademarks that are registered in the territory of another Member based on their form.

295. Honduras has made no such demonstration. Instead, as noted above, Honduras claims that the tobacco plain packaging measure is inconsistent with Article 6*quinquies* A(1) because trademarks registered in a country of origin outside Australia are not "protected as is" in Australia.⁴⁸⁵ Honduras argues that a Member's obligation to "protect" a trademark registered in the territory of another Member, "necessarily involves ensuring that trademark owners can 'use' their trademarks."⁴⁸⁶ Honduras concludes that "a measure that prohibits the use of trademarks cannot qualify as a measure that protects trademarks."⁴⁸⁷

296. Honduras' interpretation cannot be reconciled with the plain text of Article 6*quinquies* A(1). As noted above, Article 6*quinquies* A(1) does not address the *nature* of the protection that flows from the registration of a trademark, and in no way obligates Members to grant trademark owners a "right of use" in respect of their trademarks.⁴⁸⁸ Nor is Honduras able to reconcile its argument with its own

⁴⁸⁴ See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 137. See also Panel Report, *US – Section 211 Appropriations Act*, para. 8.79.

⁴⁸⁵ Honduras' first written submission, para. 263.

⁴⁸⁶ Honduras' first written submission, para. 266.

⁴⁸⁷ Honduras' first written submission, para. 264.

⁴⁸⁸ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed., (Kluwer Law International, 2014), Exhibit AUS-236, p. 233:

Article 6*quinquies* concerns the form of trademarks, only. Conditions that relate to aspects of the trademarks, other than the form, such as ownership, establishment, legal activities or use, can be dealt with freely by the domestic legislation, and yet be subject to the national treatment principle. Actually, Article 6(1), in conjunction with Article 2, assigns national discretion a predominant role, as the Appellate Body acknowledges. Article 6*quinquies* cannot be read as a manner of undermining that predominance.

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recognition that the "WIPO-administered treaties *did not establish substantive standards for the protection of intellectual property rights*."⁴⁸⁹

297. The tobacco plain packaging measure is consistent with Article 6*quinquies* A(1), properly interpreted. As outlined in Part 1 above, section 28 of the TPP Act expressly provides that the operation of the TPP Act does not affect a trademark owner's ability to *register* a trademark under the Trade Marks Act. The ability of a trademark owner to *use* a trademark falls outside the scope of Article 6*quinquies* A(1). Australia submits that Honduras' claims under this provision, as endorsed by Cuba, should be rejected.

4. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 15.4 of the TRIPS Agreement

298. As noted above, Article 15 of the TRIPS Agreement provides certain limitations on a Member's ability to set eligibility requirements for the *registration* of a trademark in its territory.⁴⁹⁰ Article 15.4 of the TRIPS Agreement provides:

The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

299. All of the complainants in this dispute are pursuing claims under Article 15.4. Far from establishing a right to *use* a sign on any product, however, Article 15.4

See also Letter to R. Oman, Mudge Rose Guthrie Alexander and Ferdon, from L. Baeumer, Director Industrial Property Law Department, WIPO (31 August 1994), Bates No. 515446013-515446015, Exhibit AUS-235:

it is to be noted that Article 6*quinquies* A does not address the question of use, but the obligation, for any country party to the Paris Convention, to accept for filing and protect (against infringement by others) a mark already registered in the country of origin. ... Article 6*quinquies* B does not mean that the use of a trademark registered under Article 6*quinquies* cannot be the subject of a limitation or prohibition for other grounds contained in laws other than trademark law.

⁴⁸⁹ Honduras' first written submission, para. 146. (emphasis added) Ukraine's expert, Professor Dinwoodie agrees that "the overall context—including the lack of any general guarantee of rights accorded the owner of a trade mark—suggests that the registration provisions of the Paris Convention did not articulate a right to use a mark." See Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 47.

⁴⁹⁰ See Honduras' first written submission, para. 158: "Articles 15.2 through 15.5 set out rules that limit the discretion of WTO Members in the process of such registration, e.g. limiting the grounds on which one can reject an application for registration."

makes clear that a Member can regulate a product in a way that may restrict or prohibit the use of a trademark in its territory, as long as a Member does not refuse to *register a trademark* based on the nature of a product. As outlined in Part B above, WIPO agreed with this understanding of Article 7 of the Paris Convention, a provision identical to Article 15.4 in all relevant respects.⁴⁹¹

300. Professor Correa explains that Article 15.4 does not address the nature of the rights that flow from the registration of a trademark:

*Article 15.4 does not refer to the enjoyment of rights, but only to their availability. Article 16, on the other hand, defines the exclusive rights of the trademark owner in a negative way (the right to exclude others). Article 15.4, hence, cannot be interpreted as preventing a Member from limiting or prohibiting the use of trademarks for the commercialization of goods or services based on public health, security, or other reasons.*⁴⁹² (emphasis added)

301. In order to establish a *prima facie* case of violation of Article 15.4, the complainants would need to establish that under the tobacco plain packaging measure, Australia does not *register trademarks* based on the nature of the underlying product. The complainants have failed to do so. Despite the fact that all of the complainants in this dispute are pursuing claims under Article 15.4, none of the complainants address the ordinary meaning of its terms. Instead, the complainants' claims rest on fundamental mischaracterisations of both the scope of the relevant obligation and the nature of Australia's measure.

⁴⁹¹ Letter from D.A. Latham of Lovell, White, Durrant, to J. Smithson, Rothmans International Services Limited (6 July 1994) attaching Letter from L. Baeumer, Director, Industrial Property Law Department, WIPO to D. A. Latham of Lovell, White, Durrant, (5 July 1994), Bates No. 502592535-502592536, Exhibit AUS-234; Letter from L. Baeumer, Director Industrial Property Law Department, WIPO to R. Oman, Mudge, Rose, Guthrie, Alexander and Ferdon (31 August 1994), Bates No. 515446013-515446015, Exhibit AUS-235.

⁴⁹² C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), Exhibit AUS-242, p. 182. See also UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, (Cambridge University Press, 2005), Exhibit AUS-238, p. 234: "the critical point from a public policy perspective is that allowing registration of a trademark or service mark does not impair the government's authority to regulate the product associated with the mark. Even if a Member must allow registration of trademarks for cigarettes, it may ban (or limit) the sale of the cigarettes on public health grounds"; T. Voon and A. Mitchell, "Implications of WTO Law for Plain Packaging of Tobacco Products", in A. Mitchell, T. Voon, J. Liberman and G. Ayres, *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Elgar Edward Publishing, 2012), Exhibit AUS-240, p. 114.

302. The complainants maintain that the tobacco plain packaging measure is inconsistent with Article 15.4 because the nature of the goods forms an obstacle to the registration of a trademark. Specifically, the complainants argue that by preventing the use of certain non-inherently distinctive "signs", the tobacco plain packaging measure prevents such signs from acquiring distinctiveness through use in the course of trade, and thus the measure constitutes an "obstacle to registration" of these signs.⁴⁹³

303. In making this argument, the complainants are confusing the concepts of "signs" and "trademarks".⁴⁹⁴ As provided in Article 15.1, a sign must be capable of distinguishing between the goods and services of one undertaking from those of another undertaking in order to "constitute a trademark" (and therefore be eligible for registration). If a sign is non-inherently distinctive, and has not yet acquired distinctiveness through use (for whatever reason), it is simply not a "trademark".⁴⁹⁵

304. The complainants' assertion that by preventing the use of non-inherently distinctive *signs* the tobacco plain packaging measure is creating an obstacle to the registration of *trademarks* is therefore fundamentally flawed. Article 15.4 provides that Members may not refuse to register a trademark (which, by necessary implication, must *already* be capable of distinguishing goods) based on the nature of the underlying goods. The obligation is not, as the complainants suggest, to guarantee

⁴⁹³ See, e.g. Ukraine's first written submission, para. 183; Dominican Republic's first written submission, para. 274; Honduras' first written submission, para. 191, 193; Indonesia's first written submission, para. 190.

⁴⁹⁴ See, e.g. Honduras' first written submission, para. 184: "The trademark restrictions at issue prevent certain trademarks that are not inherently distinctive from acquiring distinctiveness through use" and para. 188: "Honduras' claim under Article 15.4 concerns the obstacles imposed on the registration of trademarks that fall into the latter category of signs."; Ukraine's first written submission, para. 183: "Absent evidence of use in the Australian market, non-inherently distinctive *signs* cannot be registered. As a result of Australia's plain packaging measure, the nature of the product forms an obstacle to obtaining and maintaining registration of the *trademark*."; Dominican Republic's first written submission, para. 274: "Consequently, trademark registration for this class of signs is denied simply because of the nature of the products to which the signs are to be applied – i.e., tobacco products"; and Indonesia's first written submission, para. 200: "By adopting PP, Australia has created an obstacle to the registration of non-inherently distinctive marks....".

⁴⁹⁵ See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.654: "a purely descriptive term on its own is not distinctive and is not protectable as a trademark".

the use of all non-inherently distinctive signs so that they may become distinctive *in the future* and therefore may constitute a trademark that is eligible for registration.⁴⁹⁶

305. To illustrate this point using Honduras' example of the purple trademark registered for Cadbury chocolate products,⁴⁹⁷ the obligation in Article 15.4 is not to register this non-inherently distinctive sign before it has become distinctive through use in the course of trade, nor is it to guarantee the use of the purple colour on Cadbury chocolate products to the extent that it becomes distinctive and then register it as a trademark. Rather, to the extent that the colour purple is a trademark (in that it has *already* become capable of distinguishing chocolate products through use), the obligation in Article 15.4 is not to refuse to *register this trademark* because it will be applied to chocolate.

306. The fundamental problem with the complainants' claim is evident in considering its implications. Many signs are non-distinctive in the absence of use. In order for them to become capable of distinguishing the goods of one undertaking from those of other undertakings, in most cases, very significant and extensive use of those signs would have to occur in multiple contexts in the course of trade over a lengthy period of time. In practical terms, this effectively means that Members must guarantee the right to sell and advertise products in their territory, regardless of the nature of those products (including whether they are addictive and/or dangerous).⁴⁹⁸ The proposition that Article 15.4 should be interpreted in a way that would result in the

⁴⁹⁶ Indonesia acknowledges that: "Article 15.1 defines what constitutes a trademark eligible for registration and, therefore, is relevant for the interpretation of Article 15.4. Under Article 15.1 distinctiveness is the basic criterion for identifying trademarks eligible for registration." Indonesia's first written submission, para. 186.

⁴⁹⁷ Honduras' first written submission, para.156, fn 133.

⁴⁹⁸ For example, under the complainants' interpretation of Article 15.4, a Member would have to permit the marketing of pharmaceuticals that may not meet safety standards in order to comply with the obligation to allow a trader to use a sign so that it can become capable of distinguishing a pharmaceutical product from those products of a competitor in the course of trade. Similarly, Members with measures that limit the promotion and advertising of tobacco products (including on television and in print media, during sporting events and even at the point of sale) would arguably have to undo almost all of these measures in order to ensure that signs are able to be used on tobacco products so that they may eventually become distinctive.

unravelling of legitimate restrictions on the sale and promotion of dangerous products, including tobacco, cannot be accepted.

307. The complainants recognise and attempt to resolve this tension in their arguments by suggesting that tobacco plain packaging is in fact not about the regulation of a dangerous product. For example, Honduras argues that it:

fully acknowledges that Members have an undisputed right to regulate trade in certain products that they consider harmful or otherwise inconsistent with their domestic policy objectives ... Importantly, however, Australia's trademark restrictions do not aim to restrict trade in products as such. Instead these measures eviscerate trademark rights".⁴⁹⁹

This distinction is both disingenuous and false. The tobacco plain packaging measure was implemented in order to regulate a dangerous and addictive product by restricting its advertising and promotion.

308. The tobacco plain packaging measure is consistent with Article 15.4 because it does not prevent the registration of trademarks based on the nature of the underlying product (i.e. tobacco). If a sign indeed qualifies as a trademark, that trademark will be registered in Australia. As explained in Part 1, section 28 of the TPP Act ensures that the operation of the TPP Act does not prevent an owner from registering a trademark under the Trade Marks Act, and none of the complainants have provided any evidence to demonstrate that trademarks cannot be registered as a result of the tobacco plain packaging measure.

309. In providing for the continued registration of tobacco-related trademarks, Australia is acting in a manner entirely consistent with its obligations under Article 15.4. Each of the complainants has failed to establish a *prima facie* case to the contrary.⁵⁰⁰

⁴⁹⁹ Honduras' first written submission, para. 206.

⁵⁰⁰ Ukraine alone advances a second claim under Article 15.4, based on its view that if a Member may not refuse to register a trademark based on the nature of the good under Article 15.4, a Member also has an obligation to "protect" that trademark (see Ukraine's first written submission, para. 188). Ukraine argues that by preventing the "use" of trademarks (other than word trademarks) on tobacco products, "Australia provides lesser protection under Articles 16.1 and 16.3 to trademarks

(continued)

5. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 16.1 of the TRIPS Agreement

310. Article 16.1 of the TRIPS Agreement articulates the "rights conferred" by Members on owners of registered trademarks:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

311. Article 16.1 obliges Members to provide the owner of a registered trademark with an "exclusive right to prevent" the use of certain signs by third parties in the course of trade where such use would result in a likelihood of confusion. The term "exclusive" is defined in relevant part as including "a right, privilege, quality, etc.: possessed or enjoyed by the individual(s) specified and no others".⁵⁰¹ The term "prevent" is defined as "stop, hinder, avoid".⁵⁰² The phrase "in the course of" is defined as "while doing; during the progress or length of (in the course of things, in

based on the nature of the product and provides less protection under domestic law to tobacco-related marks as it does to non-tobacco related marks, solely because of the nature of the product" (see Ukraine's first written submission, para. 188). Ukraine's claim is based entirely on its assertion that despite its ordinary meaning, when considered in its "holistic context", "the term 'registration' can also be read in a more substantive manner as necessarily referring to the rights flowing from registration" (see Ukraine's first written submission, para. 187). The evident problem with Ukraine's argument is that Article 15.4 provides only that Members may not refuse to register trademarks based on the nature of the underlying goods. Article 15.4 says nothing about the *nature* of the protection that flows from registration. If Article 15.4 were intended to cover the nature of the protection afforded to trademarks as a result of registration, the drafters would have made this clear. Ukraine's claim is without merit, and is not even supported by Ukraine's own expert in this dispute, who agrees that the registration provisions of the Paris Convention (including Article 7) "did not articulate a right to use a mark." See Expert Report of G. Dinwoodie, Exhibit UKR-1, para. 47. As noted above, Article 15.4 replicates Article 7 of the Paris Convention in all relevant respects.

⁵⁰¹ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 888. Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.602.

⁵⁰² *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 2341.

the ordinary sequence of events)."⁵⁰³ Further, the word "trade" is defined as "[b]uying and selling or exchange of commodities for profit".⁵⁰⁴ Therefore, in the context of Article 16.1, use of a sign by a third party is "in the course trade" if the sign is used by the third party up to and during the point of sale and purchase of the goods.⁵⁰⁵

312. On the basis of the ordinary meaning of the terms of Article 16.1, the right accorded to the owners of registered trademarks is a *negative* right – that is, the right to stop or hinder third parties from using identical or similar signs on identical or similar goods, up to and during the point of sale, where such use would cause or would be likely to cause confusion. As Australia has explained in detail in Part B, this understanding of the *negative* nature of the right conferred in Article 16.1 is consistent with the context and object and purpose of the TRIPS Agreement,⁵⁰⁶ prior panel and Appellate Body reports,⁵⁰⁷ and the views of leading commentators.⁵⁰⁸ The right conferred under Article 16.1 is *not* a positive right to use a trademark.

⁵⁰³ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 542.

⁵⁰⁴ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 3312.

⁵⁰⁵ Four of the complainants appear to recognize that the term "use of a trademark in the course of trade" refers to the use of a trademark during the buying and selling of goods for profit, see fn 543.

⁵⁰⁶ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁵⁰⁷ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.611 at fn 564: "Article 16.1 of the TRIPS Agreement only provides for a *negative right* to prevent all third parties from using signs in certain circumstances." See also Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186.

⁵⁰⁸ For example, C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), Exhibit AUS-242, p. 186: "Article 16.1 alludes to the right to exclude the use under certain conditions. It is clearly provided for as a negative right, not as the right to use the trademark."; N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 249: "Like all other industrial property rights dealt with by the TRIPS Agreement, trademark rights are also primarily described in a negative manner. Trade mark rights are rights to exclude, rather than to use."; J. Malbon, C. Lawson, and M. Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary* (Edward Elgar, 2014), Exhibit AUS-246, p. 294: "There is no positive right given to the registered owner to use the trademark. Consequently, Members may impose onerous conditions on the sale of the trademark-related products which may, in effect, prevent the use of the registered trademark or severely limit its use. For example, restrictions on the sale of tobacco products could restrict the use of advertising involving the trademark for the product."

313. In order for the complainants to establish a *prima facie* case of violation of Article 16.1, properly interpreted, the complainants would need to establish that the tobacco plain packaging measure prevents owners of registered trademarks from exercising their right to seek forms of relief in the event that a third party uses an identical or similar sign in the course of trade where such use creates a likelihood of confusion. The complainants have failed to do so.

314. The common claim amongst the complainants under Article 16.1 is that by restricting the use of certain trademarks in commerce, the tobacco plain packaging measure "diminish[es], and in some instances remove[s], the ability of trademark owners to exercise the exclusive rights guaranteed by Article 16.1 of the *TRIPS Agreement*, including the right to prevent third parties from using similar or identical signs in a manner that creates a likelihood of confusion."⁵⁰⁹ The basis of the complainants' claims is that if a trademark is not used, the likelihood of confusion is reduced, and so the right to prevent third parties from using similar or identical trademarks on similar or identical goods is diminished. The Dominican Republic characterises the likelihood of confusion as a "condition precedent" to the exercise of the right to prevent third parties from using certain trademarks, and argues that "severe restrictions on a trademark owner's ability to use its sign in the course of trade will, over time, disrupt and destroy the ability of the condition precedent to arise."⁵¹⁰

315. The necessary implication of the complainants' "condition precedent" claim is that Members must guarantee the use of a trademark under Article 16.1 in order to ensure that confusion is created (and the "condition precedent" is satisfied), so that trademark owners can then exercise their right of exclusion to prevent this confusion.⁵¹¹ Australia trusts that this argument will seem as implausible to the Panel as it did to Australia. Article 16.1 simply does not require Members to *ensure* that a

⁵⁰⁹ Dominican Republic's first written submission, para. 295.

⁵¹⁰ Dominican Republic's first written submission, para. 299. See also Honduras' first written submission para. 226 and Ukraine's first written submission para. 278.

⁵¹¹ Indonesia's first written submission, para. 204: "First, there can be no confusion with a mark that cannot be used in the marketplace. Indeed, the scope of protection afforded to a trademark is affected by its use. The more a trademark is used, the more well-known and stronger the mark becomes and the easier it would be to show a likelihood of confusion."

likelihood of confusion arises so that trademark owners will be able to *prevent* confusion. There is no "right of confusion" under Article 16.1.

316. The complainants largely focus their arguments on the "economic functions" of trademarks in the market. Indonesia, for example, claims that "the *raison d'être* of trademarks is their ability to distinguish goods, which is attained through use. When viewed in context, the right to exclude found in Article 16.1 can only serve the valid purpose of preserving the trademark owner's ability to effectively use a mark."⁵¹² The problem with the complainants' "economic function" arguments is that these arguments find no support in the plain text of the relevant provision, which provides a negative right to prevent certain acts, not a positive "right of use".

317. The tobacco plain packaging measure is not inconsistent with Article 16.1, properly interpreted. As described in Part 1 above, section 28 of the TPP Act provides that the operation of the TPP Act does not prevent the registration of a trademark or the maintenance of registration. By ensuring that trademarks can be registered and remain on the register, the tobacco plain packaging measure does not have any impact on the ability of owners of registered trademarks to exercise the rights granted under the Trade Marks Act to seek relief in the event that a third party uses an identical or similar sign in the course of trade where such use creates a likelihood of confusion.⁵¹³

318. Australia's measure operates to ensure that the protections accorded under the Trade Marks Act to owners of registered trademarks, including the right to prevent infringement, are completely preserved.⁵¹⁴ The complainants have failed to present a *prima facie* case to the contrary.^{515,516}

⁵¹² Indonesia's first written submission, para. 204.

⁵¹³ See Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁵¹⁴ The TPP Act makes it unlikely that the owners of registered tobacco trademarks will need to *exercise* these rights, however. The TPP Act prevents the use of figurative trademarks, including industry logos and brand imagery, on all tobacco products and packaging (see TPP Act, Exhibit AUS-1, Section 20). Accordingly, in relation to such figurative trademarks, third parties will not be permitted to use "identical or similar signs" in relation to "identical or similar [goods]" in the course of trade.

⁵¹⁵ Indonesia raises a second claim under Article 16.1 that is unsupported by its co-complainants. Indonesia claims that the TPP Act is inconsistent with Article 16.1 because Article 16.1 "requires that certain identical products carry trademarks in a manner that is deceptively similar and

(continued)

6. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 16.3 of the TRIPS Agreement

319. After Article 16.1 of the TRIPS Agreement provides owners of registered trademarks with a general negative right of exclusion, Articles 16.2 and 16.3 of the TRIPS Agreement address the *specific* rights conferred in relation to owners of "well known" trademarks.

320. Both of these Articles directly reference Article 6*bis* of the Paris Convention, which provides:

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well known mark or an imitation liable to create confusion therewith.

likely to result in consumer confusion" (Indonesia's first written submission, para. 215), making it "more difficult" for trademark owners to exercise their rights. (Indonesia's first written submission, para. 219). As a factual matter, Indonesia has provided no evidence in support of its claim that the tobacco plain packaging measure causes a greater likelihood of confusion. At most, Indonesia has provided a list of registered trademarks relating to tobacco products in Australia that use the word "gold" to assert that that these word trademarks could be easily confused with the (also registered) word trademark "Indonesian Gold" (Indonesia's first written submission, para. 217). Australia would note first that if these trademarks have all been registered, the Registrar has determined that these trademarks are in fact capable of distinguishing the goods of the trademark applicant from the goods of other persons. Furthermore, Australia recalls that in Australia's dark market, consumers were distinguishing between tobacco products by reference to the brand name and variant *prior* to the introduction of tobacco plain packaging measure. Indonesia has provided no evidence or even a coherent explanation in relation to its contention that the tobacco plain packaging measure will make it "more difficult" for registered trademark owners to exercise their rights.

⁵¹⁶ Ukraine also raises a second claim under Article 16.1 that is unsupported by its co-complainants. Ukraine argues that the tobacco plain packaging measure is inconsistent with Article 16.1 because it "leads to the loss of distinctiveness of non-inherently distinctive signs, which in turn will lead to their invalidation and thus elimination of protection under Article 16.1." (Ukraine's first written submission, para. 278). In response to Ukraine's Article 15.1 claim, Australia has already explained that a non-inherently distinctive sign, which has not acquired distinctiveness through use (for whatever reason), is not a "trademark", and that there is no obligation to register such signs. Article 16.1 is only applicable in relation to "registered trademarks"—it *does not apply* with respect to non-inherently distinctive signs that do not constitute trademarks and that have not been registered.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

321. Article 16.2 of the TRIPS Agreement supplements Article 6*bis* of the Paris Convention by expanding it to apply to services as well as goods. It also prescribes what Members must take into account (at a minimum) in determining whether a trademark is a well known trademark. Article 16.2 provides:

Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a mark is well known, Members shall take into account the knowledge of the trademark in the relevant sector of the public, including knowledge in the member state concerned, which has been obtained as a result of promotion of the trademark.

322. Article 16.3 further supplements Article 6*bis* of the Paris Convention by providing that it also applies to goods or services which are *not* similar to those in respect of which a well known trademark is registered, provided certain conditions are met. Article 16.3 provides:

Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trade mark are likely to be damaged by such use.

323. It is up to a Member to determine whether a trademark is "well known", as long as when making this determination, at a minimum, the Member "takes into account the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark" as required under Article 16.2. Similarly, it is up to a Member to determine whether the use of a trademark would indicate a connection

with, and would likely damage the interests of, the owner of the registered well known trademark.⁵¹⁷

324. As with Article 16.1, the rights conferred under Article 16.3 of the TRIPS Agreement (and Article 6*bis* of the Paris Convention) are negative rights.⁵¹⁸ This is clear from the ordinary meaning of the terms in these provisions, interpreted in their context and in light of the object and purpose of the relevant treaties. Article 6*bis* requires Members (ex officio if their legislation so permits, or at the request of an interested party) to "refuse or to cancel the registration and to prohibit the use" of an offending trademark. The ordinary meaning of these terms ("refuse",⁵¹⁹ "cancel",⁵²⁰ "prohibit"⁵²¹) makes clear that these provisions confer a negative right on owners of registered well known trademarks to prevent or stop certain actions.

325. Article 16.3 does *not* grant a positive right to owners of registered well known trademarks to use their trademarks, or a positive right to use a trademark to the point that it *becomes* well known. The subject matter protected under Article 16.3 is well known registered trademarks – not trademarks that may become well known in the future or trademarks that were once well known. Accordingly, in order to establish a *prima facie* case of violation under Article 16.3, the complainants would need to demonstrate that, in relation to *current* registered well known trademarks, the tobacco

⁵¹⁷ Some complainants submit that Article 16.3 creates protection against "dilution". See Indonesia's first written submission, para 229; Honduras' first written submission, para. 159; and Ukraine's first written submission, para. 302. Australia submits that whether or not Article 16.3 is an anti-dilution provision needs not be determined by the Panel in this dispute, because the issue here is simply that the rights conferred under Article 16.3 are *negative* rights of exclusion, and not positive rights of use.

⁵¹⁸ See Expert Report of C. Correa, (10 March 2015), Exhibit AUS-16, para. 18: "[A]rticle 16.3 confirms and extends the protection conferred by the Paris Convention against the *use by third parties* of well-known trademarks. This right to exclude can only be transformed into a (positive) right to use enforceable *against the State* by speculative thinking."

⁵¹⁹ The dictionary definition of "refuse" is, in relevant part, "decline acceptance or compliance; withhold permission." (*The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 2509).

⁵²⁰ The dictionary definition of "cancel" is, in relevant part, "...revoke an order or arrangements..." (*The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol.1, Exhibit AUS-243, p. 336).

⁵²¹ The dictionary definition of "prohibit" is, in relevant part, "[f]orbid (a thing) as by a command...[p]revent or hinder..." (*The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 2363).

plain packaging measure prevents Australia from refusing, cancelling, or prohibiting the use of a trademark in the circumstances outlined in Article 6*bis* of the Paris Convention.

326. The complainants do not even allege, much less substantiate, such a violation. Rather, the complainants argue that the tobacco plain packaging measure is inconsistent with Article 16.3 because the measure prevents the use of certain trademarks for tobacco products, and thus prevents trademarks from (i) "acquiring status" as a well known trademark; and (ii) "maintaining status" as a well known trademark.⁵²²

327. The complainants maintain that in order for a trademark to become "well known", or to continue to be "well known" in Australia, the trademark must be used. If a trademark is no longer well known, or is not able to become well known, it will not be afforded the protections guaranteed to well known trademarks under Article 16.3. Therefore, the complainants argue that by preventing trademarks from becoming well known or from maintaining well known status, the tobacco plain packaging measure violates Article 16.3.

328. As outlined above, Article 16.3 requires Members to grant owners of registered well known trademarks certain negative rights of exclusion to prevent particular uses by third parties. Article 16.3 certainly does not impose an obligation on Members to guarantee the use of trademarks so that they may "acquire" or "maintain" well known status. The ability to use a trademark, including to the extent it becomes well known, is a general market freedom – it is not an intellectual property right.⁵²³

⁵²² See Indonesia's first written submission, para. 242; Ukraine's first written submission para. 221; and Dominican Republic's first written submission para. 320. The Dominican Republic's Article 16.3 claim is raised by as a third party (Dominican Republic's first written submission, para. 316). Cuba "endorses" the claim under Article 16.3 (Cuba's first written submission para. 32(f)). Honduras does not make any claim under Article 16.3.

⁵²³ The complainants explain in detail how Australia determines whether a trademark is well known. Indeed, the Dominican Republic and Indonesia acknowledge that Australia's Trade Marks Act reflects Article 16.2 in this respect (See Dominican Republic's first written submission para. 333; and Indonesia's first written submission para 226). Australia does not believe that it needs to address the

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329. The complainants' interpretation of Article 16.3 is not supported by a good faith interpretation of the text. Furthermore, Australia notes that requiring Members to guarantee that all trademarks may be used so that they may eventually become "well known" would impose an impossible burden on Members. The complainants' interpretation of Article 16.3 would seem to prevent Members from imposing regulations that limit the opportunities for trademarks to become well known (for example, bans on the use of, or the advertising and promotion of, dangerous products).

330. Acknowledging the inherent difficulty of their Article 16.3 claims, the complainants maintain that their interpretation of Article 16.3 would not require Members to allow the use of all trademarks. Ukraine explains that "[s]ome limitation on the opportunity to use the trademark may be legitimate, such as when prohibiting the use of trademarks in an advertising context."⁵²⁴ However, the complainants have failed to explain the basis for this "exception" under their interpretation, or precisely why one measure that limits trademark use would breach Article 16.3 and another would not. Furthermore, because packaging is a form of advertising,⁵²⁵ the factual premise for this argument is flawed.

331. Nothing in the tobacco plain packaging measure prevents a trademark owner from availing itself of the protections that *are* afforded to owners of registered well known trademarks under Article 16.3,⁵²⁶ and none of the complainants has provided any evidence to the contrary.⁵²⁷ Although the use of certain appealing signs and trademarks is prohibited under Australia's measure, this is not relevant under

complainants' descriptions of how Australia "determines" whether a trademark is well known, because the obligation in Article 16.3 only applies with respect to registered trademarks that are (*already*) "well known".

⁵²⁴ Ukraine's first written submission, para. 259.

⁵²⁵ As demonstrated in detail in Part II.E.2.

⁵²⁶ See Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁵²⁷ Ukraine hypothesises that certain registered trademarks for tobacco products (Benson & Hedges logo, or the Winfield Chevron) may be well known in Australia (noting that no determination has been made that it is). Ukraine does not provide any evidence that the owners of these supposedly well known trademarks are not able to exercise their rights granted under the Trade Marks Act with respect to registered well known trademarks. See Ukraine's first written submission, para. 298.

Article 16.3. Australia is *not* obligated under Article 16.3 to grant a right to a trademark owner to use its well known trademark so that it may maintain its well known status, nor is it obliged to grant the owner of a trademark the right to use its trademark so that it may become well known. Australia submits that the complainants have failed to establish a *prima facie* case under a proper interpretation of this provision.⁵²⁸

7. Conclusion

332. At the outset of its response to the complainants' TRIPS Agreement claims, Australia observed that these claims are dependent upon a "right of use" theory that is divorced from the text of the relevant provisions, as well as the object and purpose of the Agreement as a whole. The complainants' claims discussed above are in fact so contrary to the plain text of the relevant provisions that Australia does not understand why the complainants pursued these claims at all. For the reasons set forth above, Australia requests that the Panel reject the complainants' claims under Article 15.1, Article 2.1 (incorporating Article 6*quinquies* A(1) of the Paris Convention), Article 15.4, Article 16.1, and Article 16.3 of the TRIPS Agreement.

333. As Australia will discuss in Parts E and F below, the complainants' claims under Articles 2.1 (incorporating Article 10*bis* of the Paris Convention), 22.2(b), and 24.3 of the TRIPS Agreement are similarly unmoored from the text. Before turning to these claims, however, Australia will address the complainants' claims under Article 20 of the TRIPS Agreement.

⁵²⁸ Honduras argues that the special requirements imposed by the tobacco plain packaging measure "are not justified under Article 17 of the TRIPS Agreement". Honduras' first written submission, paras. 252-257. Australia will not address this argument because Article 17 is not relevant to the present dispute. As Australia has explained above, a "right of use" is not among the "rights conferred by a trademark". See also discussion in fn 589.

**D. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE
TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH ARTICLE 20
OF THE TRIPS AGREEMENT**

1. Introduction

334. Article 20 of the TRIPS Agreement, entitled "Other Requirements", provides that:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

335. As Australia explained in Part B, Article 20 is the only provision of the TRIPS Agreement that relates to the use of trademarks *per se* (as opposed to the use of trademarks with respect to how their use or non-use may bear upon issues of trademark registration or enforcement).

336. To establish a violation of Article 20, a complainant must demonstrate that the "use" of a trademark "in the course of trade" has been "unjustifiably" "encumbered by special requirements". There is no dispute that the tobacco plain packaging measure imposes special requirements on the use of trademarks, at least in some respects. In Australia's view, the issues before the Panel are: (1) the scope of the "special requirements" at issue; (2) whether the complainants have established that those special requirements "encumber" the "use" of a trademark "in the course of trade"; and (3) to the extent that the complainants have established the existence of any such encumbrance, whether the complainants have further established that the tobacco plain packaging measure imposes this encumbrance "unjustifiably".

337. Australia will address these three issues in turn. In Part 2, Australia will demonstrate that, under a proper interpretation of the term, the scope of the "special requirements" at issue does not include the respects in which the tobacco plain

packaging measure prohibits the use of certain trademarks on tobacco retail packaging and products. In Part 3, Australia will demonstrate that the complainants have failed to establish that the relevant special requirements imposed by the tobacco plain packaging measure "encumber" the "use" of a trademark "in the course of trade". For this reason, the Panel must reject the complainants' claims under Article 20 at the threshold. Notwithstanding the complainants' failure to establish the threshold applicability of Article 20, Australia will demonstrate in Part 4 that the complainants have failed to establish that any such encumbrance, if it existed, has been imposed "unjustifiably".

2. The term "special requirements" does not encompass the aspects of the tobacco plain packaging measure that prohibit the use of certain trademarks on tobacco retail packaging and products

338. As Australia discussed in Part II.G.2, the tobacco plain packaging measure prohibits the use of certain types of trademarks on tobacco products and their retail packaging, while permitting the use of other types of trademarks subject to special form requirements. In respect of tobacco packaging, the tobacco plain packaging measure prohibits the use of figurative trademarks, composite trademarks, and stylized word trademarks. The measure permits the use of word trademarks that denote the brand, business or company name, or the name of the product variant, so long as these trademarks appear in the form prescribed by the TPP Regulations. In respect of tobacco products, the tobacco plain packaging measure prohibits the use of all trademarks on cigarettes, and, in respect of cigars, permits the use of trademarks denoting the brand, business or company name, or the name of the product variant, as well as the country of origin, so long as these trademarks appear in the form prescribed by the TPP Regulations.

339. Australia does not dispute that the tobacco plain packaging measure imposes "special requirements" upon the use of trademarks insofar as it requires that any word

trademarks used on retail tobacco packaging must appear in a certain form.⁵²⁹ However, Australia does not consider that the aspects of the tobacco plain packaging measure that prohibit the use of certain trademarks on tobacco products and their retail packaging are "special requirements" that fall within the scope of Article 20.

340. Article 20 provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". The ordinary meaning of the term "use", in this context, is to "make use of (a thing), esp. for a particular end or purpose; utilize, turn to account".⁵³⁰ If domestic law prohibits the "use" of certain trademarks altogether, then those trademarks are not being "use[d] ... in the course of trade" and Article 20 is therefore not engaged. Moreover, each of the examples of a "special requirement" contained in the first and second sentences of Article 20 refers to *how* a trademark may be used *when it is used*, not to *whether* it can be used. As noted by Professor Correa, "[t]he wording of Article 20 is straightforward: it applies to 'special requirements' and provides examples of such special requirements. There is nothing in Article 20 alluding to prohibitions on the use of a trademark, which only could be considered as a 'special requirement' by a distortion of language. Article 20 'prevents only measures that impose positive obligations upon the trademark owner, but does not prevent measures in the form of prohibitions on use'".⁵³¹

341. Turning to the context of Article 20, Article 19, entitled "Requirements of Use", specifically contemplates that "government requirements" may prohibit the use of a trademark altogether. In particular, the second sentence of Article 19 states that "[c]ircumstances arising independently of the will of the owner of the trademark

⁵²⁹ The dictionary definition of "requirement" is "a condition which must be complied with" (*The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 2541). The ordinary meaning of the term "special" connotes that requirements are "special" if they have a limited scope of application (for example, they apply only in respect of a specific category of goods or services) and have an exceptional or distinctive objective. See Panel Report, *US – Section 110(5) Copyright Act*, para. 6.109 (observing that the ordinary meaning of the term "special" means "having an individual or limited application or purpose") (citing *The Oxford English Dictionary*, p. 2971).

⁵³⁰ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 3485.

⁵³¹ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 77.

which constitute an obstacle to the *use of the trademark*, such as import restrictions on *or other government requirements* for goods or services protected by the trademark, shall be recognized as valid reasons for non-use." In this way, Article 19 recognizes that circumstances "independent[] of the will of the owner of trademark", including exogenous "government requirements", may prevent "the use of a trademark". The point of Article 19 is that any involuntary "non-use" of this type is a "valid reason" for opposing the cancellation of the registration of a trademark on the grounds of non-use. This context supports the interpretation that Article 20 (entitled "Other Requirements") is concerned with special requirements imposed upon the use of a trademark when "government requirements" do not otherwise prohibit its use.⁵³²

342. Finally, as Australia has already established in Part B above, and will develop in more detail in Part 4(c) below, the object and purpose of the TRIPS Agreement is to ensure the adequate and effective protection of the intellectual property rights that Members are required to confer under the Agreement. The rights that Members are required to confer under the TRIPS Agreement are negative rights of exclusion. Nothing in the TRIPS Agreement requires Members to confer a "right of use" upon owners of intellectual property, it being understood that issues relating to the use and exploitation of intellectual property are largely matters of domestic law. In light of the object and purpose of the TRIPS Agreement, Article 20 is best interpreted as imposing a discipline on how a Member may encumber the use of a trademark in the course of trade when its domestic laws and regulations otherwise do not prohibit the use of that trademark.

343. The implications of a contrary interpretation of Article 20 are profound. If Article 20 encompasses measures that prohibit the use of a trademark, as well as

⁵³² Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 84. Moreover, Article 27.2 of the TRIPS Agreement makes clear that, in respect of patents, the question of whether an invention may be patented under domestic law is distinct from the question of whether a patent may be exploited under domestic law. Like Article 19.1 in respect of trademarks, Article 27.2 recognizes that certain inventions may obtain a patent under domestic law, but the owner of that patent may be constrained in its exploitation of the patent by other aspects of domestic law. This is additional context in support of the conclusion that Article 20 of the TRIPS Agreement is concerned with special requirements imposed upon the use of a trademark in the course of trade when domestic law does not otherwise prohibit the use of that trademark.

measures that impose special requirements on the use of a trademark (when domestic law does not prohibit its use), this could lead to the conclusion, for example, that prohibitions on advertising fall within the scope of Article 20. Australia has examined the complainants' submissions carefully and cannot discern how, under their proposed interpretation of Article 20, a prohibition on tobacco advertising in print or broadcast media or a prohibition on the display of advertising and promotional material, including trademarks at the point of sale – measures that the complainants do not challenge in this dispute – would *not* fall within the scope of Article 20.⁵³³ Given that these are tobacco control policies in common use among WTO Members,⁵³⁴ the implications of a finding that these types of measures fall within the scope of Article 20 are deeply troubling and should be of concern to all WTO Members.

344. In this case, as described above, the tobacco plain packaging measure prohibits the use of certain types of trademarks (such as figurative trademarks) on tobacco products and their retail packaging, while permitting the use of other types of trademarks (such as word trademarks denoting company, brand, and variant name) subject to special requirements as to their appearance. If, contrary to what Australia considers to be the correct interpretation of Article 20, the Panel were to conclude that Article 20 encompasses both the prohibitive and permissive elements of the tobacco plain packaging measure, then Australia believes that the tobacco plain packaging measure is best seen as imposing a unitary set of special requirements that encumber the manner in which trademark owners may and may not use their trademarks on tobacco products and their retail packaging. Because the complainants have failed to demonstrate that these special requirements encumber the "use" of trademarks "in the course of trade", and because any such encumbrance, if it existed, would not be unjustifiable under a proper interpretation of Article 20 in any event, Australia will not further distinguish in the present submission between the aspects of the tobacco plain packaging measure that prohibit the use of certain trademarks and the aspects of

⁵³³ Indeed, as Australia will discuss in Part IV.D.4(d)iii below, several of the complainants appear to suggest that the types of advertising bans would be "*per se*" unjustifiable under Article 20.

⁵³⁴ World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2013 Enforcing bans on tobacco advertising, promotion and sponsorship* (2013), Exhibit AUS-80.

the tobacco plain packaging measure that permit the use of other trademarks subject to special requirements as to their appearance. However, this analytical approach is without prejudice to Australia's position that, properly interpreted, measures that prohibit the use of certain trademarks altogether are not within the scope of Article 20.

345. In all events, Australia considers that any interpretation of the term "unjustifiably" in Article 20 must take into account the scope of "special requirements" that the Panel considers to fall within this provision. If the Panel considers that the term "special requirements" encompasses prohibitions on the use of a trademark (such as, potentially, a prohibition on tobacco advertising in print or broadcast media or a prohibition on the display of advertising and promotional material, including trademarks at the point of sale), such an interpretation runs the risk of sweeping into Article 20 a wide array of public policy measures that, in Australia's view, Article 20 was never meant to address. In that event, the complainants' attempts to read a "necessity" or "least trade-restrictive" standard into Article 20, unfounded to begin with, become all the more problematic. The present challenge to tobacco plain packaging – a public policy measure specifically recommended for consideration by the 180 Parties to the FCTC – would be just the beginning.

3. The complainants have failed to establish a *prima facie* case that the special requirements at issue "encumber" the "use" of a trademark "in the course of trade"

(a) Article 20 requires that the special requirements at issue "encumber" the "use" of a trademark "in the course of trade"

346. Article 20 provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". Based on its plain text, a complainant asserting a claim under this provision must first establish that any special requirements imposed by the challenged measure "encumber" the "use" of a trademark "in the course of trade". If no such encumbrance is established, then the claim fails at the threshold and the analysis under Article 20 proceeds no further. If a complainant does establish that the special requirements at issue "encumber" the "use"

of a trademark "in the course of trade", then it is that encumbrance, so established, which the complainant must show to be unjustifiable.⁵³⁵

347. The verb "encumber" is defined, in relevant part, to mean "[h]amper, impede ...; act as a check or restraint on".⁵³⁶ It is evident from the structure of the phrase "encumbered by special requirements" and, in particular, its use of the preposition "by", that the relevant encumbrance under the first sentence of Article 20 is the encumbrance (if any) that arises from the special requirements imposed by the measure at issue. In other words, the encumbrance is a consequence or result of the special requirements.

348. For it to be cognizable under Article 20, any encumbrance resulting from the special requirements at issue must fall upon the "use" of a trademark "in the course of trade". As Australia noted above, the term "use", in this context, means "make use of (a thing), esp. for a particular end or purpose; utilize, turn to account."⁵³⁷ As context, Article 15.1 of the TRIPS Agreement makes clear that the function of a trademark is to distinguish the goods and services of one undertaking from those of other undertakings.⁵³⁸ Australia has previously discussed in Part C.5 that the term "in the course of trade" refers to acts undertaken during the buying and selling of goods for profit. Thus, "[t]he use of a trademark in the course of trade" refers to the act of employing or applying a trademark to distinguish the goods or services of one undertaking from those of other undertakings during the sale of goods or services.

⁵³⁵ As Australia will discuss in Part IV.D.4(e)i below, the complainant has the burden of proof under Article 20 to show that an encumbrance upon the use of a trademark in the course of trade is "unjustifiable". The following discussion, however, is unaffected by which party has the burden of proof with respect to unjustifiability.

⁵³⁶ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. No. 1, Exhibit AUS-243, p. 827.

⁵³⁷ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 3485.

⁵³⁸ Article 15.1 states, in this respect, that "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark." Australia discusses Article 15.1 of the TRIPS Agreement in Part IV.C.2 above.

349. Three consequences follow from the requirement under Article 20 that the special requirements at issue must "encumber" the "use" of a trademark "in the course of trade". First, it is clear from the inclusion of the phrase "in the course of trade" that an encumbrance is only relevant under Article 20 insofar as it encumbers the use of a trademark while the trademarked product remains within the course of trade. The "course of trade" necessarily culminates at the point of sale. Thus, insofar as a measure might affect how a trademark might be perceived by consumers or others after the point of sale, this effect would not relate to the use of a trademark "in the course of trade" and would fall outside the scope of Article 20. Such an effect would not form part of an encumbrance that can be evaluated for its consistency with Article 20.⁵³⁹

350. The second and related consequence of the threshold requirement under Article 20 is that in order to assess whether special requirements "encumber" the "use" of a trademark "in the course of trade", the "use" which must be evaluated is the use of a trademark to distinguish the goods and services of one undertaking from those of other undertakings while they remain within the course of trade. Whether this use has been encumbered must be evaluated in light of the special requirements taken

⁵³⁹ Four of the complainants appear to recognize that the term "use of a trademark in the course of trade" refers to the use of a trademark during the purchase and sale of a product. See Cuba's first written submission, para. 311 ("in a commercial context"; "relevant to buying and selling decisions" by actors in the market); Dominican Republic's first written submission, para. 347 (use of a trademark "in the marketplace"); Indonesia's first written submission, para. 270 (term is synonymous with "in commerce"); Ukraine's first written submission, paras. 338-339 (term refers to "in commercial use", use of a trademark "in retail trade"). Several of the complainants note that the French and Spanish texts of the TRIPS Agreement use a phrase which, in English, would translate literally as "in the course of commercial operations" ("au cours d'opérations commerciales", "en el curso de operaciones comerciales"). This confirms that the English phrase "in the course of trade" does not extend past the point of sale.

Honduras alone takes the position that the term "in the course of trade" goes beyond the point of sale and includes, *inter alia*, how a special requirement imposed upon the use of a trademark might affect "the post-sale perceptions of the consumer or its use of the product." See Honduras' first written submission, para. 224. Australia certainly agrees with Honduras that trademarks on tobacco packages and products can affect "the post-sale perceptions" not only of the consumer, but also others (such as adolescents and persons who do not currently smoke) who are exposed to the package or product. As a matter of law, however, these "post-sale" effects do not relate to "the use of a trademark in the course of trade" and are irrelevant to any evaluation of a measure under Article 20. The interpretation advanced by Honduras, if accepted, would mean that the term "in the course of trade" in Article 20 would place no practical limitation upon the scope of this provision. Such an interpretation would, of course, be contrary to the principle of effective treaty interpretation.

as a whole. Insofar as special requirements encumber the "use" of a trademark for other purposes (such as to convey positive emotional associations with a product or to appeal to particular segments of consumers), those "uses" are not relevant under Article 20.

351. The third consequence of the threshold requirement under Article 20 is that any identification of the relevant encumbrance must take into account other laws and regulations that affect how a trademark may be "used" in the course of trade. To the extent that the responding Member maintains other laws or regulations that affect how a trademark may be used to distinguish goods or services in the course of trade, the effects of those other measures must not be attributed to the particular "special requirements" that are the subject of the claim under Article 20. Otherwise, a panel could inadvertently find that the challenged set of special requirements is inconsistent with Article 20 when the encumbrance upon the use of a trademark in the course of trade is, in fact, a consequence of other measures that are not at issue in the dispute (when such measures may not even constitute "special requirements" within the meaning of Article 20). The encumbrance that a panel evaluates under Article 20 must be the encumbrance upon the use of a trademark, if any, that results from the imposition of the special requirements that are alleged to be inconsistent with Article 20.

(b) The complainants have failed to identify any encumbrance upon the use of a trademark in the course of trade resulting from the special requirements at issue

352. The three considerations laid out above – the limitation of Article 20 to encumbrances upon the use of a trademark "in the course of trade", the scope of the relevant "use" that may potentially be encumbered, and the relevance of other laws and regulations that may affect the use of a trademark in the course of trade – are highly significant to the present dispute. The complainants have failed completely to take these three considerations into account in presenting their claims under Article 20.

353. As Australia explained in Part 0, Australia is a dark market in respect of the purchase and sale of tobacco products. Australia maintains a comprehensive ban on the advertising and promotion of tobacco products, including extensive restrictions on how tobacco products may be marketed and displayed at the point of sale. The practical effect of these other measures, which are not at issue in this dispute, is that Australian consumers have no opportunity even to see tobacco packages or products in the course of trade until after they have decided which product to purchase (if any), and they will not actually see the package or product until the purchase transaction is complete (or nearly complete).

354. For the benefit of the Panel, Australia will walk through a typical tobacco purchase transaction in the Australian market. In every Australian state and territory, it is unlawful for cigarette packs to be displayed by retailers.⁵⁴⁰ It is also unlawful for tobacco product advertising and promotional materials to be displayed at the point of sale.⁵⁴¹ Thus, when a consumer enters a store to purchase a tobacco product, he or she will not be exposed to tobacco trademarks of any kind (other than word trademarks as they may be used on price boards, where state or territory law permits the use of price boards).



Figure 14: A typical Australian point of sale for tobacco products

⁵⁴⁰ Refer to Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

⁵⁴¹ Refer to Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

355. Note in this example that tobacco packages are kept, by law, behind the nondescript grey cabinets visible in the picture. Depending on the laws of each state or territory, the consumer will typically see only a single price board listing, for example, the brand name, the variant, the pack size, and the price, all in a prescribed appearance. These boards may not otherwise include tobacco trademarks, and some jurisdictions (such as the ACT) do not permit the use of price boards at all.⁵⁴² This is a picture of a price board used in Victoria:

BRAND	SIZE	PRICE
DUNHILL SMITH	25	18.99
DUNHILL	25	15.50
DUNHILL	25	16.99
DUNHILL 25 TWIN PACK	30.90	
B&W 4 HEDGES	25	15.50
B&W 4 HEDGES	25	16.99
B&W 4 HEDGES 25 TWIN PACK		
WINDMILL	25	17.99
WINDMILL	25	15.99
WINDMILL 25 TWIN PACK		
WINDMILL	25	18.99
WINDMILL	25	18.99
WINDMILL	25	14.99
WINDMILL	25	18.99
WINDMILL 25 TWIN PACK	33.90	
WINDMILL SILVER LINE SCENT	25	18.99
WINDMILL TOBACCO	25	22.99
WINDMILL TOBACCO	25	34.90
WINDMILL TOBACCO	25	20.49
WINDMILL TOBACCO	25	13.49
WINDMILL	25	16.49
WINDMILL	25	22.50
WINDMILL	25	27.60
WINDMILL	25	16.99
WINDMILL	25	14.49
WINDMILL	25	13.49
WINDMILL	25	19.99
WINDMILL	25	17.60
WINDMILL	25	14.99
WINDMILL	25	12.49
WINDMILL	25	12.99

Figure 15: A picture of a price board used in Victoria

356. Within this point-of-sale environment, the consumer will typically request a tobacco product by reference to the brand and variant name of the product (e.g. "Lucky Strike Original Red"). The salesperson will retrieve the requested product from behind the cabinet or other non-visible location in which tobacco products are stored. The salesperson will then bring the requested product to the counter. This is the first time that the consumer will see the tobacco package – i.e. after he or she has

⁵⁴² Refer to Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

decided which product to purchase and requested that product from the salesperson. In fact it is possible for the consumer to have paid for the product before the salesperson retrieves the product from its concealed location and delivers it to the consumer. At no point in the purchase transaction is the consumer able to see a tobacco package, except, perhaps, in a transaction where the package has been placed on the counter immediately prior to the consumer paying for the product.

357. Every single aspect of the transaction just described is prescribed by laws and regulations that are not at issue in this dispute. Within this regulatory context, only brand and variant names can be used to distinguish the tobacco products of one undertaking from those of other undertakings. Because the tobacco plain packaging measure permits the use of brand and variant word trademarks on the retail packaging of tobacco products, the special requirements imposed by the measure do not encumber the ability of trademarks to perform this function while the products remain within the course of trade. The complainants have therefore failed to establish the existence of any relevant encumbrance that results from the special requirements at issue.

358. It is clear from the evidence and arguments proffered by the complainants that their actual objections to the tobacco plain packaging measure relate to how trademarks on tobacco packaging and products shape the perceptions of consumers and others *after* the point of sale, i.e. after the course of trade is complete. Australia agrees with the complainants that trademarks on tobacco packaging and products can have these effects. Indeed, the rationale for the tobacco plain packaging measure relates precisely to these post-sale effects. For example, the manner in which trademarks on a tobacco package might appeal to an adolescent when the package is handed to her by a friend is a major public policy concern for Australia and many other countries, but it does not relate to "the use of a trademark in the course of trade".⁵⁴³ Any "encumbrance" that tobacco plain packaging requirements impose upon

⁵⁴³ To use the complainants' terminology, when an adolescent hands a tobacco package to a friend, any trademarks that appear on that package are not being "use[d]" "in the marketplace", "in a

(continued)

the "use" of a trademark in this post-sale context (if it can even be called a "use") is not an "encumbrance" that requires any sort of justification under Article 20 of the TRIPS Agreement. These effects are simply outside the scope of this provision, and rightly so.

359. The complainants have failed to establish a single respect in which the special requirements imposed by the tobacco plain packaging measure "encumber" the "use" of a trademark "in the course of trade", as those terms are properly interpreted. Other measures not at issue in this dispute prevent tobacco packages or products from being visible to consumers until moments before the course of trade is complete, at the earliest. In order to establish the threshold applicability of Article 20, the complainants would need to demonstrate that the special requirements at issue encumber the use of a trademark to distinguish the tobacco products of one undertaking from those of other undertakings, taking into account other laws and regulations that bear upon this use. As the complainants have failed to demonstrate the existence of such an encumbrance, the Panel must dismiss the complainants' claims under Article 20 of the TRIPS Agreement for this reason.

4. Even if the complainants had established the threshold applicability of Article 20, the complainants have failed to establish that any "encumbrance" resulting from the special requirements at issue has been imposed "unjustifiably" under a proper interpretation of this term

360. Australia has established in the preceding section that the complainants have failed to establish the threshold applicability of Article 20 of the TRIPS Agreement, as they have failed to establish that the special requirements at issue "encumber" the "use" of a trademark "in the course of trade". As a consequence, there is no relevant encumbrance for the Panel to evaluate in relation to the standard of unjustifiability established by Article 20.

commercial context", "in commerce", or "in retail trade". Nor are they being used "au cours d'opérations commerciales" or "en el curso de operaciones comerciales".

361. In this section, Australia will demonstrate that even if the complainants had established the existence of such an encumbrance – whatever it might be – that encumbrance is not "unjustifiable" under a proper interpretation of this term.

362. Australia will begin by interpreting the term "unjustifiably" in accordance with the ordinary meaning to be given to this term in its context and in light of the object and purpose of the TRIPS Agreement. As Australia will demonstrate, the term "unjustifiably", properly interpreted, requires there to be no rational connection between any encumbrance resulting from special requirements imposed upon the use of trademarks in the course of trade, on the one hand, and the pursuit of a legitimate public policy objective, on the other. Australia will demonstrate in Part (e) that the complainants have failed to demonstrate that the tobacco plain packaging measure meets this standard, even assuming that the complainants have established that the special requirements at issue "encumber" the "use" of a trademark "in the course of trade".

363. However, before demonstrating that the complainants have failed to establish a *prima facie* case that the tobacco plain packaging measure is "unjustifiable" under a proper interpretation of that term, Australia will demonstrate in Part (d) that the complainants' proposed interpretations of the term "unjustifiably" lack any foundation in the Vienna Convention's principles of treaty interpretation. Having identified relevant dictionary definitions of the term "unjustifiably", the complainants seek to imbue this term with all sorts of additional meanings and requirements unrelated to the ordinary meaning. These interpretative add-ons have no basis in principles of treaty interpretation. At a high level, the complainants' proposed interpretations of the term "unjustifiably" draw on their "right of use" theory, which Australia has fully rebutted in Part B above. The complainants' contention is that the term "unjustifiably" has the same meaning as "necessary" or should be interpreted to impose a standard similar to the analysis required under Article 2.2 of the TBT Agreement, including its notions of "least restrictiveness" and "reasonably available alternatives". Australia will demonstrate that these proposed interpretations of the term "unjustifiably" are completely unfounded.

(a) The ordinary meaning of "unjustifiably" requires that there be no rational connection between the encumbrance arising from the special requirements at issue and the pursuit of a legitimate objective

364. There is little disagreement among the parties about how to approach the ordinary meaning of the term "unjustifiably". All parties agree that the ordinary meaning of this term can be discerned, *inter alia*, from its non-adverbial form, "unjustifiable", and from its opposites, i.e. "justifiably" and "justifiable".

365. The term "unjustifiable" is defined as "not justifiable, indefensible".⁵⁴⁴ The ordinary meaning of the term "justifiable", in turn, is "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible".⁵⁴⁵ The complainants offer various dictionary definitions of the term "unjustifiably" which are not inconsistent with this understanding of the term.⁵⁴⁶

366. No prior panel has had occasion to consider the meaning of the term "unjustifiably" as it appears in Article 20. However, panels and the Appellate Body

⁵⁴⁴ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 3445.

⁵⁴⁵ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 1482.

⁵⁴⁶ Indonesia, for example, observes that the ordinary meaning of the term "unjustifiably" means "not capable of being justified" and that "[j]ustified" means "{m}ade just or right; made or accounted righteous; warranted; supported by evidence". Indonesia's first written submission, para. 287. (citing *Merriam Webster Online Dictionary*, accessed 29 September, <http://www.merriamwebster.com/dictionary/unjustifiably> ("unjustifiable"); and *The Compact Oxford English Dictionary*, 2nd. ed. (Oxford University Press, 2000), p. 905 ("justified")). Ukraine states that the term "unjustifiable" means "[i]ncapable of being justified or explained" and notes that the term "justified" is defined as "warranted, having good cause or reason, correct; supported by evidence." Ukraine's first written submission, para. 343 (citing *Webster's Online Dictionary*, Princeton University Press, accessed 24 June 2014, <http://www.websters-dictionary-online.org/search.php?word=unjustifiable>), Exhibit UKR-105 ("unjustifiable"); and A. Stevenson ed., *The Shorter Oxford English Dictionary*, 6th ed. (Oxford University Press, 2007), Exhibit UKR-73, p. 1482 ("justified")). Honduras notes that the term "justifiable" means "[a]ble to be shown to be right or reasonable; defensible" (Honduras' first written submission, para. 292 (citing *Oxford University Press*, *Oxford Dictionaries*, Exhibit HON-31), while Cuba similarly observes that the term "unjustifiable" refers to "that which cannot be 'shown to be just, reasonable or correct' or 'defensible'". Honduras' first written submission, para. 292 Cuba's first written submission, para. 316 (citing *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit CU-45, pp. 1482, 3445). To the extent that the complainants seek to spin dictionary definitions of the term "unjustifiably" into a standard of "necessity" or "least restrictiveness", these understandings are unfounded for the reasons that Australia will discuss in Part IV.D.4(d) below.

have considered the meaning of the term "unjustifiable" in the context of the phrase "arbitrary or unjustifiable discrimination", as it appears in Article XX of the GATT 1994 and Article XIV of the GATS. These prior interpretations support the conclusion that the term "unjustifiably" refers to measures that do not have a reasoned basis, i.e. that do not have a rational connection to a particular legitimate objective.

367. In *Brazil – Retreaded Tyres*, the Appellate Body considered that an examination of whether discrimination is "arbitrary or unjustifiable" within the meaning of Article XX of the GATT 1994 should be "directed at the cause, or rationale, of the discrimination".⁵⁴⁷ The Appellate Body explained that this inquiry requires a panel to examine whether the discrimination at issue has a "rational connection" to the objective that was provisionally found to justify the measure under one or more of the general exceptions contained in Article XX.⁵⁴⁸ The Appellate Body held that there is no "rational connection" if the rationale for discrimination "does not relate to" or "would go against" the pursuit of a legitimate objective under Article XX.⁵⁴⁹

368. In its report in *EC – Seals*, the Appellate Body recently reaffirmed the interpretation of the chapeau to Article XX that it articulated in *Brazil – Retreaded Tyres*. The Appellate Body stated that "[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."⁵⁵⁰ The Appellate Body examined this issue as one of whether the discrimination inherent in the measure had a "rational relationship" to the objective that provisionally justified the measure under Article XX.

⁵⁴⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225.

⁵⁴⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

⁵⁴⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228 (finding that the discrimination at issue did not satisfy the chapeau to Article XX because it "it bears no relationship to the legitimate objective pursued by the [measure at issue], and even goes against this objective, to however small a degree.").

⁵⁵⁰ Appellate Body Report, *EC – Seals*, para. 5.306.

369. These prior Appellate Body reports are consistent with the ordinary meaning of the term "unjustifiably" cited above and support the conclusion that the use of a trademark in the course of trade is "unjustifiably" encumbered by special requirements only if there is no "rational connection" between the imposition of the special requirements and a legitimate public policy objective. The meaning of the term "unjustifiably" in Article 20 of the TRIPS Agreement must be *at least* as permissive as the meaning of the term "unjustifiable" in the chapeau to Article XX, considering that Article XX concerns measures that have been found to violate one or more provisions of the GATT 1994. Article 20 of the TRIPS Agreement, by contrast, is not an exception to a violation. Rather, it is an affirmative obligation relating to special requirements that encumber the use of trademarks in the course of trade, and the ordinary meaning of Article 20 requires only that such encumbrances bear a rational connection to a legitimate public policy objective.

(b) The ordinary meaning of the term "unjustifiably" is fully supported by its context

370. The conclusion that the use of a trademark is "unjustifiably" encumbered by special requirements if there is no rational connection between the imposition of the special requirements at issue and a legitimate objective is further supported by the context in which the term "unjustifiably" appears.

371. As Australia explained in Part B, the TRIPS Agreement is not generally concerned with the use of trademarks, or with the use of other types of intellectual property. The principal objectives of Part II, Section 2 of the TRIPS Agreement in relation to the pre-existing provisions of the Paris Convention were to: (1) define the negative rights of exclusion that Members are required to confer upon the owners of registered trademarks; (2) expand the scope of trademark rights to encompass trademarks for services as well as goods; (3) ensure that all WTO Members are committed to implement the requirements of Section 2 as part of the single undertaking; and (4) provide an effective dispute settlement mechanism for disputes arising in respect of these commitments. Issues relating to the use of intellectual property were left largely within the realm of domestic law, as they had been under the Paris Convention.

372. As Australia will discuss below in response to the complainants' arguments, Article 20 is not an "exception" to rights that Members are otherwise required to confer upon trademark owners under domestic law. Such exceptions are the subject matter of Article 17. Instead, Article 20 is a provision that relates, exceptionally, to a sovereign right that the TRIPS Agreement does not otherwise seek to constrain.⁵⁵¹ Further, as Australia has outlined, Article 19, which immediately precedes Article 20, specifically contemplates that Members may regulate products in such a way as to create an obstacle to the use of a trademark, and provides that Members must not refuse to renew registration on this basis. It is consistent with this context that Article 20 requires only that the imposition of a special requirement upon the use of trademarks have a rational connection to a legitimate objective – and not, for example, that any resulting encumbrance be "necessary" or "least restrictive", standards that the covered agreements impose when a domestic measure is inconsistent with or has the potential to impinge upon a core concern of the relevant covered agreement.

373. The fact that Article 20 comes toward the end of Section 2 provides further contextual support for this interpretation. Article 20 is outside the main line of Section 2's concern with rights with respect to registration and rights of exclusion that pertain to individual trademarks, which likely explains why, contextually, it comes toward the end of Section 2. In the case of special requirements imposed upon the use of trademarks in the course of trade, the drafters considered that such requirements are permissible so long as they are not "unjustifiable". This choice is consistent with the fact that, as discussed above, the Paris Convention – upon which Section 2 of the TRIPS Agreement is largely based – "does not contain any obligation to the effect that the use of a registered trademark must be permitted".⁵⁵²

⁵⁵¹ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 348: "because the TRIPS Agreement is not about the use of protected intangible assets, but rather their protection against the unauthorized use by third parties, measures restraining the use of the assets by their owners do not need to be covered by exceptions. They result from public policies, which WTO Members are free to adopt."

⁵⁵² Letter from D.A. Latham of Lovell, White, Durrant, to J. Smithson, Rothmans International Services Limited (6 July 1994) attaching Letter from L. Baeumer, Director, Industrial Property Law

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374. In sum, it is evident from the context of Article 20 that the term "unjustifiably" was not meant to impose significant constraints upon Members' sovereign right to regulate the use of trademarks in furtherance of public policy objectives (as acknowledged in the principle set forth in Article 8.1). These considerations support the conclusion that an encumbrance resulting from the imposition of special requirements upon the use of a trademark is not "unjustifiable" if the encumbrance has a rational connection to a public policy objective.

(c) The ordinary meaning of the term "unjustifiably" is consistent with the object and purpose of the TRIPS Agreement

375. Finally, the conclusion that the term "unjustifiably" should be interpreted in accordance with its ordinary meaning, and in the same manner in which the Appellate Body has previously interpreted the term "unjustifiable", is supported by a consideration of the object and purpose of the TRIPS Agreement, as well as a consideration of the principle set forth in Article 8.1 of the Agreement.

376. As Australia discussed in Part B above, the core object and purpose of the TRIPS Agreement is to ensure that all WTO Members provide a minimum level of exclusive rights to owners of intellectual property. These exclusive rights are in the nature of "negative rights to prevent certain acts", not "positive rights to exploit or use certain subject matter".⁵⁵³ As Carvalho explains, the "fundamental and overall thrust" of the TRIPS Agreement "is about the protection of intellectual property rights, not about the freedom to exploit them in trade."⁵⁵⁴ This is because "it was the lack of intellectual property protection that was deemed the barrier to trade, not restrictions [on] their economic exploitation."⁵⁵⁵

Department, WIPO to D.A. Latham of Lovell, White, Durrant, (5 July 1994), Bates No. 502592535-502592536, Exhibit AUS-234.

⁵⁵³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁵⁵⁴ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 348.

⁵⁵⁵ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, p. 348

377. The first recital to the *Preamble* of the TRIPS Agreement states that the objectives of the Agreement are to "reduce distortions and impediments to international trade" and to "promote the effective and adequate protection of intellectual property rights".⁵⁵⁶ The negative rights of exclusion that Members are required to confer under the TRIPS Agreement fulfil these objectives by ensuring that the owners of intellectual property rights are protected against the unauthorized use of their rights by third parties. In this way, the TRIPS Agreement promotes international trade by ensuring that the owners of intellectual property rights can engage in international trade with confidence that their intellectual property rights will be recognized and enforceable against third parties in all WTO Member jurisdictions according to certain minimum standards.

378. In respect of each category of intellectual property covered by Part 2 of the TRIPS Agreement, the Agreement contains a provision describing the scope of the intellectual property rights that Members are required to confer. Each of these provisions is cast in terms of a right to exclude third parties from engaging in unauthorized use of the relevant intellectual property, and not one of these provisions refers to a right to exploit the relevant intellectual property.⁵⁵⁷ It should be apparent that the TRIPS Agreement's objective of "promot[ing] the effective and adequate protection of intellectual property rights" refers to the protection of the intellectual property rights that Members are *required* to confer under the TRIPS Agreement, and not to the protection of *additional* rights that Members might determine in their own discretion to provide under domestic law.⁵⁵⁸

⁵⁵⁶ The first recital also refers to "ensur[ing] that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade", an objective that is not relevant in the present dispute.

⁵⁵⁷ See Article 16.1 of the TRIPS Agreement ("exclusive right to prevent all third parties ..."); Article 22.2 ("the legal means for interested parties to prevent ..."); Article 23.1 ("the legal means for interested parties to prevent ..."); Article 28.1 ("to prevent third parties not having the owner's consent ..."); Article 36 ("shall consider unlawful the following acts if performed without the authorization of the right holder ...").

⁵⁵⁸ Indeed, Article 1.1 of the TRIPS Agreement specifically provides that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."

379. The nature of the rights that the TRIPS Agreement seeks to protect has important implications for the rights that Members retain to regulate the use and exploitation of intellectual property, including trademarks. As noted above, the panel in *EC – Trademarks and Geographical Indications (Australia)* observed that the fact that the TRIPS Agreement requires Members to confer certain negative rights of exclusion upon intellectual property owners "inherently grants Members freedom to pursue legitimate public policy objectives", since most measures that regulate the use or exploitation of intellectual property will not interfere with the rights of exclusion that Members are required to confer.⁵⁵⁹ Most such measures are simply "outside the scope of intellectual property rights" and are therefore not constrained by Members' obligations under the TRIPS Agreement.⁵⁶⁰

380. Article 8 of the TRIPS Agreement, entitled "Principles", is an express acknowledgement of the broad scope that Members retain under the TRIPS Agreement to adopt laws and regulations for public policy purposes. To reiterate, Article 8.1 provides that:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

381. Importantly, Article 8.1 is not an exception for public policy measures that are otherwise *inconsistent* with a Member's obligations under the TRIPS Agreement. Instead, it enunciates "a fundamental principle of the TRIPS Agreement" that must be taken into account "when interpreting and applying its remaining provisions."⁵⁶¹ Article 8.1 is a recognition that each Member retains the right to adopt measures in furtherance of public policy objectives, including measures to protect public health, as long as those measures are consistent with the Member's obligations under the TRIPS

⁵⁵⁹ Panel Report *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁵⁶⁰ Panel Report *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁵⁶¹ P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd ed. (Cambridge University Press, 2013), Exhibit AUS-237, p. 955.

Agreement. The provisions of the TRIPS Agreement must be interpreted in light of this "fundamental principle".

382. The *Declaration on the TRIPS Agreement and Public Health* also refers to the principle set forth in Article 8.1.⁵⁶² The Declaration states that the TRIPS Agreement "does not and should not prevent members from taking measures to protect public health", and "reaffirm[s] the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose." The Declaration further states that "in applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles", i.e. in Articles 7 and 8.

383. Taking all of these considerations into account, it is apparent that the object and purpose of the TRIPS Agreement supports the conclusion that the term "unjustifiably" in Article 20 cannot be interpreted other than in accordance with its ordinary meaning, i.e. as requiring a rational connection between any special requirements imposed upon the use of trademarks in the course of trade and a legitimate public policy objective. In accordance with Article 8.1, the term "unjustifiably" must be interpreted to give effect to the principle that Members retain the right to adopt measures in furtherance of public policy purposes so long as those measures are consistent with the Agreement. That principle is served by giving the term "unjustifiably" its ordinary meaning. This interpretation is fully consistent with the object and purpose of promoting the adequate and effective protection of the intellectual property rights that Members are required to confer under the TRIPS Agreement.

⁵⁶² WTO Ministerial Conference, 'Declaration on the TRIPS Agreement and Public Health', WT/MIN(01)/DEC/2, (20 November 2011), Exhibit AUS-247.

(d) The complainants' attempts to add additional meanings and requirements to the term "unjustifiably" are not supported by principles of treaty interpretation

384. Having identified relevant dictionary definitions of the term "unjustifiably", the complainants then seek to imbue this term with all sorts of additional meanings and requirements that find no basis in a proper interpretation of Article 20. Broadly speaking, the complainants contend (either alone or in various combinations) that the term "unjustifiably": (1) means "necessary" or requires a "relational analysis" similar to the analysis required under Article 2.2 of the TBT Agreement; (2) requires an "individual assessment" of the features of particular trademarks in relation to the intended public policy objective; or (3) precludes special requirements that prohibit altogether the use of certain registered trademarks (such as purely figurative marks). Australia will address each of these arguments in turn, along with two other miscellaneous interpretative arguments advanced in each case by only one complainant.

i. "Unjustifiably" does not mean "necessary" or require an analysis similar to the analysis required under Article 2.2 of the TBT Agreement

385. With varying degrees of candour, most of the complainants contend that the term "unjustifiably" requires an evaluation of the "necessity" of a measure (such as under Article XX(d) of the GATT 1994) or the application of a standard similar to that which is required under Article 2.2 of the TBT Agreement, including its evaluation of whether a measure is "no more trade-restrictive than necessary to fulfil a legitimate objective" in light of "reasonably available alternatives".⁵⁶³ In this way, the

⁵⁶³ Australia will refer to this latter concept as "least restrictiveness". By "least restrictiveness", Australia refers to the complainants' various formulations of the notion that, under Article 20, an encumbrance upon the use of trademarks must not be more restrictive than necessary (either of international trade or of the use of trademarks, or both) to fulfil a legitimate objective, taking into account the existence of reasonably available alternatives. See, e.g. Honduras' first written submission, para. 297 ("the regulating Member must choose the alternative measure with the least restrictive impact on other Members' trade"); Ukraine's first written submission, para. 392 (positing that any evaluation of whether an encumbrance has been imposed "unjustifiably" must take into account

(continued)

complainants seek to import into the term "unjustifiably" an entire body of jurisprudence that panels and the Appellate Body have developed with respect to other provisions of the covered agreements which bear no resemblance to Article 20 of the TRIPS Agreement.

386. The Dominican Republic, for example, asserts that the term "unjustifiably" requires a panel to evaluate the nature and extent of the encumbrance imposed upon the use of a trademark in relation to the objective for which the encumbrance is imposed, taking into account the degree of contribution that the encumbrance makes toward that objective and the availability of alternative measures that would make an equivalent contribution toward that objective with a lesser degree of encumbrance upon the use of a trademark.⁵⁶⁴ While the Dominican Republic does not refer to Article 2.2 of the TBT Agreement in articulating this proposed interpretation of the term "unjustifiably", the factors that the Dominican Republic identifies are nearly indistinguishable from some of the factors that panels and the Appellate Body have identified as relevant under Article 2.2.⁵⁶⁵

387. The Dominican Republic even refers to its proposed interpretation of Article 20 as a "relational analysis" standard – exactly the term that panels and the Appellate Body have used to describe the analysis required under Article 2.2 of the TBT Agreement once a technical regulation is shown to restrict trade.⁵⁶⁶

"its trade-or trademark-restrictive nature and the availability of alternative measures"). Dominican Republic's first written submission, para. 390 (asserting that the term "unjustifiably" requires an examination of whether "an alternative measure could have been deployed that would make an equivalent contribution, while imposing a lesser or no encumbrance on trademark use"). Because the complainants are unclear and inconsistent as to whether they mean "least restrictive of trade" or "least restrictive of trademark use", or both, Australia will refer to this idea generically as "least restrictiveness".

⁵⁶⁴ Dominican Republic's first written submission, paras. 387-391.

⁵⁶⁵ Notably, the Dominican Republic and other complainants do not refer to risks of non-fulfilment, which are a relevant factor under Article 2.2 of the TBT Agreement. They also omit reference to the importance of the public policy objective, which is relevant to an examination of "necessity" under the three exceptions set forth in Article XX of the GATT 1994, that refer to the term "necessary". See, e.g. Ukraine's first written submission, paras. 396-403; Honduras' first written submission, paras. 296-297; Cuba's first written submission para. 319; and Dominican Republic's first written submission paras. 387-391.

⁵⁶⁶ Dominican Republic's first written submission, para. 391.

388. The Dominican Republic later acknowledges that the manner in which it interprets the term "unjustifiably" is effectively the same as the standard required under Article 2.2 of the TBT Agreement. The Dominican Republic begins its discussion of Article 2.2 by stating that, in its view, "the elements of the 'relational' analysis under Article 2.2 are not unlike those that we have said should inform the analysis of 'unjustifiable' under Article 20 of the TRIPS Agreement ...".⁵⁶⁷ The Dominican Republic then proceeds to analyse the tobacco plain packaging measure under Article 2.2 of the TBT Agreement largely by incorporating the arguments that it developed in relation to Article 20 of the TRIPS Agreement. In this way, the Dominican Republic makes clear that, in its view, the term "unjustifiably" means "not more restrictive of the use of trademarks than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create". The Dominican Republic plainly considers that the Panel should apply this proposed interpretation of the term "unjustifiably" in the same manner that panels and the Appellate Body have applied Article 2.2 of the TBT Agreement.⁵⁶⁸

389. Ukraine, for its part, takes the position that the term "unjustifiably" somehow imposes a higher standard than what it calls "mere necessity".⁵⁶⁹ Ukraine does not explain what would need to be demonstrated under its "necessity-plus" standard. Along the same lines as the other complainants, Ukraine concludes that the term

⁵⁶⁷ See, e.g. Dominican Republic's first written submission, para. 981.

⁵⁶⁸ Cuba and Honduras interpret the term "unjustifiably" in essentially the same manner as the Dominican Republic, i.e. seeking to assimilate that term to Article 2.2 of the TBT Agreement. For example, Cuba's first written submission, para. 319: "a special requirement should be treated as unjustifiable if any of the following (non-exhaustive) conditions are met: (a) If the aim sought to be achieved (through the special requirement) is illegitimate. (b) If the special requirement is ineffective, in that it fails to achieve the legitimate aim for which it is imposed. (c) If the special requirement is disproportionate, in that there are alternative measures which do not encumber the use of trademarks (or which would encumber the use of trademarks to a lesser degree) that meet the legitimate aim sought to be achieved an equivalent (or greater) extent." Honduras' first written submission, para. 296: "In order to strike this balance, a WTO panel must consider the two following criteria: First, does the measure contribute to its stated objective; and Second, can this objective be achieved through a less-restrictive measure, that is, a measure that has a lesser impact on the rights of other Members?" Honduras notes that "The above criteria have been applied by panels and the Appellate Body when balancing a Member's rights and obligations under various legal standards of the covered agreements, for instance, the 'necessity' test under Article XX of the GATT 1994, Article XIV of the GATS and Article 2.2 of the TBT Agreement." Honduras' first written submission, para. 298.

⁵⁶⁹ Ukraine's first written submission, para. 390.

"unjustifiably" must mean, at a minimum, what it characterises as a "strict necessity" test under Article 2.2 of the TBT Agreement.⁵⁷⁰ Like the Dominican Republic, Ukraine attempts to demonstrate that the tobacco plain packaging measure is "unjustifiable" under Article 20 of the TRIPS Agreement largely by incorporating the arguments that it puts forward in support of its claims under Article 2.2 of the TBT Agreement.⁵⁷¹

390. The complainants make a variety of interpretative arguments in support of their contention that the term "unjustifiably" in Article 20 must be interpreted as a "necessity" test or a test comparable to Article 2.2 of the TBT Agreement. As Australia will proceed to demonstrate, each of those arguments is erroneous.

a. Article 20 does not refer to "necessity" or concepts similar to those set forth under Article 2.2 of the TBT Agreement or Article XX of the GATT 1994

391. Before turning to the specific arguments that the complainants advance in support of their "necessity" argument, however, Australia will begin with the simple observation that if the drafters of Article 20 had intended to incorporate notions of "necessity", "least restrictiveness", and "reasonably available alternatives" into the obligation established by Article 20, they could have done so. The fact that these notions are nowhere evident on the face of Article 20 means that the ordinary meaning of the terms must be given their interpretative effect.

392. The concepts of "necessity", "least restrictiveness", and "reasonably available alternatives" have a long and established history in the WTO and in the GATT before it. These concepts appear in a variety of places in the covered agreements and in the jurisprudence interpreting those agreements. For example, the concept of "necessity" has been extensively examined in connection with the use of the term "necessary" in

⁵⁷⁰ Ukraine's first written submission, para. 391.

⁵⁷¹ Ukraine's first written submission, paras. 396-402.

Articles XX(a), XX(b), and XX(d) of the GATT 1994.⁵⁷² Even before the adoption of the WTO Agreement, GATT panels interpreting Article XX of the GATT 1947 had concluded that a measure could be considered "necessary" only if the party invoking Article XX demonstrated that there was no reasonably available alternative measure that was consistent with the GATT, and that the measure actually chosen entailed the least degree of inconsistency with other GATT provisions.⁵⁷³ These early articulations of the concept of "necessity" influenced the drafting of various provisions of the Uruguay Round agreements, including Article 2.2 of the TBT Agreement.⁵⁷⁴

393. Notwithstanding the fact that the concepts of "necessity", "least trade-restrictiveness", and "reasonably available alternatives" were well known at the time of the Uruguay Round and appear in other Uruguay Round agreements, these concepts were not incorporated into Article 20 of the TRIPS Agreement. Article 20 could have been drafted, for example, to provide that:

Special requirements imposed upon the use of a trademark in the course of trade shall not be more restrictive of the use of trademarks than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

394. But this is not what Article 20 says. Instead, Article 20 uses the word "unjustifiably" to establish the standard by which special requirements imposed upon the use of trademarks are to be evaluated. The ordinary meaning of this term is clear and bears no resemblance to the concepts of "necessity", "least restrictiveness", and "reasonably available alternatives" that appear elsewhere in the covered agreements. Just as the use of the same or similar terms in different provisions of the covered agreements creates a presumption that the terms should be interpreted to have the same or similar meaning, the use of different terms creates a presumption that the

⁵⁷² These articles establish general exceptions, respectively, for measures "necessary to protect public morals", "necessary to protect human, animal or plant life or health", and "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement ...".

⁵⁷³ See, e.g. GATT Panel Report, *US – Section 337*, para. 5.26; GATT Panel Report, *Thailand – Cigarettes*, para. 74.

⁵⁷⁴ As discussed at length in Part V.B below, Article 2.2 of the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".

terms were intended to have a *different* meaning.⁵⁷⁵ Given the vast and incontrovertible difference between the term "unjustifiably" and the terminology that has been used to establish requirements of "necessity", "least restrictiveness", and an evaluation of "reasonably available alternatives", it is implausible for the complainants to suggest that this was the intended meaning of the term "unjustifiably" in Article 20.

395. For these reasons alone, the complainants' attempts to interpret Article 20 as establishing a standard of "necessity" or a standard comparable to Article 2.2 of the TBT Agreement are fundamentally misguided. This is before one even begins to evaluate the specific interpretative arguments that the complainants advance in support of their position. An analysis of those arguments underscores just how untenable their proposed interpretation of Article 20 is.

b. "Necessity" and concepts of "least restrictiveness" do not follow from the ordinary meaning of "unjustifiably"

396. In Part (a) above, Australia demonstrated that the ordinary meaning of the term "unjustifiably" supports the conclusion that an encumbrance resulting from the imposition of special requirements is not "unjustifiable" if there is a rational connection between the encumbrance imposed and the pursuit of a legitimate public policy objective. As Australia further demonstrated, this interpretation is fully supported by the manner in which panels and the Appellate Body have interpreted the term "unjustifiable".

397. The complainants' descriptions of the ordinary meaning of the term "unjustifiably" do not support their assertion that this term requires an examination of "necessity" or an examination of whether the encumbrance is the "least restrictive"

⁵⁷⁵ For example, it is well established that the use of different terminology in the general exceptions established under Article XX of GATT 1994 must be given interpretative effect. Three of those exceptions refer to measures that are "necessary" to the relevant objective, another three exceptions refer to measures "relating to" the relevant objective, and still others use different terms (such as "undertaken in pursuance of", "imposed for the protection of", "essential to"). See, e.g. Appellate Body Report, *US – Gasoline*, pp. 17-18.

encumbrance possible in light of "reasonably available alternatives". Several of the complainants seek to derive these conclusions, for example, from the fact that the ordinary meaning of the term "unjustifiably" can be seen to encompass an examination of whether a measure is "reasonable". The complainants seek further support for these notions based on the manner in which prior panel and Appellate Body reports have interpreted the term "reasonable" and related terms such as "undue".

398. As is apparent from the complainants' own citations, their proposed interpretations of the term "unjustifiably" simply do not follow from the ordinary meaning of the terms on which they rely or the manner in which those terms have been interpreted by panels and the Appellate Body. Beginning with the term "reasonable", prior panels interpreting Article X:3(a) of the GATT 1994⁵⁷⁶ have recognized that the ordinary meaning of this term is "in accordance with reason; not irrational or absurd."⁵⁷⁷ Panels interpreting the term "reasonable" as it is used in other provisions of the covered agreements have reached the same conclusion.⁵⁷⁸ This understanding of the ordinary meaning of the term "reasonable" does not support the

⁵⁷⁶ Article X:3(a) of the GATT 1994, provides that "[e]ach contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in para. 1 of this Article."

⁵⁷⁷ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. No. 2, Exhibit AUS-245, p. 2481. See, e.g. Panel Report, *US – COOL*, paras. 7.850, 7.859 (evaluating whether the measure at issue had "any justifiable rationale"); and Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.385, 7.388 (evaluating whether the measure at issue was "in accordance with reason", "having sound judgement", "sensible", "within the limits of reason", "articulate"). In *Thailand – Cigarettes (Philippines)*, the panel considered the Appellate Body's interpretation of the term "unjustifiable" as it appears in Article XX of the GATT 1994 to be relevant to the interpretation of the term "reasonable" as it appears in Article X:3(a). The panel found that Thailand's decision to grant dual functions to certain government officials had a "rationale behind it" and was therefore "reasonable" within the meaning of Article X:3(a), even though there may have been alternative means by which Thailand could have accomplished the same administrative objectives. Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.925, 7.929. The panel considered that, under a standard of "reasonableness", it was not the function of the panel to "second guess" a Member's administration of its laws and regulations, so long as there is a rationale to support the Member's choice. Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.924.

⁵⁷⁸ See, e.g. Panel Report, *United States – Shrimp (Thailand)*, para. 7.141 (interpreting the term "reasonable security" in the Note Ad Article VI of the GATT 1994 to mean "not irrational or absurd"); Panel Report, *United States – Customs Bond Directive*, para. 7.118 (same); Panel Report, *Mexico – Telecoms*, para. 7.182 (interpreting the term "reasonable" in Section 2.2(b) of the Reference Paper on telecommunications services).

conclusion that a measure may be considered "reasonable" only if it is "necessary" or "least restrictive" in light of "reasonably available alternatives". The term "reasonable" requires only that a measure be "in accordance with reason".

399. The Dominican Republic and Ukraine seek additional support for their proposed interpretation of the term "unjustifiably" from the manner in which the panel in *EC - Approval and Marketing of Biotech Products* interpreted the term "undue", as that term appears in Annex C(1)(a) of the SPS Agreement.⁵⁷⁹ In point of fact, the panel report in *EC - Approval and Marketing of Biotech Products* supports the opposite conclusion. The panel in that case noted that one of the meanings of the term "undue" is "unjustifiable".⁵⁸⁰ The panel found that a delay in the completion of sanitary and phytosanitary procedures could not be considered "undue" (or "unjustifiable") if there was "a legitimate reason, or justification, for a given delay".⁵⁸¹ A "legitimate reason" is not the same as "necessity" or "least restrictiveness" in light of "reasonably available alternatives".

400. For these reasons, insofar as the terms "reasonable" and "undue" bear upon the interpretation of the term "unjustifiably", the ordinary meanings of these terms as interpreted by panels and the Appellate Body do not support the complainants' assertion that the term "unjustifiably" means "necessary" or "least restrictive" in light of "reasonably available alternatives". The complainants' interpretative conclusions are unsupported by the text of the Agreement or WTO jurisprudence.

⁵⁷⁹ See Dominican Republic's first written submission, para. 380; Indonesia's first written submission, para. 292. Annexure C(1)(a) provides that "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that ... such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products".

⁵⁸⁰ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495. The panel considered that interpreting the term "undue" to be synonymous with "unjustifiable" is consistent with the fact that the French version of Annexure C(1)(a) uses the phrase "retard injustifié".

⁵⁸¹ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1496. Ukraine's reference to the Appellate Body Report, *Australia – Apples*, is equally unavailing. See Ukraine's first written submission, para. 344. In that report, the Appellate Body agreed with the panel in *EC – Approval and Marketing of Biotech Products*, that the term "undue" in Annexure C(1)(a) requires an evaluation of whether there was an "adequate explanation" for the delay. Appellate Body Report, *Australia – Apples*, para. 441.

c. *"Necessity" and concepts of "least restrictiveness"
cannot be inferred from an alleged "right of use" under
the TRIPS Agreement*

401. Setting aside their misguided reliance on dictionary definitions, the complainants' "necessity" argument begins at the broadest level from the proposition that the TRIPS Agreement establishes a "strong presumption in favour of the unencumbered use of a trademark".⁵⁸² In support of this proposition, the complainants refer back to their argument that other provisions of the TRIPS Agreement, primarily Article 16, establish by implication a right to use of trademarks, even though those provisions refer by their terms only to rights with respect to the registration of trademarks and to the negative rights of exclusion that are thereby conferred.⁵⁸³ Australia has established in Part B above that this "right of use" interpretation of the TRIPS Agreement is wholly unfounded. The opening premise of the complainants' interpretation of Article 20 of the TRIPS Agreement is therefore in error.

402. Contrary to the complainants' contention, the TRIPS Agreement does not establish a general "right of use" to which Article 20 is an exception. What makes Article 20 exceptional is not that it constitutes a derogation from a "right of use" that is established elsewhere in the TRIPS Agreement, but that it represents a constraint upon the sovereign right that Members retain to regulate the exploitation of intellectual property. Article 20 is not an exception for measures that otherwise violate an obligation under the TRIPS Agreement, along the lines of Article XX of the GATT 1994 or Article XIV of the GATS. Rather, it is a stand-alone provision that addresses a subject that the TRIPS Agreement does not otherwise address. Article 20 must be interpreted in this light, not as a limited exception to a general "right of use" that does not exist under the TRIPS Agreement.⁵⁸⁴

⁵⁸² Dominican Republic's first written submission, para. 344.

⁵⁸³ See, e.g. Ukraine's first written submission, para. 355.

⁵⁸⁴ Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para 31: "The purpose of Article 16 is to define the content of the rights that Members are bound to confer on trademark owners *against third parties*, while Article 20 alludes to the need for justification for certain *acts by States* that

(continued)

403. The Dominican Republic continues in the same vein by trying to recast Article 20 as "a prohibition against encumbrances on the use of a trademark", which such "prohibition" is then subject to an "exception" implied by the word "unjustifiably".⁵⁸⁵ This is a complete rewriting of Article 20. The first sentence of Article 20 is a single thought: "The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements", followed by three examples of what might constitute a special requirement. It is not framed as a prohibition with an exception. Instead, it provides by its plain terms that the use of a trademark in the course of trade must not be "unjustifiably" encumbered through the imposition of special requirements. If an encumbrance is not "unjustifiable", then there is no violation of Article 20. There is no sense in which Article 20 establishes any sort of "prohibition" or "presumption" against encumbrances upon the use of trademarks through the imposition of special requirements. Such encumbrances are permitted under Article 20 so long as they are not unjustifiable, which, as established above, requires a rational connection between the encumbrance imposed and the pursuit of a legitimate public policy objective.

*d. "Necessity" and concepts of "least restrictiveness"
cannot be inferred from Article 17 of the TRIPS
Agreement*

404. Finally, several of the complainants seek to bolster their "necessity" interpretation of the term "unjustifiably" by reference to Article 17 of the TRIPS Agreement and its reference to the "legitimate interests of the owner of the trademark". In doing so, the complainants suggest that any interpretation of the term "unjustifiably" in Article 20 of the TRIPS Agreement must likewise take into account the "legitimate interests" of trademark holders. Relying on the panel report in *EC – Trademarks and Geographical Indications (Australia)*, the complainants contend that these "legitimate interests" of a trademark holder "include its interest in using its own

may encumber the use of trademarks. Any attempt to read in Article 20 a right to use a trademark on the basis of Articles 16 and 17 is, hence, bound to fail."

⁵⁸⁵ Dominican Republic's first written submission, para. 343.

trademark in connection with the relevant goods and services of its own and authorized undertakings".⁵⁸⁶ The Dominican Republic argues that a consideration of this "legitimate interest" of a trademark holder "must permeate the analysis of justifiability" under Article 20.⁵⁸⁷

405. The first response to this line of argument is that Article 17 and Article 20 are different provisions with different purposes. The terms of Article 17 therefore cannot be read into Article 20 in the manner that the complainants propose. As Carvalho explains, and as noted in Part B above, Article 17 concerns *internal* exceptions to the rights conferred by trademark, i.e. exceptions to the rights of exclusion that Members are otherwise required to provide to registered trademark owners under Article 16 of the TRIPS Agreement.⁵⁸⁸ In that context, it makes sense that any exception to these rights must "take account of the legitimate interests of the owner of the trademark", as the creation of an exception necessarily detracts from the rights of exclusion that trademark owners otherwise possess.⁵⁸⁹

⁵⁸⁶ Dominican Republic's first written submission, para. 383, quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664.

⁵⁸⁷ Dominican Republic's first written submission, para. 383.

⁵⁸⁸ N.P. de Carvalho, *The TRIPS Regime of Trademarks and Designs*, 3rd ed. (Kluwer Law International, 2014), Exhibit AUS-236, page 318.

⁵⁸⁹ In fact, the logical implication of the complainants' position is that the subject of limitations on trademark usage should be addressed by (and perhaps *is* addressed by) Article 17 of the TRIPS Agreement. This is because the complainants consider a "right of use" to be among the rights that Members are required to confer upon trademark owners under Article 16. If that were true, a limitation on the use of a trademark would constitute an "exception[]" to the rights conferred by a trademark" and would need to be evaluated under Article 17. As discussed below, the fact that the TRIPS Agreement addresses limitations on trademark usage under a different provision, and not under the heading of "exceptions", confirms that a "right of use" is not among the rights conferred by the TRIPS Agreement. Moreover, if complainants' "right of use" theory were correct, they would have a hard time explaining the functional purpose of Article 20 within the structure of the TRIPS Agreement.

This paradox in the complainants' position is evident in the fact that Honduras attempts to demonstrate that the special requirements imposed by the tobacco plain packaging measure "are not justified under Article 17 of the TRIPS Agreement". Honduras' first written submission, paras. 252-257. Honduras appears to have recognized that if Members are required to confer a "right of use" under Section 2 of the TRIPS Agreement, then any exception to that "right" would need to be evaluated under Article 17. While Honduras is to be commended for its logical consistency, Article 17 is simply irrelevant to the present dispute because a "right of use" is not among the "rights conferred by a trademark".

406. Article 20, in contrast to Article 17, does not concern derogations from the exclusive rights that Members are required to provide to trademark owners under Article 16. Rather, it concerns external requirements that Members impose upon the *use* of trademarks in furtherance of public policy objectives. For the reasons that Australia has established, nothing in the TRIPS Agreement requires Members to confer a general "right of use" upon trademark owners. As a result, and unlike Article 17, any special requirement that a Member imposes upon the use of trademarks under Article 20 does not detract from a right that the Member is otherwise required to confer upon trademark owners. The "legitimate interests of the owner of the trademark" are therefore not relevant in the context of Article 20, as they are in the context of Article 17. Instead, the standard that Article 20 establishes focuses exclusively on whether any encumbrance resulting from the imposition of special requirements is "unjustifiable".

407. Had the drafters of the TRIPS Agreement considered the "legitimate interests of the owner of the trademark" to be relevant to the inquiry under Article 20, its language would reflect this. The fact that the drafters did not use the same or similar terminology confirms that they understood the subject matter of Article 20 to be different from the subject matter of Article 17. Indeed, Article 20 recognizes that special requirements imposed upon the use of trademarks may be "detrimental to" the capability of trademarks "to distinguish the goods or services of one undertaking from those of other undertakings", and yet there is no indication in Article 20 that any such effect would be considered to infringe upon a "legitimate interest" of a trademark owner or that any such "legitimate interest" would need to be taken into account or given special priority.⁵⁹⁰ The fact that the complainants must import language from a

⁵⁹⁰ Professor Correa notes "distinctiveness is a requirement for protection under the TRIPS Agreement, and there is no guaranteed right to preserve it. This is confirmed by Article 20, which allows Members to take any measure that may impair the distinctive character of a trademark, so long as it is not unjustifiable. ... Contrary to the Dinwoodie Report's suggestion, as a matter of principle, governments can take measures that affect distinctiveness of a trademark. Article 20 only requires a justification when it is established that certain 'special requirements' encumber the use of a trademark in the course of trade." Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 76.

different provision in order to support their proposed interpretation of the term "unjustifiably" merely underscores how untenable that interpretation is.

e. Conclusion

408. For all of these reasons, the Panel must reject the complainants' contention that the term "unjustifiably" in Article 20 of the TRIPS Agreement goes beyond its ordinary meaning to encompass a requirement of "necessity" or a standard comparable to that prescribed by Article 2.2 of the TBT Agreement. This is an obvious attempt by the complainants to rewrite Article 20 to say something that it does not say. The standard prescribed by Article 20 is straightforward, and requires only that any encumbrance resulting from the imposition of special requirements on the use of trademarks in the course of trade have a rational connection to the legitimate public policy objective for which the special requirements are imposed.

ii. The term "unjustifiably" does not require an "individual assessment" of the features of particular trademarks

409. Ukraine, Honduras, and the Dominican Republic submit that any special requirement imposed upon the use of a trademark in the course of trade is *per se* "unjustifiable" if that special requirement does not result from an "individual assessment" of the particular features of the trademark whose use is encumbered.⁵⁹¹ These complainants consider that an "individual assessment" of particular trademarks is compelled by a proper interpretation of Article 20. It is not.

410. The complainants' "individual assessment" argument is based largely on the fact that trademark rights are acquired, registered, and enforced on an "individual basis".⁵⁹² From this, the complainants conclude that any special requirement that encumbers the use of a trademark in the course of trade must be adopted and justified by reference to a *particular* trademark, based on an individual assessment of the

⁵⁹¹ See Dominican Republic's first written submission, paras. 383-384; Honduras' first written submission, paras. 289-291; and Ukraine's first written submission, paras. 346-348.

⁵⁹² Honduras' first written submission, para. 289; see also Dominican Republic's first written submission, para. 383; and Ukraine's first written submission, para. 348.

specific features of that trademark as they relate to the intended policy objective. This is a non-sequitur. The fact that trademarks are ordinarily acquired, registered, and enforced on an individual basis is simply a consequence of the fact that trademarks must be capable of distinguishing between products in the course of trade. It does not follow that any justification for the imposition of special requirements upon the use of a trademark must likewise be framed by reference to the characteristics of individual trademarks.

411. Article 20 is not concerned with the registration of individual trademarks, but rather with special requirements that are imposed upon the use of trademarks. If the justification for the imposition of special requirements upon the use of a trademark relates to a group of trademarks as a class, nothing in Article 20 requires that justification to be restated by reference to individual trademarks falling within that class. In respect of Article 17 of the TRIPS Agreement, the panel in *EC – Trademarks and Geographical Indications (US)* found that any exception to the rights conferred under Article 16 need not "take account of the legitimate interests of the owner of the trademark" on an individual basis.⁵⁹³ The panel observed that "nothing in the text of Article 17 indicates that a case-by-case analysis is a requirement under the TRIPS Agreement."⁵⁹⁴ That panel's conclusion applies *a fortiori* to the interpretation of Article 20, which, unlike Article 17, does not concern exceptions to rights that are actually conferred under the TRIPS Agreement. Article 20 is a provision that concerns special requirements that Members impose upon the use of a trademark in furtherance of public policy objectives, and the justification for such requirements will often relate to a class of trademarks as a whole.

412. The complainants also seek support for their "individual assessment" argument from their overarching contention that the TRIPS Agreement establishes a "right of use". Honduras, for example, argues that because Article 6*quinquies* of the Paris Convention provides that "[e]very trademark duly registered in the country of origin shall be accepted for filing and protected as is", and because, in its view,

⁵⁹³ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672.

⁵⁹⁴ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672.

"trademark protection includes the ability to *use* a trademark in the course of trade", it follows that any imposition of a special requirement upon the use of a trademark must take into account "the individual nature of each particular trademark."⁵⁹⁵ Setting aside other logical failings in this path of reasoning, the fact is that the TRIPS Agreement does not establish a "right of use" that would somehow compel an "individual assessment" of particular trademarks when imposing special requirements upon the use of a class of trademarks. Once again, the complainants' proposed interpretation of a provision rests upon a "right of use" theory that has no basis in a proper interpretation of the TRIPS Agreement.

413. Finally, the complainants argue that the use of the singular "a trademark" in the phrase "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements" supports their view that any special requirement imposed upon the use of a trademark must be justified by reference to the features of a particular trademark.⁵⁹⁶ This argument seeks to impart interpretative significance to what is nothing more than a drafting convention. Notably, Article 17 of the TRIPS Agreement also refers to "a trademark" in the singular, and yet the panel in *EC – Trademarks and Geographical Indications (US)* held that nothing in the text of Article 17 requires exceptions to the rights conferred by a trademark to be crafted on an individual basis. There is no reason why a different conclusion would apply in the case of Article 20.

414. As Australia noted above, the justification for the imposition of special requirements upon the use of a trademark in the course of trade will often (if not ordinarily) relate to a class of trademarks as a whole, such as pharmaceutical products and products that are inherently hazardous to human health (such as tobacco). It is illogical to suggest that the use of the term "a trademark" in Article 20 compels the conclusion that any special requirement imposed upon the use of a trademark must be justified by reference to the features of a particular trademark. The complainants' line

⁵⁹⁵ Honduras' first written submission, para. 290.

⁵⁹⁶ See Honduras' first written submission, para. 289; Dominican Republic's first written submission, para. 386; and Ukraine's first written submission, para. 347.

of reasoning appears to be semantic. If a rationale for the imposition of a special requirement upon the use of trademarks applies to a class of trademarks as a whole, then that rationale *does* apply to "a trademark", i.e. to each and every trademark that falls within that class. For this reason, it is unclear to Australia what practical difference the complaints consider to result from the use of the singular phrase "a trademark" in Article 20.⁵⁹⁷

415. The argument by Ukraine, Honduras, and the Dominican Republic that the lack of an "individual assessment" of each trademark under the tobacco plain packaging measure renders it *per se* "unjustifiable" under Article 20 of the TRIPS Agreement is incorrect. Article 20 contains no such requirement.

iii. The term "unjustifiably" does not preclude special requirements that prohibit the use of certain trademarks altogether, such as figurative trademarks

416. Honduras, Indonesia, and Ukraine argue that any set of special requirements that prohibits the use of certain registered trademarks (such as figurative trademarks) is *per se* "unjustifiable" under Article 20 of the TRIPS Agreement.⁵⁹⁸ The Dominican Republic and Cuba do not appear to advance this argument.⁵⁹⁹

⁵⁹⁷ As Australia explains throughout this submission, an important objective of the tobacco plain packaging measure is to reduce the appeal of tobacco products. By prohibiting the use of certain signs and trademarks, such signs and trademarks can no longer convey positive attributes, values, and imagery to consumers and potential consumers of those products. Australia is not aware of any instance in which a tobacco producer has registered or sought to register a trademark that conveys *negative* associations with a tobacco product (such as "Jeff the Diseased Lung"). That being the case, it is unclear how the application of the tobacco plain packaging measure would have been any different had it provided what the complainants characterize as an "individual assessment" of each trademark.

⁵⁹⁸ These three complainants adopt slightly different formulations of this argument, but the different formulations all amount to the same thing. See, e.g. Ukraine's first written submission, para. 319: the tobacco plain packaging measure is "*ipso facto* ... unjustifiable" insofar as any "prohibition on the use of trademarks impairs and negates the very substance of the trademark right"; Indonesia's first written submission, para. 277: "[w]here PP prevents use of trademarks all together [sic] ... such measures cannot be justified" under Article 20; Indonesia's first written submission, para. 284: "the Panel should find Australia's PP measures are inconsistent with Article 20 to the extent they prohibit the use of tobacco trademarks."; Honduras' first written submission, paras. 333-336: arguing that measures that "contain blanket restrictions on the use of trademarks or that defeat a trademark's core function" are "unjustifiable by their very nature").

⁵⁹⁹ It is unclear whether Cuba advances this argument. As discussed below, Cuba seems to advance a different but related argument, namely that each of the three types of "special requirements"

(continued)

417. As is the case with all of their other interpretative arguments relating to the TRIPS Agreement, the arguments that these three complainants advance in support of this interpretation are a confusing combination of assertion, obfuscation, and hyperbole. The foundation of the complainants' interpretative argument is, once again, their misguided belief that the TRIPS Agreement confers a "right of use" upon trademark owners and that the protection of this alleged "right" is a "core function" of the Agreement. The complainants likewise seek to base their interpretative argument on the notion that the use of a trademark is a "legitimate interest" that must be taken into account or given special priority in the interpretation of the term "unjustifiably". From these premises, the complainants reason that any measure that prohibits the use of certain registered trademarks impinges so severely upon the alleged "right of use" or the trademark owner's "legitimate interests" that it must be *per se* unjustifiable.

418. As the premise goes, so goes the conclusion. As Australia has demonstrated at length, there is no "right of use" that Members are required to confer upon trademark owners under the TRIPS Agreement. With the singular exception of Article 20, the TRIPS Agreement does not impose any constraint upon a Member's sovereign right to regulate the use and exploitation of intellectual property. Within the context of Article 20, a measure that prohibits the use of certain types of registered trademarks – assuming that such prohibitions fall within the scope of Article 20 at all – has no *a priori* status among the types of special requirements that a Member might impose upon the use of a trademark in the course of trade. As for the complainants' "legitimate interests" theory, Australia has already demonstrated in Part 3 above that Article 20 does not refer to a trademark owner's "legitimate interests" or give special priority to any such "legitimate interests" in an evaluation of whether an encumbrance upon the use of trademarks in the course of trade has been imposed "unjustifiably". Under Article 20, Members may impose special requirements upon the use of a trademark in the course of trade – including, to the extent they are encompassed by

illustrated in the first sentence of Article 20 is "presumptively unjustifiable". Australia addresses this argument below.

Article 20, a prohibition on the use of trademarks – as long as the resulting encumbrance is not "unjustifiable".

419. Australia notes that the complainants' argument concerning "*per se*" unjustifiability, if accepted, would have far reaching implications for a wide array of public policies that Members have adopted, including tobacco control policies that the complainants have not challenged in this dispute. This is particularly true if, as the complainants contend, prohibitions on the use of a trademark are "special requirements" affecting the "use" of a trademark that fall within the scope of Article 20. Following the complainants' logic, a prohibition on the use of tobacco trademarks in print or broadcast advertising – a widely adopted element of a comprehensive tobacco control policy – would be *per se* unjustifiable under Article 20 of the TRIPS Agreement. Most or all of the complainants appear to take the position that the term "in the course of trade" encompasses the use of trademarks in advertising.⁶⁰⁰ Thus, under this interpretation, a ban on tobacco advertising, or a more specific ban on the use of trademarks in such advertising, would constitute a special requirement imposed upon the use of trademarks in the course of trade that could never be justified under Article 20. This radical interpretation of this provision is indefensible.

420. For the reasons that Australia established in Part (a) above, the term "unjustifiably", properly interpreted in accordance with Article 31 of the Vienna Convention, requires a rational connection between special requirements imposed upon the use trademarks in the course of trade and the pursuit of a legitimate public policy objective. This includes special requirements that prohibit the use of certain registered trademarks (such as figurative trademarks for tobacco products), to the extent that such prohibitions can even be considered "special requirements" affecting the "use of a trademark in the course of trade". If any special requirement encompassed by Article 20 is not "unjustifiable", then it is not inconsistent with that provision.

⁶⁰⁰ See, e.g. Ukraine's first written submission, para. 223; and Indonesia's first written submission, paras. 270, 287.

iv. Other miscellaneous and erroneous arguments concerning the interpretation of the term "unjustifiably"

421. Finally, Australia will briefly dispense with two additional arguments concerning the meaning of the term "unjustifiable", each of which is advanced by only one of the complainants.

422. First, Cuba argues that any special requirement provided by illustration in the first sentence of Article 20 – i.e. "use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings" – is "presumptively unjustifiable" under Article 20.⁶⁰¹ It is unclear what practical implications Cuba considers this notion of "presumptive unjustifiability" to have. In any event, Cuba's interpretation of Article 20 is in error. The three examples provided in the first sentence of Article 20 are merely illustrations of what might constitute "special requirements", not illustrations of special requirements that are unjustifiable or "presumptively unjustifiable". This is evident from the placement of these three examples immediately after "special requirements", introduced by "such as". The other complainants appear to recognize this self-evident point.⁶⁰²

423. Second, Indonesia takes the position that Australia's alleged failure to follow its own internal administrative processes in developing the tobacco plain packaging measure means that this measure is "unjustifiable" under Article 20. Australia has explained in Part II.G.1 above that Australia did, in fact, fully adhere to its own internal administrative and legislative processes in developing the tobacco plain packaging measure.⁶⁰³ But in any event, it is legally irrelevant to the interpretation

⁶⁰¹ Cuba's first written submission, para. 323.

⁶⁰² Ukraine's first written submission, para. 330: "The term "such as" following the phrase "shall not be unjustifiably encumbered by special requirements" indicates that what follows are examples of special requirements that encumber the use of a trademark"; Indonesia's first written submission, para. 257; Honduras' first written submission, para. 281; Dominican Republic's first written submission, para 353.

⁶⁰³ The essence of Indonesia's argument, in this respect, is that the Australian Government did not complete a regulatory impact statement (RIS) prior to its announcement of the tobacco plain packaging measure. See Indonesia's first written submission, paras. 295-302. The complainants' expert,

(continued)

and application of Article 20 whether Australia did or did not adhere to its own internal processes. The evaluation of whether special requirements imposed upon the use of a trademark are "unjustifiable" turns on the objective rationale for those special requirements, not on any question of adherence to domestic law.

v. Conclusion

424. For these reasons, the complainants' various proposed interpretations of the term "unjustifiably" are unfounded as a matter of treaty interpretation. None of these interpretations finds support in the ordinary meaning of the term "unjustifiably" interpreted in its context, in light of the object and purpose of the TRIPS Agreement. For the reasons that Australia established in Part (a), the term "unjustifiably", properly interpreted, requires a rational connection between any encumbrance imposed upon the use of trademarks in the course of trade and the pursuit of a legitimate public policy objective.

(e) The complainants have failed to establish a *prima facie* case that any encumbrance imposed upon the use of trademarks in the course of trade is "unjustifiable" under a proper interpretation of this term

425. In Part 3 above, Australia demonstrated that the complainants have failed to establish that the special requirements imposed by the tobacco plain packaging measure give rise to an "encumbrance" upon the "use" of a trademark "in the course of trade". Notwithstanding the complainants' failure to establish the threshold

Mr Howell, discusses this point at length in his report. Contrary to Indonesia's arguments, however, the fact that the Australian Government did not finalise a RIS prior to its decision to implement tobacco plain packaging does not mean that the government did not adhere to Australian law, as Indonesia seeks to imply. A RIS is not a statutory requirement under Australian law. As explained at fn 196 above, the Australian Regulatory Impact Analysis process allows for a post implementation review (PIR) in the circumstances where, for one reason or another, a RIS is not completed in relation to a regulatory proposal, and must commence within one to two years of implementation. The PIR is a similar process to that of a RIS. (See Australian Government, "Best Practice Regulation Handbook" (August 2007), pp. 32 and 36-37 which applied at the time of the Government's decision to implement tobacco plain packaging in April 2010, Exhibit AUS-126). Consistent with Australian regulatory best practice, the PIR process for the tobacco plain packaging measure commenced by 1 December 2014. Thus, Indonesia is simply incorrect when it argues that the adoption of the tobacco plain packaging measure was not "lawful" or "in harmony with law".

applicability of Article 20, Australia provided the proper interpretation of the term "unjustifiably" in the preceding Parts (a) through (d), and corrected the complainants' erroneous interpretations of this term.

426. To conclude this section, Australia will demonstrate that the complainants have failed to establish that any relevant encumbrance under Article 20 resulting from the special requirements at issue – however that encumbrance might be established – is "unjustifiable". In fact, under a proper interpretation of this term, any encumbrance resulting from the special requirements imposed by the tobacco plain packaging measure, whatever that encumbrance might be, is manifestly not "unjustifiable".

i. Burden of Proof

427. As a preliminary matter, Australia will address the complainants' incorrect contention that Australia bears the burden of proof in demonstrating that any encumbrance imposed upon the use of a trademark in the course of trade by virtue of the special requirements at issue is not "unjustifiable".

428. The Appellate Body has made clear that "[t]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."⁶⁰⁴ For the reasons that Australia set forth in Part (d) above, Article 20 of the TRIPS Agreement is not an exception for measures that are otherwise inconsistent with relevant provisions of the TRIPS Agreement. Nor can the first sentence be interpreted, as the Dominican Republic suggests, as establishing a "prohibition" that is then subject to an "exception" by virtue of the word "unjustifiably". Rather, the first sentence of Article 20 establishes a single, affirmative obligation: "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". An encumbrance upon the use of a trademark in the course of trade is inconsistent with Article 20 only if that encumbrance is shown to be unjustifiable. Establishing that an encumbrance is "unjustifiable" is

⁶⁰⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

therefore an element of the *prima facie* case that a complainant must establish in order to prove a violation of this provision.

429. In this limited regard, Article 20 of the TRIPS Agreement is similar to other provisions of the covered agreements that require a complainant to establish that some threshold has been crossed (however that threshold might be defined). For example, Annex C(1)(a) of the SPS Agreement provides that "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that ... such procedures are undertaken and completed *without undue delay* and in no less favourable manner for imported products than for like domestic products". In *EC - Approval and Marketing of Biotech Products*, the complainants accepted, and the panel concurred, that the complainants bore the initial burden of demonstrating that any delay in the completion of approval procedures covered by this provision was "undue".⁶⁰⁵ The panel considered that the ordinary meaning of the term "undue" required an evaluation of whether there was "a legitimate reason, or justification, for a given delay".⁶⁰⁶ The complainants therefore bore the burden of demonstrating not only that there had been a "delay", but that this delay lacked a legitimate reason or justification.⁶⁰⁷

430. There is no basis to interpret the first sentence of Article 20 in a contrary manner. Article 20 does not prohibit all measures that impose encumbrances upon the use of a trademark in the course of trade, but only those measures that "*unjustifiably* encumber" the use of a trademark in the course of trade. Just as a complainant must demonstrate under Annex C(1)(a) of the SPS Agreement that a delay is "undue", a complainant must demonstrate under Article 20 of the TRIPS Agreement that an encumbrance is "unjustifiable". As Australia has established in Part (a) above, this requires a complainant to establish that there is no rational connection between an

⁶⁰⁵ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1505.

⁶⁰⁶ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1496.

⁶⁰⁷ Panels have likewise found that a Member asserting a claim of violation under Article 2.2 of the TBT Agreement bears the burden of proving that a technical regulation is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create." See, e.g. Panel Report, *US – Clove Cigarettes*, para. 7.331.

encumbrance imposed upon the use of a trademark in the course of trade and the pursuit of a legitimate public policy objective.

431. A complainant's obligation to establish a *prima facie* case of unjustifiability is all the more evident where, as here, the measure at issue provides a justification for the encumbrance on the face of the measure itself. Section 3 of the TPP Act lays out the rationale for tobacco plain packaging, and this rationale is elaborated upon in more detail in the Explanatory Memorandum that accompanied the legislation. As their own submissions indicate, the complainants are perfectly aware of the public health rationale for the special requirements that they are challenging in this dispute, and accept that the objectives of the measure are legitimate. There is no obstacle whatsoever to the complainants bearing the burden of proof that is so clearly theirs to discharge under a proper interpretation of Article 20.

432. The complainants ultimately appear to recognize that they face a very high hurdle in attempting to discharge this burden. The Dominican Republic, for example, appears to take the position that an encumbrance is unjustifiable under Article 20 if it makes "no contribution" to the intended public policy objective.⁶⁰⁸ Ukraine contends that special requirements resulting in an encumbrance upon the use of trademarks in the course of trade are not justifiable if they "do not contribute to the fulfilment of the policy objective (or go against such objective)".⁶⁰⁹ Honduras, in its submission, sets out to demonstrate that the special requirements imposed by the tobacco plain packaging measure "do not, *and cannot*, contribute" to the intended objectives of the measure.⁶¹⁰

433. As Australia has demonstrated above, the complainants must establish a *prima facie* case that any encumbrance upon the use of trademarks in the course of trade that

⁶⁰⁸ Dominican Republic's first written submission, para. 427.

⁶⁰⁹ Ukraine's first written submission, para. 386. Ukraine also argues that an encumbrance is not justifiable "if the same objective could have been achieved by using less trademark-encumbering alternatives" (Ukraine's first written submission, para. 386). Australia has explained in Part IV.D.4(d) above why the term "unjustifiably" does not require an examination of what Ukraine calls "less trademark-encumbering alternatives".

⁶¹⁰ Honduras' first written submission, para. 341. (emphasis added)

results from the special requirements at issue has no rational connection to a legitimate public policy objective, i.e. that the special requirements at issue "go against" or "cannot be reconciled with" the legitimate objective. It is evident that the complainants have not discharged this burden.

ii. The complainants have failed to establish that any encumbrance resulting from the special requirements at issue lacks a rational connection to the objectives of the TPP Act

434. Australia has documented at length in Part II.I of this submission that the special requirements imposed by the tobacco plain packaging measure contribute to the overall objectives of Australia's comprehensive tobacco control strategy, namely, to improve public health by discouraging uptake, encouraging quitting, discouraging relapse, and reducing exposure to smoke. The special requirements imposed by the tobacco plain packaging measure contribute to these objectives by reducing the appeal of tobacco products to consumers, increasing the effectiveness of graphic health warnings, and reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking. Australia will not repeat here the extensive evidence presented in Part II.I to demonstrate that tobacco plain packaging contributes to these objectives.

435. In order to demonstrate that any encumbrance upon the use of a trademark in the course of trade resulting from the special requirements at issue is "unjustifiable", the complainants would need to demonstrate that there is no rational connection between the encumbrance imposed (whatever that might be) and the pursuit of public health objectives whose legitimacy the complainants do not question. For the complainants to do so, they would need to convince the Panel of at least four propositions.

436. First, the complainants would need to convince the Panel that the use of trademarks on tobacco retail packaging and products serves no advertising function. It is clear why the complainants go to such extraordinary lengths to try to persuade the Panel of this counterintuitive proposition. If the complainants are wrong (and they are), they would then need to explain to the Panel why other prohibitions and

restrictions on tobacco advertising and promotion – a widely adopted tobacco control measure – serve no rational purpose.⁶¹¹ The fact is that tobacco plain packaging is a logical extension of the laws that Australia and many other Members have adopted to prohibit or restrict the advertising and promotion of tobacco products. As Australia discussed in Part II.I.2 above, tobacco companies have repeatedly acknowledged that tobacco packaging is an important part of their marketing strategies, especially in dark markets such as Australia.⁶¹² If prohibitions and restrictions on tobacco advertising and promotion serve a rational purpose – and they do – then so do tobacco plain packaging requirements.

437. The second proposition of which the complainants would need to convince the Panel is that tobacco plain packaging does not affect consumer perceptions, and in turn, that there is no connection whatsoever between perceptions and behaviour. Australia has detailed in Part II.I above the extensive evidence demonstrating that tobacco plain packaging reduces the appeal of tobacco products to consumers and prospective consumers, increases the effectiveness of graphic health warnings, and reduces the ability of tobacco packaging to mislead consumers and prospective consumers about the harmful effects of tobacco products. The complainants fail to show that there is no connection between any special requirements and these mechanisms and rely instead on the assertion that there is no demonstrable connection between attitudes, intentions and beliefs, on the one hand, and behaviour, on the other. The tobacco industry has been peddling this line – unsuccessfully – for many years. This line is not only contrary to scientific evidence and basic intuition, but is also contrary to the tobacco industry's own extensive efforts over the course of many decades to design tobacco packages and products so as to appeal to consumers

⁶¹¹ World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2013 Enforcing bans on tobacco advertising, promotion and sponsorship* (2013), Exhibit AUS-80.

⁶¹² Australia has provided extensive evidence in Part II.E, which demonstrates the effect of tobacco advertising and promotion, including the role of packaging, and how it influences tobacco smoking behaviour. See also: the Expert Report of G. Fong (4 March 2015), Exhibit AUS-14; the Expert Report of F. Chaloupka (public health) (7 March 2015), Exhibit AUS-9; the Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13; the Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10; the Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12.

(including particular segments of consumers, such as young people).⁶¹³ Just as the tobacco industry must consider that *these* perceptions affect behaviour, so too must it acknowledge that perceptions created by plain packaging also affect behaviour.⁶¹⁴

438. The third proposition of which the complainants must convince the Panel is that the COP to the FCTC acted without any rational basis when it agreed by consensus to specifically recommend that parties "should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)."⁶¹⁵ The complainants must further convince the Panel that the COP to the FCTC had no rational basis to conclude that "[p]ackaging and product design are important elements of advertising and promotion" and that parties should therefore "consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging."⁶¹⁶ This is, of course, a ludicrous assertion. The parties to a convention simply do not assemble for the purpose of making unfounded and irrational recommendations concerning the implementation of their common treaty commitments. Clearly, those countries – which included 148 Members of the WTO, including Ukraine and Honduras – considered that tobacco plain packaging has a rational connection to the objective of curbing the global epidemic of tobacco addiction. Otherwise, they would not have recommended it.⁶¹⁷

⁶¹³ See Part II, which outlines tobacco industry views in relation to the role of packaging and using the pack to communicate to consumers. See also the Expert Report of G. Fong (4 March 2015), Exhibit AUS-14; the Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13; and the Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, which provide key insights into tobacco industry internal documents.

⁶¹⁴ The evidence set out in II.I demonstrates that the tobacco plain packaging measure influences perceptions, attitudes, and ultimately the behaviour of consumers. Indeed, there is a strong emerging body of direct behavioural evidence in Australia that the tobacco plain packaging measure is having the effects intended by the tobacco plain packaging legislation.

⁶¹⁵ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11.

⁶¹⁶ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 13.

⁶¹⁷ In its amicus submission to the Panel, the WHO and the WHO FCTC Secretariat discuss in detail the basis for the recommendations adopted by the FCTC Conference of the Parties concerning the use of tobacco plain packaging. World Health Organization and the WHO Framework on Tobacco

(continued)

439. The fourth proposition of which the complainants must convince the Panel is that tobacco plain packaging has no rational connection to Australia's legitimate public health objectives *in the context of* Australia's comprehensive tobacco control policies. A central part of the complainants' strategy in this dispute is to claim that it is somehow Australia's burden to isolate the precise contribution that tobacco plain packaging has made to Australia's tobacco control objectives, and to do so by reference to the two years immediately following the adoption of the tobacco plain packaging measure. In fact, the early evidence shows that tobacco plain packaging *is* contributing to these objectives.⁶¹⁸ But this is not the test of whether there is a rational connection between the special requirements imposed by the tobacco plain packaging measure and the fulfilment of Australia's public health objectives. The complainants must show that tobacco plain packaging has no rational connection to Australia's tobacco control objectives when seen as one element of an overall strategy that is designed to achieve those objectives. Among other things, this requires the complainants to demonstrate – as discussed in the first proposition above – that

Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, paras. 12-25.

⁶¹⁸ There is a strong emerging body of direct behavioural evidence in Australia that the tobacco plain packaging measure is having the effects intended by the tobacco plain packaging legislation, as outlined in Part II.I above. See, e.g. M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo and M. Wakefield, "Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips" *Addiction*, Vol. 109, (2014), Exhibit AUS-222; M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo and M. Wakefield, "Personal pack display and active smoking at outdoor café strips: Assessing the impact of plain packaging 1 year post implementation." *Tobacco Control* Vol. 24 (2015) Exhibit AUS-223; Wakefield et al, "Australian adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-206; Brennan et al, "Are quitting-related cognitions and behaviours predicted by proximal responses to plain packaging with larger health warnings? Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), Exhibit AUS-224; Durkin et al, "Short-term changes in quitting-related cognitions and behaviours after the implementation of plain packaging with larger health warnings: Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), Exhibit AUS-215; White et al, "Has the introduction of plain packaging with larger graphic health warnings changed adolescents' perceptions of cigarette packs and brands?" *Tobacco Control*, Vol. 24 (2015), Exhibit AUS-186, ii42-49; S. Dunlop, T. Dobbins, J. Young, D. Perez and D. Currow, "Impact of Australia's introduction of tobacco plain packs on adult smokers' pack-related perceptions and responses: results from a continuous tracking survey", *BMJ Open*, Vol. 4, (2014), Exhibit AUS-207; Miller et al, "'You're made to feel like a dirty filthy smoker when you're not, cigar smoking is another thing all together.' Responses of Australian cigar and cigarillo smokers", *Tobacco Control* Vol. 24 (2015), Exhibit AUS-102.

tobacco plain packaging bears no rational connection to Australia's existing and unchallenged prohibition on tobacco advertising and promotion.

440. It should be apparent to the Panel that Australia considers each one of these four propositions to be utterly unfounded and unproven. Australia is aware that the complainants have adopted the tobacco industry's usual tactic of putting large volumes of industry-commissioned studies and reports on the record in their attempt to demonstrate that the tobacco plain packaging measure is "unjustifiable", and Australia has preliminarily responded to that evidence in Annexure E to this submission. For present purposes, however, the relevant point is that none of this evidence even remotely discharges the complainants' burden of demonstrating that there is no rational connection between any encumbrance resulting from the imposition of special requirements upon the use of tobacco trademarks in the course of trade and the pursuit of Australia's legitimate public health objectives. Australia established in Part II.I of this submission that tobacco plain packaging has a rational connection to the pursuit of Australia's tobacco control objectives, and nothing in the evidence and arguments submitted by the complainants proves otherwise.

441. For this reason, even if the Panel were to find that the complainants have demonstrated that the special requirements at issue encumber the use of a trademark in the course of trade, the Panel must find that any such encumbrance has not been imposed "unjustifiably" within the meaning of Article 20 of the TRIPS Agreement.

5. Conclusion

442. For the reasons set forth in this section, Australia respectfully requests that the Panel reject the complainants' claims that the tobacco plain packaging measure is inconsistent with Article 20 of the TRIPS Agreement.

E. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE
TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH THE TRIPS
AGREEMENT PROTECTION AGAINST "UNFAIR COMPETITION"

**1. The complainants have failed to demonstrate that the tobacco plain
packaging measure is inconsistent with Article 10bis of the Paris Convention, as
incorporated into Article 2.1 of the TRIPS Agreement**

443. Various complainants in this dispute have brought claims under Article 10bis(1), Article 10bis(3)(i), and Article 10bis(3)(iii) of the Paris Convention, which are incorporated by reference into Article 2.1 of the TRIPS Agreement. Australia will address these claims in turn below, and demonstrate that the complainants' claims are not supported by the plain text of the relevant provisions.

(a) Article 10bis(1) of the Paris Convention

444. Article 10bis of the Paris Convention provides:

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:
 - (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

445. Article 10bis(1) obligates Members to assure "effective protection against unfair competition". "Unfair competition" is defined in Article 10bis(2) as "any act of competition contrary to honest practices in industrial or commercial matters". While

not exhaustive, the examples in Article 10bis(3) illustrate the nature and scope of the acts encompassed by this definition.

446. The ordinary meaning of the term "act" is "a thing done; a deed"; "the process of doing".⁶¹⁹ The use of the term "act" in Article 10bis(2) thus indicates that the relevant conduct is particular or specific in nature – i.e., a particular "thing done" or "deed" of competition. This is confirmed by the illustrative examples of unfair competition in Article 10bis(3) – each of which concerns *particular* "acts".

447. The "acts" that are prohibited in Article 10bis(2) are "any act[s] of competition contrary to honest practices in industrial or commercial matters". The ordinary meaning of the term "competition" is the "action of competing or contending with others" or "striving for custom between rival traders in the same commodity".⁶²⁰ The ordinary meaning of the term "honest" is, in relevant part, "straightforward; free from fraud" or "truthful".⁶²¹

448. In Article 10bis(2), the term "honest" is used in connection with "practices in industrial or commercial matters", rather than in isolation.⁶²² While there is no single international standard for what constitutes an act of competition contrary to "honest" commercial practices,⁶²³ the illustrative examples in Article 10bis(3) indicate that Article 10bis is concerned with acts that are "dishonest" in the sense of being not

⁶¹⁹ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 22.

⁶²⁰ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.), (Oxford University Press, 2007), Vol. No. 1, Exhibit AUS-243, p. 470. As the complainants have outlined, this latter meaning of "competition" was endorsed by the panel in Panel Report, *Mexico – Telecoms*, para. 7.230: Honduras' first written submission, para. 663; and Dominican Republic's first written submission, para. 842.

⁶²¹ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.), (Oxford University Press, 2007), Vol. No. 1, Exhibit AUS-243, p. 1271.

⁶²² As noted by Wadlow: "[t]he requisite standards of fairness or honesty in competition is defined by reference to 'honest practices' in 'industrial or commercial matters'. One is not simply dealing with some abstract standard of ethical conduct ... as might be the case if a word such as 'unfair' or 'dishonest' stood on its own": C. Wadlow, *The Law of Passing-Off: Unfair Competition by Misrepresentation*, 3rd ed., (Sweet & Maxwell, 2004), Exhibit IND-60, at 2-17.

⁶²³ Such acts may include "competitor's misrepresentation, fraud threats, defamation, disparagement, enticement of employees, betrayal of confidential information, and commercial bribery, among others". See C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, (Oxford University Press, 2007), Exhibit AUS-242, p. 388.

"truthful"⁶²⁴ – each of subparagraphs (i) to (iii) is an example of a *false* or *misleading* representation.

449. Thus, by its terms, Article 10*bis* requires Members to assure effective protection against "particular deeds" of "dishonest" or "untruthful" commercial "rivalry" – i.e., acts that are intended to benefit a market actor by influencing consumers on the basis of false or misleading representations.⁶²⁵ This interpretation of Article 10*bis* is consistent with the views of WIPO.⁶²⁶

450. In order to establish a *prima facie* case of violation of Article 10*bis* of the Paris Convention, properly interpreted, the complainants would need to demonstrate that Australia has failed to assure effective protection *against* acts of competition by market actors that are intended to benefit such market actors by influencing consumers on the basis of false or misleading representations. The complainants have failed to do so.

451. Instead, each of the complainants argues that Australia's tobacco plain packaging measure violates Article 10*bis* of the Paris Convention by *compelling*

⁶²⁴ This interpretation of Article 10*bis* is consistent with the views of WIPO, which highlight that "truthfulness is rightly considered to be one of the main principles of honest trade practice": WIPO, *Introduction to Intellectual Property: Theory and Practice*, (Kluwer Law International, 1997), Exhibit UKR-80, para. 12.66; WIPO, *Protection Against Unfair Competition – Analysis of the Present World Situation*, (WIPO, 1994), Exhibit DR-139, para. 65.

⁶²⁵ In this way, Article 10*bis* requires Members to discipline the conduct of market actors in relation to rival competitors and potential consumers. Members have discretion in implementing this obligation, including in determining the range of acts constituting unfair competition, provided that the definition in Article 10*bis*(2) and the specific examples set out in Article 10*bis*(3) are given effect. See G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property As Revised at Stockholm in 1967*, (WIPO Publications, 1969), Exhibits UKR-79, HON-39, DR-79, IND-61, p. 144.

⁶²⁶ WIPO highlights that the common aspect of the illustrative and "most important" examples of unfair competition outlined in Article 10*bis*(3) is "the attempt (by an entrepreneur) to succeed in competition without relying on his own achievements" including "by influencing consumer demand with false or misleading statements": WIPO, *Introduction to Intellectual Property: Theory and Practice*, (Kluwer Law International, 1997), Exhibit UKR-80, para. 12.31; WIPO, *Protection Against Unfair Competition – Analysis of the Present World Situation*, (WIPO, 1994), Exhibit DR-139, para. 31.

market actors to engage in acts of "unfair competition".⁶²⁷ The complainants cite *Mexico – Telecoms* in support of the proposition "that a Member cannot legally require the behaviour it has undertaken to prevent and protect against".⁶²⁸

452. Contrary to the complainants' assertions, however, *Mexico – Telecoms* is inapplicable to the present dispute.⁶²⁹ Australia's measure in no way compels "act[s]" of "unfair competition" within the meaning of Article 10*bis* of the Paris Convention.

453. The complainants acknowledge that "unfair competition" is expressly defined in Article 10*bis*(2) to mean "[a]ny act of competition contrary to honest practices in industrial or commercial matters".⁶³⁰ The complainants nevertheless attempt to expand the meaning of any "act of competition" to encompass the *regulatory environment* in which such acts take place.⁶³¹ Furthermore, despite the fact that Article 10*bis*(2) explicitly defines what is "unfair" for the purposes of Article 10*bis*,⁶³² the complainants' focus their arguments on the ordinary meaning of the term "unfair" rather than the ordinary meaning of the term "honest".⁶³³

⁶²⁷ See Ukraine's first written submission, para. 414; Honduras' first written submission, para. 683; Dominican Republic's first written submission, paras. 834 and 873; Cuba's first written submission, para. 388; and Indonesia's first written submission, para. 151.

⁶²⁸ See Ukraine's first written submission, paras. 417-419; Honduras' first written submission, para. 659; Dominican Republic's first written submission, para. 879, fn 774; Cuba's first written submission, para. 383, fn 428; and Indonesia's first written submission, para. 178.

⁶²⁹ In *Mexico – Telecoms*, Mexico was found to have legally required the conduct it was specifically obligated to prevent. See, e.g. Panel Report, *Mexico – Telecoms*, para. 7.262.

⁶³⁰ Honduras' first written submission, para. 653; Dominican Republic's first written submission, para. 845; Cuba's first written submission, para. 381; and Indonesia's first written submission, para. 154. Ukraine is the only complainant that does not acknowledge this.

⁶³¹ See, e.g. Ukraine's first written submission, para. 405 (suggesting that Article 10*bis* encompasses a "fair competitive environment"); Honduras' first written submission, para. 669 (suggesting that Article 10*bis* encompasses "all aspects of competition" including the "circumstances" in which "rival traders ... strive for customs"). See also Dominican Republic's first written submission, para. 843; Cuba's first written submission, paras. 382 and 386; Indonesia's first written submission, para. 174.

⁶³² As Indonesia's own exhibit indicates: "[t]he intended meaning of Article 10*bis* is to be derived from the complete formula of para. (2), which is at risk of being lost if one notionally replaces it with a single word, whether 'unfair' or 'dishonest'. To attempt to use 'unfair' as a paraphrase is doubly inadmissible, because the formula which is abbreviated was actually devised as a definition of what is 'unfair' in this context": C. Wadlow, *The Law of Passing-Off: Unfair Competition by Misrepresentation*, 3rd ed., (Sweet & Maxwell, 2004), Exhibit IND-60, at 2-17.

⁶³³ See, e.g. Dominican Republic's first written submission, para. 845; Cuba's first written submission, para. 382; Honduras' first written submission, paras. 669-670.

454. With blithe disregard for the definition of "unfair competition" in Article 10*bis*(2), the complainants then argue that "unfair competition" within the meaning of Article 10*bis* includes: a "competitive environment in which rival manufacturers are required to present their goods to consumers in a visually undifferentiated manner"⁶³⁴ and "constraining the ability to convey product differentiation through trademarks, imagery, color and ... product design features".⁶³⁵ Such claims of "unfair competition" bear *no* resemblance to the illustrative examples in Article 10*bis*(3). By redefining "unfair competition" in this manner, the complainants seek to:

455. read in to Article 10*bis*(1) a positive right to use trademarks to advertise and promote products, on the basis that "competition" in the absence of such use is "unfair"; and

456. transform Article 10*bis*(1) from a provision that requires Members to proscribe particular acts of dishonest commercial rivalry into one that instead prevents Members from imposing measures that affect any "aspect of competition",⁶³⁶ such as measures that restrict the use of trademarks⁶³⁷ or result in "any asymmetrical impact on different market participants".⁶³⁸

457. The complainants' arguments are without legal foundation.⁶³⁹ By departing from the meaning of "unfair competition" in Article 10*bis*(2), the complainants are ignoring the plain text of Article 10*bis*.

⁶³⁴ Cuba's first written submission, para. 382.

⁶³⁵ Honduras' first written submission, para. 676. See also Dominican Republic's first written submission, para. 851; Ukraine's first written submission, para. 434; and Indonesia's first written submission, para. 178.

⁶³⁶ Honduras' first written submission, para. 669.

⁶³⁷ See, e.g. Honduras' first written submission, para. 676; Dominican Republic's first written submission, para. 851.

⁶³⁸ Honduras' first written submission, para. 670.

⁶³⁹ WIPO has expressly confirmed that the "Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted. If a national law does not exclude trademarks for certain kinds of products from registration, but only limits the use of such trademarks, this would not constitute a violation of the Paris Convention. See Letter from D.A. Latham of Lovell, White, Durrant, to J. Smithson, Rothmans International Services Limited (6 July 1994) attaching Letter

(continued)

458. Australia gives effect to its obligations under Article 10*bis*, properly interpreted, by providing a range of legal mechanisms through which affected parties can prevent or obtain redress for false or misleading representations, including:

- a right of enforcement against trademark infringement;⁶⁴⁰
- a general prohibition with respect to conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive;⁶⁴¹
- a prohibition with respect to false or misleading representations in connection with the supply, possible supply or promotion of goods (including statements concerning the place of origin of goods);⁶⁴²
- a prohibition with respect to imports of goods bearing false or misleading trade descriptions (including in relation to the country or place in which the goods were made or produced);⁶⁴³ and
- common law protection for the reputation of a business through the tort of "passing off", which can provide additional protection against misrepresentations.⁶⁴⁴

459. Australia's tobacco plain packaging measure does not interfere with the ability of interested parties to prevent or obtain redress for false or misleading representations through these legal avenues.⁶⁴⁵ Nor does Australia's measure "compel"

from L. Baeumer, Director, Industrial Property Law Department, WIPO to D.A. Latham of Lovell, White, Durrant, (5 July 1994), Bates No. 502592535-502592536, Exhibit AUS-234.

⁶⁴⁰ *Trade Marks Act 1995*, (Cth), Exhibit AUS-244, Sections 20, 120(1) and 170. See also Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁶⁴¹ *Competition and Consumer Act 2010* (Cth), Exhibit AUS-127, Section 18. See also Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁶⁴² *Competition and Consumer Act 2010* (Cth), Exhibit AUS-127, Subsection 29(1). See also Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁶⁴³ *Commerce Trade Descriptions Act 1905* (Cth), Exhibit AUS-248, Section 9.

⁶⁴⁴ See Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁶⁴⁵ For example, nothing in the tobacco plain packaging measure provides any licence, permission or immunity from liability of any kind for contravention of the relevant protections against unfair competition outlined in para. 458.

acts of competition by tobacco producers that seek to benefit such producers by influencing consumers on the basis of false or misleading representations. Article 10*bis*(1) is thus wholly inapplicable to Australia's tobacco plain packaging measure, and Australia requests that the Panel reject the complainants' claims under this provision.

(b) Article 10*bis*(3)(i) of the Paris Convention

460. Ukraine and Indonesia allege that the tobacco plain packaging measure is also inconsistent with Article 10*bis*(3)(i) of the Paris Convention.⁶⁴⁶ As noted above, Article 10*bis*(3)(i) prohibits:

All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.

461. The ordinary meaning of "confuse" is, in relevant part, to "mix up in the mind".⁶⁴⁷ In the context of Article 10*bis*(3)(i), the relevant confusion is between one market actor's establishment, goods, or industrial or commercial activities and the establishment, goods, or industrial or commercial activities of "a competitor". Thus, by its terms, Article 10*bis*(3)(i) prohibits acts that "mix up" the establishment, goods or commercial activities of a market actor with those of a rival competitor.⁶⁴⁸

462. In order to establish a *prima facie* case of violation of Article 10*bis*(3)(i) of the Paris Convention, the complainants would therefore need to demonstrate that Australia has failed to prohibit acts that create confusion between the goods of one market actor and those of a rival competitor. The complainants have failed to do so.

463. In relation to their claims under Article 10*bis*(3)(i), Ukraine and Indonesia argue that by standardising the retail packaging and appearance of tobacco products,

⁶⁴⁶ Neither Honduras, the Dominican Republic, nor Cuba makes a specific claim with respect to Article 10*bis*(3)(i).

⁶⁴⁷ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 489.

⁶⁴⁸ WIPO, *Introduction to Intellectual Property: Theory and Practice*, (Kluwer Law International, 1997), Exhibit UKR-80, para. 12.46; WIPO, *Protection Against Unfair Competition – Analysis of the Present World Situation*, (WIPO, 1994), Exhibit DR-139, para. 45.

Australia's tobacco plain packaging measure compels acts that create confusion with the goods of a competitor.⁶⁴⁹

464. Neither Ukraine nor Indonesia provide evidence to demonstrate that Australia's tobacco plain packaging measure has *in fact* created confusion between competing tobacco products since the measure came into effect in 2012. Nor does either complainant advance any arguments or evidence to establish how Australia's measure *could* create confusion between competing tobacco products within the context of Australia's dark market, in which: (i) consumers initiate the purchase of a tobacco product by asking the retailer for a particular tobacco product by its brand and variant name; (ii) consumers do not see the packaging of tobacco products until the act of purchase; and (iii) the brand and variant name of the tobacco product is clearly identified on the tobacco product packaging. Indonesia does not explain why, for example, the use of word marks "is insufficient to prevent confusion among tobacco products" in this retail context.⁶⁵⁰

465. The complainants also fail to explain how, post-purchase, the packaging and appearance of tobacco products creates confusion between the goods of one tobacco producer and those of a particular rival competitor. As Professor Tavassoli observes, "[i]t is not necessarily true ... that the presence of visual brand elements enhances brand distinguishability".⁶⁵¹ Rather, since "copycat brands often mimic visual features of leading brands"⁶⁵² the presence of visual elements can make it more difficult for consumers to distinguish the goods of one producer from those of a competitor (as demonstrated in the picture below).⁶⁵³ Thus, for example, it may "be more difficult to

⁶⁴⁹ Ukraine claims that "Australia requires competitors to package the tobacco products and to use the word marks in a way that would create an obvious likelihood of confusion" by removing "all forms of logos, colors, etc. from the packaging": Ukraine's first written submission, paras. 424 and 426. Indonesia claims that, under Australia's measure, "the packaging of tobacco products and the products themselves are stripped of any distinctiveness" and "[t]his required uniformity constitutes an act of 'such a nature as to create confusion' among the tobacco product offerings of different competitors": Indonesia's first written submission, paras. 162 and 163.

⁶⁵⁰ Indonesia's first written submission, para. 166.

⁶⁵¹ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 128.

⁶⁵² Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 128.

⁶⁵³ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 128.

distinguish between *Sensodyne* and *Pro-tech* toothpaste, or *Marlboro* and *Winfield* cigarettes, when they are side-by-side in their full trade dress rather than when the brand names alone are side-by-side in standardised font".⁶⁵⁴



Figure 16: Examples of copycat branding

466. Furthermore, because Australia's measure applies to all tobacco products for retail sale in Australia, it is implausible that consumers could be confused about whether *all* tobacco products in Australia are those of a single market actor on the basis of their standardised packaging and appearance.⁶⁵⁵ This is especially so when the measure permits the packaging of each tobacco product to clearly identify its particular brand, business or company name and any variant name.⁶⁵⁶

467. Ukraine and Indonesia have thus failed to establish a *prima facie* case of violation of Article 10bis(3)(i) of the Paris Convention, and Australia requests that the Panel reject these claims.

⁶⁵⁴ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 128.

⁶⁵⁵ In a relevant domestic case prior to the implementation of Australia's tobacco plain packaging measure, the court found that, in relation to two competing tobacco product offerings ("Summit" and "Horizon"), "a significant number of customers might think that the [Summit] cigarettes come from the same source as Horizon cigarettes. That is because the packs are so similar *whilst other cigarette packs are quite distinctive*. This conclusion flows in part from the similarities in the packaging [and] in part from *the fact that the get-up of the two brands is strikingly different from that of other brands ...*": Australian Federal Court case *W.D. & H.O. Wills (Australia) Ltd v Philip Morris Ltd* [1997] FCA 1074 (9 October 1997), Exhibit AUS-249, pp. 365-366.

⁶⁵⁶ TPP Regulations, Exhibit AUS-3, Regulations 2.4.1 and 2.4.2.

(c) Article 10bis(3)(iii) of the Paris Convention

468. Ukraine, Honduras, the Dominican Republic, and Indonesia maintain that the tobacco plain packaging measure is also inconsistent with Article 10bis(3)(iii) of the Paris Convention. As noted above, Article 10bis(3)(iii) prohibits:

indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

469. The ordinary meaning of "indication" is, in relevant part, "the action or an instance of indicating; something that indicates or suggests".⁶⁵⁷ The ordinary meaning of "to indicate" is "[p]oint out or to, make known, show".⁶⁵⁸ The ordinary meaning of "allegation" is, in relevant part, "[a] claim or assertion".⁶⁵⁹ The ordinary meaning of "mislead" is to "lead astray in action or conduct; cause to have an incorrect impression or belief".⁶⁶⁰ Finally, as Australia has already established in Part D.3 above, the term "in the course of trade" refers to acts undertaken in connection with the buying and selling of goods for profit.⁶⁶¹

470. In contrast to Article 10bis(3)(i) and Article 10bis(3)(ii), Article 10bis(3)(iii) does not contain the words "of a competitor". This indicates that Article 10bis(3)(iii) prohibits market actors from making misleading claims or assertions with respect to their *own* goods – i.e., claims or assertions by a market actor that entice consumers to buy that actor's goods on false grounds.⁶⁶²

⁶⁵⁷ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 1364.

⁶⁵⁸ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 1364.

⁶⁵⁹ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 56.

⁶⁶⁰ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 1799.

⁶⁶¹ See para. 311.

⁶⁶² This interpretation is emphasised by WIPO, which observes that Article 10bis(3)(iii) disciplines the actions of competitors in "creating a false impression of a competitor's *own* products or services": WIPO, *Introduction to Intellectual Property: Theory and Practice*, (Kluwer Law International, 1997), Exhibit UKR-80, para. 12.65; WIPO, *Protection Against Unfair Competition – Analysis of the Present World Situation*, (WIPO, 1994), Exhibit DR-139, para. 64. (emphasis original)

(continued)

471. Therefore, by its terms, Article 10bis(3)(iii) requires Members to prohibit a market actor from "mak[ing] known" or making "claims" or "assertions" about "the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity" of the actor's own goods that – when used in connection with the buying or selling of those goods – would "lead astray" the public to purchase the goods on false grounds.

472. To establish a *prima facie* case of violation of Article 10bis(3)(iii) of the Paris Convention, the complainants would therefore need to demonstrate that Australia has failed to prohibit market actors from enticing consumers with indications or allegations about certain features of their goods during the buying or selling of those goods, which are liable to mislead the public.

473. Ukraine, Honduras, the Dominican Republic, and Indonesia each maintain that, by imposing standardised packaging and appearance requirements, Australia's tobacco plain packaging measure "misleads" consumers that all tobacco products are similar or identical.⁶⁶³ However, none of the complainants explains how this alleged "misleading" of consumers occurs *in the course of trade*, as that concept is properly understood.

474. Honduras attempts to address this threshold issue with its untenable assertion that even where any "misleading" indications or allegations are "perceived by the consumer only *after* the sale of particular item",⁶⁶⁴ this nonetheless occurs "in the course of trade". Honduras argues that such indications or allegations "have the potential to mislead the consumer into buying *another* item of that product *in the*

Further to this, WIPO emphasises that misleading indications or allegations within the meaning of Article 10bis(3)(iii) refers to those that have "some enticing effect on the consumer" such as by trying "to entice customers with incorrect information": WIPO, *Introduction to Intellectual Property: Theory and Practice*, (Kluwer Law International, 1997), Exhibit UKR-80, para. 12.71; WIPO, *Protection Against Unfair Competition – Analysis of the Present World Situation*, (WIPO, 1994), Exhibit DR-139, para. 70.

⁶⁶³ Honduras' first written submission, para. 721; Ukraine's first written submission, para. 426. See also Dominican Republic's first written submission, paras. 875-877; Indonesia's first written submission, paras. 179-180.

⁶⁶⁴ Honduras' first written submission, para. 717. (emphasis added)

future".⁶⁶⁵ The implication of Honduras' interpretation is that the "course of trade" in fact *never* ends, as a future purchase could potentially give rise to a subsequent future purchase *ad infinitum*. To this end, Honduras' interpretation would deprive the qualifier "in the course of trade" of any *effet utile*, and must therefore be rejected. As Australia has explained in Part D.3 above, the "course of trade" necessarily culminates at the point of sale.

475. Australia has already outlined in detail a typical tobacco purchase transaction in the Australian market.⁶⁶⁶ Australia has explained that it is only after a consumer has requested a tobacco product, typically by reference to the brand and variant name of the product, that the consumer will see the package. The complainants have failed to establish *how* consumers are liable to be "misled" by the packaging and appearance of tobacco products under Australia's measure, when the package is seen only *after* the consumer has made his or her product selection.

476. In light of the complainants' failure to explain how their claims arise *in the course of trade*, as required by the plain text of the provision, Australia will not address the complainants' additional arguments in relation to Article 10*bis*(3)(iii) of the Paris Convention.

2. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 22.2(b) of the TRIPS Agreement

477. The complainants have also failed to demonstrate that the tobacco plain packaging measure is inconsistent with the protection against "unfair competition" in Article 22.2(b) of the TRIPS Agreement.

478. Article 22.2(b) of the TRIPS Agreement provides:

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

...

⁶⁶⁵ Honduras' first written submission, para. 717. (emphasis original)

⁶⁶⁶ See para. 354.

(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

479. As Australia explained in Part C.5 above, the ordinary meaning of the term "prevent" is "stop, hinder, avoid" or "forestall or thwart".⁶⁶⁷ The ordinary meaning of the term "use" is "make use of (a thing), esp. for a particular end or purpose; utilize, turn to account".⁶⁶⁸ The subject matter that is "prevent[ed]" from "use" in Article 22.2(b) is "geographical indications", as is evident from the context provided by Article 22.2 itself – i.e., "in respect of geographical indications". This understanding is also consistent with the broader context of the provision. For example, Article 22.4 clarifies that the protection under Articles 22.1, 22.2, and 22.3 is "applicable *against a geographical indication* which, while literally true, would nevertheless constitute a false representation to the public."⁶⁶⁹

480. By its terms, Article 22.2(b) obligates Members to provide the legal means for interested parties to "stop" or "forestall" any "act of using" a geographical indication that constitutes "an act of unfair competition" under Article 10*bis* of the Paris Convention. Australia has already established what constitutes "an act of unfair competition" within the meaning of Article 10*bis* in addressing the complainants' claims under Article 2.1 of the TRIPS Agreement. Specifically, Australia has demonstrated that "unfair competition" refers to "any act of competition that is contrary to honest practices in industrial or commercial matters", and covers conduct that is intended to benefit a market actor by influencing consumers on the basis of false or dishonest representations.⁶⁷⁰

⁶⁶⁷ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 2341.

⁶⁶⁸ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 3485.

⁶⁶⁹ Honduras argues in its submission that "Article 22.2(b) does not require that the unfair circumstances result from the use 'of' a geographical indication, e.g. the use of an existing geographical indication owned by another party": Honduras' first written submission, para. 775. (emphasis added). However, Honduras fails to explain how the text of Article 22.2(b) supports its interpretation. Nor does Honduras explain *what* is prevented from being "used" (or by whom) through the protection afforded by Article 22.2(b) if *not* a geographical indication. Furthermore, after making this argument, Honduras' argument then proceeds to focus squarely on the use "of" geographical indications. See Honduras' first written submission, para. 781.

⁶⁷⁰ See para. 449.

481. Article 22.2(b) therefore requires Members to provide the legal means for interested parties to prevent third parties from falsely or dishonestly using a geographical indication to influence consumers to purchase goods that are not in fact identified by that geographical indication. The protection provided under Article 22.2(b) is *negative* in nature, consistent with the understanding that the TRIPS Agreement "does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of *negative rights to prevent certain acts*".⁶⁷¹ This interpretation of Article 22.2(b) is consistent with observations of WIPO,⁶⁷² and the views of respected commentators.⁶⁷³

482. In order to establish a *prima facie* case of violation of Article 22.2(b) of the TRIPS Agreement, the complainants would need to demonstrate that Australia has failed to provide the legal means for interested parties to prevent the false or dishonest use of a geographical indication by a third party. Instead, Honduras and the Dominican Republic argue that the tobacco plain packaging measure is inconsistent with Article 22.2(b) because, pursuant to the measure, "Australia is regulating the use of geographical indications in such a manner that a geographical indication – other than the country of origin – cannot be used".⁶⁷⁴

⁶⁷¹ Panel Report, *EC – Trademarks and Geographical Indications*, para. 7.246. (emphasis added)

⁶⁷² WIPO observes that the protection in Article 22.2(b) applies to "the use of a certain geographical indication for goods or services not originating from the respective area", and that the purpose of unfair competition laws is to provide remedies "to traders and producers damaged by the unauthorized use of geographical indications by third parties". See WIPO, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Ninth Session Geneva: The Definition of Geographical Indications SCT/9/4* (11-15 November, 2002), Exhibit AUS-250, para. 66.

⁶⁷³ For example, C. Correa describes Article 22.2(b) as providing "protection against acts of unfair competition committed *with the use of geographical indications*, as provided for under Article 10bis of the Paris Convention". Correa notes that "[t]he basic issue under ... regulations (such as unfair competition...) is not whether the geographical indication as such is eligible for protection but, rather, whether a specific act *involving the use of a geographical indication* has contravened standards contained in laws covering such acts." C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), Exhibit AUS-242, p. 223 (quoting De Sousa). (emphasis added)

⁶⁷⁴ Honduras' first written submission, para. 781. Similarly, Dominican Republic argues that Australia's measure violates Article 22.2(b) "by establishing a situation where GIs can no longer be used in commerce to distinguish products in the name of fair and vigorous competition": Dominican Republic's first written submission, para. 882. These claims are endorsed by Cuba and Indonesia. See Cuba's first written submission, para. 428 and Indonesia's first written submission, para. 462. Australia notes that Indonesia states that it "supports the arguments presented by ... Ukraine with respect to

(continued)

483. First, it is important to clarify precisely how the tobacco plain packaging measure operates in relation to geographical indications. The measure permits the use of geographical indications on the packaging of tobacco products, and on the bands of individual cigars, if such indications are: (i) part of the brand or variant name of the product; or (ii) the country of origin of the product. In addition, geographical indications are permitted on tobacco product packaging if they are the place of packaging.⁶⁷⁵ Thus, contrary to the complainants' assertions, the measure does not have the effect of "banning the display of geographical indications on tobacco packaging and products".⁶⁷⁶

484. Setting aside the complainants' mischaracterisations of the operation of the measure, it is evident that the complainants' claims under Article 22.2(b) are once again based on reading a "right of use" into a TRIPS Agreement provision where no such right exists. The complainants are attempting to insert into Article 22.2(b) a *positive* right for interested parties to *use* geographical indications to advertise and promote their tobacco products to "consumers and to the broader public", on the basis that *not* using a geographical indication in this manner results in competition that is "unfair".⁶⁷⁷ The complainants contend that Article 22.2(b) prohibits Members from imposing restrictions on this alleged positive "right of use".⁶⁷⁸

Australia's violation of Article[] 22.2(b)".⁶⁷⁴ Australia notes, however, that Ukraine did not advance a claim under Article 22.2(b) of the TRIPS Agreement.

⁶⁷⁵ TPP Regulation 2.3.1(c) permits a "trade description" statement on primary and secondary packaging and TPP Regulation 2.3.4 mandates the form of such a statement (see TPP Regulations, Exhibit AUS-3, Regulations 2.3.1 and 2.3.4). A "trade description" is required to appear on imported products pursuant to the *Commerce (Imports) Regulations 1940* (Cth) and must include the name of the country in which the product was made or produced and a true description of the product (see *Commerce (Imports) Regulations 1940* (Cth), Exhibit AUS-251, Regulations 7 and 8). See also *Commerce Trade Descriptions Act 1905* (Cth), Exhibit AUS-248.

⁶⁷⁶ Dominican Republic's first written submission, para. 912.

⁶⁷⁷ Australia recalls that it has already established at para. 454-457 that the complainants' claims of "unfairness" fall outside the definition of "unfair competition" within the meaning of Article 10*bis* of the Paris Convention.

⁶⁷⁸ Honduras argues that such *restrictions* constitute "unfair competition" because they "result in an *inability* for the owners [of geographical indications] to communicate through their geographical indications differences in quality, taste and other physical characteristics to their consumers and to the broader public." Honduras' first written submission, para. 782. (emphasis added) The Dominican Republic claims that Article 22.2(b) requires Members to prevent "acts that would diminish consumers'

(continued)

485. The complainants' arguments are wholly unsupported by the text of Article 22.2(b). Honduras and the Dominican Republic fundamentally ignore the negative nature of the protection provided by Article 22.2(b), and the fact that such protection is provided to *interested parties* to *prevent* false or dishonest use of geographical indications by *third parties*. A Member's refusal to *allow* the unfettered use of geographical indications by interested parties is not a violation of this provision.

486. Australia has already demonstrated that it meets its obligations under Article 22.2(b) of the TRIPS Agreement, properly interpreted, in responding to the complainants' claims under Article 2.1 of the TRIPS Agreement.⁶⁷⁹ There, Australia outlined the range of legal mechanisms it provides through which affected parties can prevent or obtain redress for acts of unfair competition, including a right of enforcement against trademark infringement; a general prohibition with respect to misleading or deceptive conduct in trade or commerce; a prohibition with respect to false or misleading representations in connection with the supply of goods; a prohibition with respect to imports of goods bearing false or misleading trade descriptions; and common law protection for the reputation of a business through the tort of passing off.

487. These mechanisms provide the legal means for interested parties to prevent the false or dishonest use of geographical indications by third parties. The operation of these mechanisms is in no way affected by Australia's tobacco plain packaging measure. Australia therefore respectfully requests that the Panel reject the complainants' claims in this dispute under Article 22.2(b) of the TRIPS Agreement.

understanding regarding the qualities, reputation, or other characteristics expected from a good with the protected origin." Dominican Republic's first written submission, para. 895.

⁶⁷⁹ See para. 458.

F. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE
TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH
ARTICLE 24.3 OF THE TRIPS AGREEMENT

488. Article 24.3 of the TRIPS Agreement provides that "[i]n implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement."

489. The scope of Article 24.3 is limited by the introductory phrase "[i]n implementing this Section". As noted by the panel in *EC – Trademarks and Geographical Indications (Australia)*, this means that Article 24.3 "does not apply to measures adopted to implement provisions outside Section 3."⁶⁸⁰

490. With respect to the substance of Article 24.3, the panel in *EC – Trademarks and Geographical Indications (Australia)* explained that the reference in the provision to "the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement" must be understood as a reference to the state of protection of *individual geographical indications* prior to 1 January 1995.⁶⁸¹ The panel explained that to interpret this phrase more broadly, as a reference to a "system of protection in a Member" rather than the state of protection of individual geographical indications, would "prevent a Member which had a system that granted a higher level of protection than that provided for in the TRIPS Agreement from implementing the same minimum standards of protection as other Members."⁶⁸²

⁶⁸⁰ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.632.

⁶⁸¹ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.636.

⁶⁸² Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.634. The panel further explained that "a standstill provision for a system of protection would exclude from the scope of Section 3 not only individual rights already in force under that system as at the date of entry into force of the WTO Agreement, but also rights subsequently granted under that system in perpetuity." Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.635.

491. In order to substantiate their claims under Article 24.3, the complainants in this dispute would first need to establish that the provision is relevant at all. In other words, consistent with the panel's understanding in *EC – Trademarks and Geographical Indications (Australia)*, the complainants would need to establish that the tobacco plain packaging measure is a measure adopted to implement Part II, Section 3 of the TRIPS Agreement. Then, in order to establish a *prima facie* case of violation, the complainants would need to demonstrate that the protection of *individual geographical indications* has been diminished by the tobacco plain packaging measure, in relation to the protection that existed prior to 1 January 1995. The complainants have failed on both fronts.

492. First, the complainants have not demonstrated that the tobacco plain packaging measure is a measure adopted to implement Part II, Section 3 of the TRIPS Agreement. This is not surprising, because such a demonstration would be contrary to fact. As noted in Part E.2 above, Article 22 of the TRIPS Agreement provides in relevant part:

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

3. A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

493. A measure adopted to implement Part II, Section 3 of the TRIPS Agreement would be a measure that "provide[s] the legal means for interested parties to *prevent*" the use of a geographical indication in the manner described in Article 22 (i.e. uses which are misleading or which constitute an act of unfair competition).⁶⁸³ At the time of entry into force of the TRIPS Agreement, under Australian law, geographical indications were primarily protected against acts of misleading conduct or unfair competition through statutory⁶⁸⁴ and common law⁶⁸⁵ consumer protections laws. In order to implement the TRIPS Agreement, Australia enacted the Trade Marks Act 1995. Section 61 of the Trade Marks Act specifically implements Australia's obligations with respect to geographical indications, to the extent not already conferred under existing law. Unlike section 61 of Australia's Trade Marks Act, the purpose of the tobacco plain packaging measure is indisputably not to "provide[s] the legal means for interested parties to *prevent*" the use of a geographical indications in the circumstances described in Article 22. Accordingly, Australia submits that Article 24.3 is inapplicable in relation to the current measure.

494. Even if the Panel were to conclude that Article 24.3 were applicable, however, Australia notes that the complainants have also failed to demonstrate that the level of protection for *individual* geographical indications has been diminished by virtue of the tobacco plain packaging measure. Of the complainants, only Cuba has identified a specific geographical indication, "Habanos" (registered trade mark 1356832), and alleged that the level of protection provided with respect to that geographical indication has been diminished by Australia's plain packaging measure. Cuba's argument, however, is without merit. The geographical indication "Habanos" was registered as a trademark in Australia from 16 April 2010, and thus was not

⁶⁸³ While not relevant for purposes of this dispute, the same would be true of a measure adopted to "provide the legal means for interested parties to prevent use of a geographical indication" in the manner described in Article 23.

⁶⁸⁴ *Trade Practices Act 1974* (Cth), Exhibit AUS-252, Section 52. (Now replaced by *Competition and Consumer Act 2010* (Cth), Exhibit AUS-127, Section 18 of Schedule 2).

⁶⁸⁵ As indicia of reputation, trademarks or geographical indications may be protected through passing off actions, although they are not protected *per se*. See *Spalding v Gamage* (1915) 32 RPC 273, Exhibit AUS-253; *Campomar Sociedad, Limitada v Nike International Limited* [2000] HCA 12, Exhibit AUS-254, 108.

"protected" in the Australian market as a trademark under the Trade Marks Act prior to that date. To the extent that "Habanos" had a reputation in Australia before 1995, it would have been protected against acts of misleading conduct or unfair competition under the common law through the tort of passing off and through statutory consumer protections. Such statutory and common law protections have not been diminished by the implementation of the tobacco plain packaging measure. Accordingly, there is no basis for Cuba's claim that the tobacco plain packaging measure has diminished Australia's "protection" of the geographical indication "Habanos" from that which existed prior to 1 January 1995.

495. Neither the Dominican Republic nor Honduras even alleges that the level of protection for *individual* geographical indications has been diminished by virtue of the tobacco plain packaging measure.⁶⁸⁶ This is because the complainants disagree with the panel in *EC – Trademarks and Geographical Indications (Australia)* that such a demonstration is required.⁶⁸⁷ Rather, the complainants maintain that the proper analysis under Article 24.3 is in relation to a "system of protection in a Member", and not *individual geographical indications*.⁶⁸⁸

496. For the reasons articulated by the panel in *EC – Trademarks and Geographical Indications (Australia)*, the complainants' interpretation of Article 24.3 is flawed. A standstill provision that applies only to the specific geographical indications that were protected in a Member prior to the entry into force of the TRIPS Agreement is different in both purpose and effect to a provision that applies to a Member's entire system of protection. Precluding the diminution of protection provided to existing geographical indications serves the purpose of protecting existing property rights and ensuring that the minimum standards introduced by the TRIPS

⁶⁸⁶ Indonesia "endorses" the claims of the Dominican Republic and Honduras under Article 24.3, advancing no arguments of its own. Indonesia's first written submission, para. 462. Australia notes that Ukraine has not advanced claims under this provision.

⁶⁸⁷ See Dominican Republic's first written submission, para. 918, fn 793; and Honduras' first written submission, paras. 745-758.

⁶⁸⁸ See Dominican Republic's first written submission, para. 918; and Honduras' first written submission, para. 744.

Agreement do not have the unintended consequence of removing protections already provided by a national system in respect of such geographical indications.

497. In contrast, a standstill provision that pertains to an entire system of protection would have the effect of creating a two-tiered system of protection for geographical indications, wherein those Members that previously provided a system of protection for geographical indications would be required in perpetuity to maintain a higher level of protection than the minimum standards provided in the TRIPS Agreement. Australia submits that this cannot have been the intention of the drafters.

498. For these reasons, Australia maintains that the panel in *EC – Trademarks and Geographical Indications (Australia)* properly interpreted "the protection of geographical indications" in Article 24.3 as a reference to the protection of individual geographical indications that existed prior to 1 January 1995, not as a reference to a Member's system of protection prior to the entry into force of the TRIPS Agreement. The complainants' failure to demonstrate that there has been any change in the level of protection in relation to individual geographical indications as a result of the tobacco plain packaging measure, as compared to that which existed prior to 1 January 1995, is yet another reason for the Panel to reject the complainants' claims under Article 24.3.

499. There is, in addition, a third reason for the Panel to reject the complainants' claims. Even if the Panel were to find that Article 24.3 was relevant to the tobacco plain packaging measure, and even if the Panel were to agree with the complainants, contrary to the express findings of the panel in *EC – Trademarks and Geographical Indications (Australia)* that the reference to "the protection of geographical indications" in Article 24.3 is a reference to a Member's "system of protection", Australia maintains that the complainants have still failed to establish a *prima facie* case under their *own* interpretation of the scope of Article 24.3.

500. The complainants allege that in prohibiting the use of geographical indications on the packaging of tobacco products, Australia has diminished the level of protection

provided to geographical indications.⁶⁸⁹ In order to substantiate this allegation, the complainants would need to demonstrate that prior to 1 January 1995, there was a protected "right of use" under Australian law in relation to geographical indications. The complainants have failed to do so, because no such "right of use" was protected prior to the entry into force of the TRIPS Agreement.⁶⁹⁰

501. The complainants confuse the *ability* to use a geographical indication under Australian law with the *right* to use a geographical indication under Australian law. For example, the Dominican Republic argues that "[p]rior to 1995, GIs in Australia could be used freely by interested parties on tobacco products, including on the sticks, in order to acquire, maintain, and, ultimately, to enforce GIs."⁶⁹¹ What the Dominican Republic is referring to is a general market freedom, not a protected legal right.

502. Under Australian law, geographical indications are primarily protected through the trademarks system, as well as through statutory and common law consumer protection laws. Neither now, nor at the time of entry into force of the TRIPS Agreement, was a right to use a geographical indication protected under Australian law. Rather, under the Trade Marks Act, if a geographical indication was registered as a trademark, then the owner of the geographical indication had negative rights to *prevent* certain uses and to obtain remedies in respect of infringement.⁶⁹² These rights continued to exist in Australia following the adoption of the TRIPS Agreement, consistent with the requirements in Article 22, and these rights continue to exist today following the introduction of the tobacco plain packaging measure.

503. In light of the fact that the protection provided to geographical indications under Australian law prior to 1 January 1995 did not include the protection of a "right to use" a geographical indication, Article 24.3 is not relevant to the Panel's

⁶⁸⁹ See Cuba's first written submission, paras. 374-375; Dominican Republic's first written submission, para. 928; and Honduras' first written submission, paras. 769-771.

⁶⁹⁰ See Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁶⁹¹ Dominican Republic's first written submission, para. 925.

⁶⁹² *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 20 and Part 12, Subsections 120-130.

consideration of Australia's tobacco plain packaging measure. This is a third reason for the Panel to reject the complainants' claims under Article 24.3 under the TRIPS Agreement.

G. CONCLUSION

504. Australia has demonstrated that the complainants' claims under the TRIPS Agreement find no support in the text of the relevant provisions. In addition to asking the Panel to ignore the plain meaning of the text of the TRIPS Agreement, the complainants also suggest that the Panel should disregard the operation of the measure, including the import of section 28, and disregard the significance of Australia's dark market. In other words, the complainants seek to have the Panel rewrite the text of the TRIPS Agreement and then apply that rewritten text without regard for how the measure at issue operates in Australia's legal regime. That this would be an improper exercise for the Panel should be beyond dispute.

505. For the reasons set forth in this section, Australia respectfully requests that the Panel reject the complainants' claims that the tobacco plain packaging measure is inconsistent with Articles 2.1 (incorporating *6quinquis* A(1) and *10bis* of the Paris Convention), 15.1, 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement.

V. THE COMPLAINANTS HAVE FAILED TO MAKE A PRIMA FACIE CASE THAT THE TOBACCO PLAIN PACKAGING MEASURE VIOLATES ARTICLE 2.2 OF THE TBT AGREEMENT

506. Australia will now turn to the complainants' claims under Article 2.2 of the TBT Agreement. As Australia discussed in Part II.G above, the tobacco plain packaging measure establishes: (1) certain requirements as to the usage of trademarks on tobacco packages and products (the "trademark requirements"); and (2) certain requirements as to the physical characteristics of tobacco packages and products (the "physical requirements").

507. Australia accepts that the physical requirements are technical regulations within the scope of the TBT Agreement. These requirements of the measure "lay[] down product characteristics" and/or "deal ... with terminology, symbols, packaging, marking or labelling requirements as they apply to a product".⁶⁹³ Compliance with these requirements is mandatory. As Australia will demonstrate below, the complainants have failed to establish that these physical requirements are inconsistent with Article 2.2 of the TBT Agreement.

508. The complainants contend that the trademark requirements can also be reviewed under the TBT Agreement, in addition to the TRIPS Agreement. The complainants apparently consider that Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement share "the same subject matter", i.e. measures that impose limitations on the use of trademarks on retail packages and products.⁶⁹⁴

509. Australia has significant concerns about the systemic implications of the complainants' contentions. The TBT Agreement addresses technical regulations and

⁶⁹³ TBT Agreement, Annex 1.1.

⁶⁹⁴ This is evidenced, *inter alia*, by the fact that the complainants do not distinguish the scope of applicability of Article 20 of the TRIPS Agreement, on the one hand, and Article 2.2 of the TBT Agreement, on the other.

does not, on its face, appear to be concerned with the exploitation of intellectual property.

510. As Australia discussed in Part IV.D above, Article 20 of the TRIPS Agreement provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings." Article 2.2 of the TBT Agreement, by contrast, does not refer to the use of a trademark at all, but instead encompasses all manner of "technical regulations".

511. However, if the Panel takes the view that requirements affecting the use of trademarks can be "technical regulations" within the scope of the TBT Agreement, Article 20 of the TRIPS Agreement would remain the applicable provision in respect of the trademark requirements imposed by the tobacco plain packaging measure. In this regard, Australia recalls the statement by the Appellate Body in *EC - Bananas III* that, as between two agreements or norms addressing the same subject matter, a panel should apply the agreement or norm that "deals specifically, and in detail" with the particular subject matter.⁶⁹⁵ Thus, if requirements affecting the use of trademarks on packages and products fall within the scope of Article 2.2, Article 20 of the TRIPS Agreement would clearly address this subject matter more "specifically, and in detail" as compared to Article 2.2 of the TBT Agreement. For this reason, Article 20 of the TRIPS Agreement would apply to the exclusion of Article 2.2 in respect of those requirements.

512. In presenting their claims under Article 2.2, the complainants do not significantly distinguish between the trademark requirements and the physical requirements imposed by the tobacco plain packaging measure. For this reason, and

⁶⁹⁵ Appellate Body Report, *EC – Bananas III*, para. 204. Note that the panel in *US – 1916 Act (Japan)* regarded the Appellate Body "as applying the general principle of *lex specialis derogat legi generali*" in making this finding. Panel Report, *US – 1916 Act (Japan)*, para. 6.269. See also Panel Report, *US – Customs Bond Directive*, paras. 7.170-7.172.

because the complainants' claims under Article 2.2 are unfounded in any event, Australia will not distinguish between those two aspects of the tobacco plain packaging measure in its response to the complainants' claims. However, this analytical approach is without prejudice to Australia's view that only the physical requirements are properly subject to examination under Article 2.2.

513. With respect to the substance of the complainants' claims, Australia will begin in Part A of this section by demonstrating that the complainants have failed to establish that the tobacco plain packaging measure is "trade-restrictive". For this reason, the Panel must reject the complainants' claims under Article 2.2 of the TBT Agreement at the threshold. Australia will then proceed in Part B to demonstrate that, even if the Panel were to consider that the complainants had established some degree of trade-restrictiveness, the complainants have failed to establish that the tobacco plain packaging measure is more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Thus, even if the Panel were somehow to conclude that the measure is "trade-restrictive", the Panel would still need to reject the complainants' claims under Article 2.2 of the TBT Agreement in their entirety.

A. THE COMPLAINANTS HAVE FAILED TO ESTABLISH, AS A THRESHOLD MATTER, THAT THE TOBACCO PLAIN PACKAGING MEASURE IS "TRADE-RESTRICTIVE"

1. Introduction and summary of argument

514. In this section, Australia will demonstrate, as a threshold matter, that the complainants have failed to establish a *prima facie* case that the tobacco plain packaging measure constitutes an "obstacle to international trade" in that it is "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement. As Australia will proceed to demonstrate, the complainants' allegations that the tobacco plain packaging measure is trade-restrictive suffer from four principal failings.

515. First, the complainants have attempted to expand the concept of "trade-restrictive" under Article 2.2 beyond recognition by framing their claims with respect

to an *abstract* notion of market conditions without establishing that the tobacco plain packaging measure has altered market conditions in such a way as to have a *limiting effect* on international trade in tobacco products.⁶⁹⁶ This is most evident in the complainants' claims that the tobacco plain packaging measure diminishes the ability of foreign producers to differentiate their brands in the Australian market. The complainants argue that this alleged lack of product differentiation leads to "downtrading" from premium brands to lower-priced brands, which, they further allege, reduces their profit margins on sales of tobacco products in Australia.

516. However, the complainants have utterly failed to establish that these alleged effects of the tobacco plain packaging measure on market conditions in the abstract are "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement. That is, the complainants have not demonstrated *how* such effects give rise to a limiting effect on international trade in tobacco products.

517. The second principal failing underlying the complainants' claims of trade-restrictiveness is their reliance on speculation, assertion, and abstract theory in place of the actual, concrete evidence of trade-restrictiveness that their claims require. Even if certain of the effects of the tobacco plain packaging measure alleged by the complainants could be deemed "trade-restrictive" within the meaning of Article 2.2, the complainants' *prima facie* case would still fail because they have failed to establish that those claimed effects are likely to occur in the Australian market as a result of the design, structure and operation of the measure.

518. Further, even if certain of the effects alleged by the complainants have in fact occurred in the Australian market, the complainants have failed to demonstrate that those effects are attributable to the tobacco plain packaging measure, and not to other unchallenged elements of Australia's comprehensive tobacco control policy or to other external factors unrelated to the tobacco plain packaging measure. For example, the complainants and their experts repeatedly assert that the claimed changes in market conditions that form the basis for the complainants' trade-restrictiveness

⁶⁹⁶ See, e.g. Honduras' first written submission, para. 874.

claims are attributable to "plain packaging" without taking any account of the fact that its implementation coincided with the introduction of updated and enlarged graphic health warnings. Australia fully appreciates the difficulties associated with separating and distinguishing the effects of the tobacco plain packaging measure from the other elements of Australia's comprehensive tobacco control policy. Nevertheless, that is the burden the complainants have assumed in bringing this dispute, which is confined to challenging Australia's tobacco plain packaging measure exclusively. The complainants plainly ignore this evidentiary problem by effectively asking the Panel to presume that any changes in market conditions coincident with and since the implementation of the tobacco plain packaging measure must have been caused by that measure. This is flatly inconsistent with the parties' respective burdens of proof and is a third independent basis for concluding that the complainants have failed to establish their *prima facie* case of trade-restrictiveness under Article 2.2.

519. Finally, the complainants have failed to address at all the implications for their argument of the fact that the tobacco plain packaging measure was adopted in accordance with the FCTC. It is evident on the face of the tobacco plain packaging measure that it has been adopted for the protection of public health, and that it implements the FCTC Guidelines, which are the relevant international standards for tobacco plain packaging. Accordingly, the tobacco plain packaging measure benefits from the presumption under Article 2.5 of the TBT Agreement that it *does not* create an unnecessary obstacle to international trade, and the complainants have not even begun to overcome this presumption.

520. Given the complainants' failure to establish a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" within the meaning of Article 2.2, the Panel's analysis can and should end here.⁶⁹⁷ The Panel should find, for the reasons articulated below, that the complainants have failed to establish that the tobacco plain packaging measure is inconsistent with Article 2.2 of the TBT Agreement.

⁶⁹⁷ See Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322. See also Appellate Body Report, *US – COOL*, fn 748 to para. 376.

2. The complainants' burden of proof with respect to "trade-restrictiveness" under a proper interpretation of Article 2.2

521. Article 2.2 provides, in relevant part, that:

Members shall 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. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

522. Article 2.2 therefore prohibits WTO Members from adopting technical regulations that constitute "unnecessary obstacles to international trade", understood as those regulations that are "more trade-restrictive than necessary" to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. It is axiomatic that, in order to make a *prima facie* case under this standard, a complainant must establish, as a threshold matter, that the technical regulation at issue is "trade-restrictive".⁶⁹⁸

523. The first sentence of Article 2.2 refers to an "obstacle to international trade". The second sentence refers to "trade-restrictive" measures. The terms "international trade" and "trade", in this context, refer to trade in goods between WTO Members.⁶⁹⁹

524. In *US – Tuna II (Mexico)* the Appellate Body noted that the ordinary meaning of the term "restriction" is "something that restricts someone or something, a limitation on action, a limiting condition or regulation".⁷⁰⁰ When used in conjunction

⁶⁹⁸ Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322.

⁶⁹⁹ The second recital to the preamble of the TBT Agreement states: "*Desiring* to further the objectives of GATT 1994"; Article 1.3 of the TBT Agreement provides: "*All products*, including industrial and agricultural products, shall be subject to the provisions of this Agreement". See also Appellate Body Report, *US – Clove Cigarettes*, paras. 89-96, at para. 91: "While this recital may be read as suggesting that the *TBT Agreement* is a "development" or a "step forward" from the disciplines of the GATT 1994, in our view, it also suggests that the two agreements overlap in scope and have similar objectives. If this were not true, the *TBT Agreement* could not serve to "further the objectives" of the GATT 1994. The second recital indicates that the *TBT Agreement* expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner".

⁷⁰⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319 (referring to Appellate Body Report, *China – Raw Materials*, para. 319).

with the term "trade", the term "restriction" means something "having a limiting effect on trade".⁷⁰¹

525. Viewed in the context of the first sentence of Article 2.2, a technical regulation will have a "limiting effect on trade" when it creates an "obstacle" ("hindrance" or "impediment")⁷⁰² to international⁷⁰³ trade. Establishing the extent to which a technical regulation creates an obstacle to international trade does not require evidence of "actual trade effects", but rather can be discerned from the design, structure and operation of the measure. For example, in *US – COOL*, the relevant technical regulation was found to be trade-restrictive by examining whether the design, structure and operation of the measure had limited the competitive opportunities for "imported livestock" subject to the measure.⁷⁰⁴ Thus the focus of the analysis at the threshold of Article 2.2 is on whether the technical regulation at issue modifies the conditions of competition in the marketplace in a manner that has a limiting effect on trade for imported products subject to that regulation.

526. In prior disputes arising under Article 2.2, complainants have sought to establish trade-restrictiveness by demonstrating that the technical regulations at issue modified the conditions of competition in the marketplace to the detriment of imported products *relative to* domestic products.⁷⁰⁵ Australia agrees that this is one

⁷⁰¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

⁷⁰² *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 1974 ("obstacle"), p. 1252 ("hindrance").

⁷⁰³ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 1412 ("international": *adjective* 1. Existing, occurring, or carried on *between nations*; pertaining to relations, communications, travel, etc., *between nations*"). (emphasis added)

⁷⁰⁴ See Appellate Body Reports, *US – COOL*, paras. 247-264 and 477 and fn 981 (citing Panel Reports, *US – COOL*, paras. 7.373-7.380); Panel Reports, *US – COOL*, paras. 7.438 (noting "[w]e have reached our conclusions on less favourable treatment under Article 2.1 of the TBT Agreement *without examining in detail the actual trade effects* of the muscle cuts and ground meat labels under the COOL measure. Instead, *by assessing segregation and the resulting cost implications of the COOL measure*, we have followed the Appellate Body's approach in *Korea – Various Measures on Beef*.")) and 7.574-7.575; and Appellate Body Report, *EC – Seal Products*, para. 5.95, in the context of Article I:1 of the GATT 1994.

⁷⁰⁵ See Panel Reports, *US – COOL*, para. 7.560, noting Canada's argument that: "In the case of the COOL measure, there is evidence that it has restricted international trade by reducing the possibility of livestock born in Canada to be exported to the United States. The evidence provided by

(continued)

possible way of making a *prima facie* case that a technical regulation is "trade-restrictive" under Article 2.2 of the TBT Agreement. If the design, structure and operation of a technical regulation disadvantages the category of imported products relative to domestic products, it is likely to have a "limiting effect on trade" within the meaning of Article 2.2.⁷⁰⁶

527. That is not, however, the nature of the complainants' claims here. In this dispute, the complainants have not attempted to demonstrate that the tobacco plain packaging measure has a detrimental impact on imported tobacco products relative to domestic tobacco products.⁷⁰⁷ Although the complainants initially brought claims under Article 2.1 of the TBT Agreement, they have not pursued those claims further, suggesting the complainants have been unable to substantiate an argument that the tobacco plain packaging measure is discriminatory. This is because the measure is "even-handed" in the manner in which it addresses risks that tobacco products pose to public health.

528. Regardless of origin, *all* tobacco products sold in Australia must comply with the requirements laid out in the tobacco plain packaging measure. In its design, structure and operation, the measure permits products from all countries to have equal access to the Australian market and to compete on an equal footing against each other

the complainants to establish that the *conditions of competition were modified* by the COOL measure shows that the COOL measure *restricts international trade* for purposes of the first step of the Article 2.2 analysis." See also Panel Reports, *US – Tuna II (Mexico)*, para. 7.447, noting that "Mexico argues that in the context of the facts of this dispute, the phrase 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create' means that the US measures shall not be more trade-restrictive (i.e. *deny competitive opportunities to imports of Mexican tuna products and tuna*) than necessary ...". (emphasis added)

⁷⁰⁶ See, e.g. *US – COOL* where the Panel found that the COOL measure negatively affected the conditions of competition for imported livestock *vis-à-vis* domestic livestock in the US market by imposing higher segregation costs on imported livestock. See Panel Reports, *US – COOL*, para. 7.575.

⁷⁰⁷ In fact, the complainants do not dispute that the tobacco plain packaging measure sets forth conditions that affect both foreign and domestic manufacturers to the same extent. The Dominican Republic, for example, when discussing the alleged negative effects of the tobacco plain packaging measure on a manufacturer's ability to differentiate tobacco products on the basis of brands, expressly acknowledges that "the trademark requirements in the [tobacco plain packaging] measure affects the ability of *all* tobacco manufacturers to differentiate their offerings in the market." See Dominican Republic's first written submission, para. 978.

and against domestic products. This is therefore the first dispute arising under the TBT Agreement in which the complainants do *not* claim that the technical regulation at issue modifies the conditions of competition in the marketplace to the detriment of imported products vis-à-vis domestic products.

529. In the absence of an allegation of discrimination, it is insufficient for the complainants to refer to changes in market conditions in the abstract without also demonstrating how such changes have a limiting effect on international trade. The text of Article 2.2, when considered in the light of the aforementioned panel and Appellate Body decisions, plainly requires a complainant to establish that the technical regulation is "trade-restrictive" because it modifies the conditions of competition for imported products in the marketplace in a manner that has a limiting effect on *trade*.

530. Thus, in order to make a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement, the complainants in this dispute must establish that any alleged change in market conditions has a limiting effect on *trade* in the products subject to the measure – i.e. tobacco products. Further, the complainants must establish either that such an alleged change in market conditions is likely to occur in the Australian market as a result of the design, structure and operation of the tobacco plain packaging measure; or that such an alleged change in market conditions has in fact occurred in the Australian market and is attributable to the tobacco plain packaging measure.

531. As Australia will proceed to demonstrate, none of the complainants have discharged this burden in relation to their four overarching claims of trade-restrictiveness, which are:

- That the tobacco plain packaging measure is trade-restrictive because of its alleged effects on brand differentiation and downtrading;⁷⁰⁸

⁷⁰⁸ This issue arises from the Dominican Republic's first written submission, para. 978; Indonesia's first written submission, para. 398; and Ukraine's first written submission, paras. 471, 475-476.

- That the tobacco plain packaging measure is trade-restrictive because it raises barriers to entry for the Australian tobacco market;⁷⁰⁹
- That the tobacco plain packaging measure is trade-restrictive because it results in increased compliance costs;⁷¹⁰ and
- That the tobacco plain packaging measure is trade-restrictive because the mandatory requirements it imposes operate as a condition for the importation of tobacco products into Australia;⁷¹¹ or because technical regulations, by their very nature, impose limits on trade.⁷¹²

3. The complainants have failed to establish that the tobacco plain packaging measure is trade-restrictive because of its alleged brand differentiation and downtrading effects

532. The complainants' principal claim under Article 2.2 is that the tobacco plain packaging measure eliminates "competitive opportunities"⁷¹³ in the Australian market because it limits the ability of tobacco manufacturers to differentiate their offerings in the market on the basis of brand.⁷¹⁴ The complainants claim that this alleged lack of brand differentiation leads to "downtrading" from premium brands to lower-priced

⁷⁰⁹ This issue arises from Ukraine's first written submission, para. 469.

⁷¹⁰ This issue arises from Honduras' first written submission, paras. 857 and 878-886; Cuba's first written submission, para. 404; and Ukraine's first written submission, paras. 466, 480-487.

⁷¹¹ This issue arises out of the Dominican Republic's first written submission, paras. 975-976; Cuba's first written submission, para.401; and the Ukraine's first written submission paras. 465-466, 480-487.

⁷¹² Dominican Republic's first written submission, para. 973. See also Dominican Republic's first written submission, para. 960.

⁷¹³ Dominican Republic's first written submission, para. 978 ("[t]he trademark requirements in the PP measures affect the ability of *all tobacco manufacturers* to differentiate their offerings in the market. This interference with all trademarks constrains their very ability to compete on the basis of brands, *eliminating competitive opportunities*"); Indonesia's first written submission, para. 398 ("*limiting competitive opportunities for producers of premium products*"; Ukraine's first written submission, para. 466 ("...its potential to adversely affect importation and *competitive opportunities for imported products*"), 478; Honduras' first written submission, para. 862 ("...the trademark restrictions harm the *competitive opportunities of imported tobacco products* and, thus, are trade-restrictive").

⁷¹⁴ Dominican Republic's first written submission, para. 978; Indonesia's first written submission, para. 394; Ukraine's first written submission, para. 475; Cuba's first written submission, para. 403; Honduras' first written submission, paras. 866, 867.

brands.⁷¹⁵ According to the complainants, the alleged downtrading effects of the tobacco plain packaging measure have a "disproportionate impact" on premium tobacco products, such as cigars and higher priced cigarettes;⁷¹⁶ and create a disincentive to export tobacco products to Australia.⁷¹⁷

533. As Australia will demonstrate, this claim is insufficient to establish that a measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement because the complainants have failed to demonstrate that any such downtrading effects result in a limiting effect on international trade; and (i) that downtrading is likely to occur in the Australian market as a result of the design, structure and operation of the tobacco plain packaging measure; or (ii) that any downtrading effects that have occurred in the Australian market are attributable to the tobacco plain packaging measure.

534. The first and most fundamental problem with these allegations is that it simply does not follow that any such downtrading effects will result (or have resulted) in a *limiting effect on trade* in imported tobacco products in Australia.

535. That is, the complainants have failed to adduce any evidence or argument demonstrating why the design, structure and operation of the tobacco plain packaging measure, and its theoretical effects on the ability to differentiate tobacco products on the basis of brands, or any resulting downtrading effects on imported tobacco products, will have a limiting effect on trade in the tobacco products that are subject to the measure.

⁷¹⁵ Dominican Republic's first written submission, para. 978; Ukraine's first written submission, paras. 475-476; Indonesia's first written submission, paras. 397-398; Honduras' first written submission, paras. 870, 876.

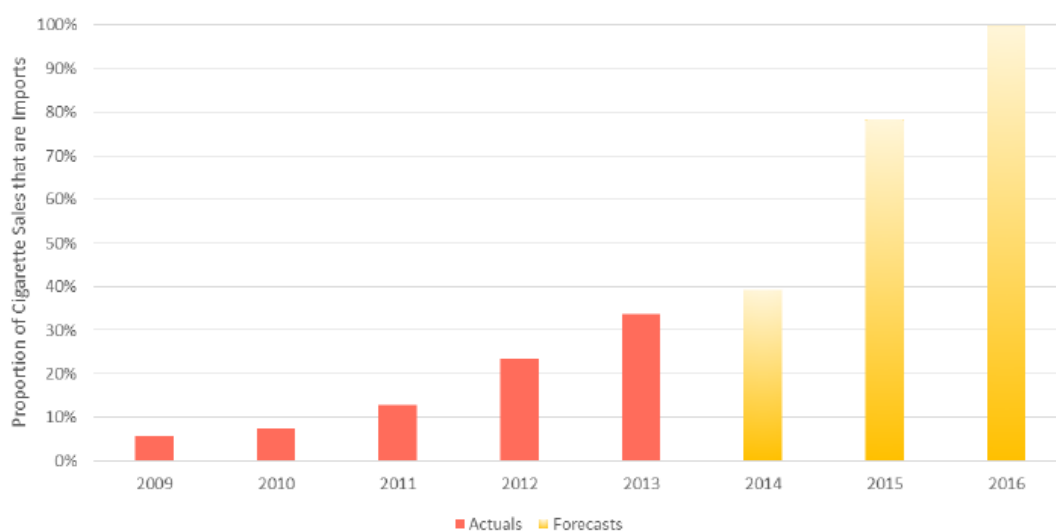
⁷¹⁶ Dominican Republic's first written submission, para. 978; Honduras' first written submission, paras. 875-876; Ukraine's first written submission, paras. 475-476; Indonesia's first written submission, paras. 397-398.

⁷¹⁷ Honduras' first written submission, paras. 875-876.

536. Nowhere is this more evident than in the statement by Honduras that "[a]s consumers begin to down trade, demand for imported tobacco products is bound to decline"⁷¹⁸.

537. Further, the empirical evidence suggests that the tobacco plain packaging measure has had no "limiting effect" on imports of tobacco products. To the contrary, the proportion of imported products in the Australian market has continued to rise since the introduction of the tobacco plain packaging measure, even as demand for tobacco products in Australia declines. As the following graphic demonstrates, import penetration, as a proportion of total tobacco sales in the Australian market, has increased since the introduction of the tobacco plain packaging measure, as domestic producers have left the Australian market.⁷¹⁹

Figure 5.1 Proportion of cigarette sales in Australia that are imported (forecast for 2014-2016)



Notes and sources: Data from ABS and Nielsen. See Appendix A6 for further notes.

Figure 17: Proportion of cigarette sales in Australia that are imported (forecast for 2014-2016)

⁷¹⁸ Honduras' first written submission, para. 876.

⁷¹⁹ Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, p. 40. [Contains SCI]

538. As Australia has established in Part A above, in order to establish a *prima facie* case of violation of Article 2.2 of the TBT Agreement, the complainants would need to demonstrate that any changes in market conditions resulting from Australia's tobacco plain packaging measure have a limiting effect on *trade in imported tobacco products*.

539. Instead, the complainants' arguments with respect to downtrading and asserted impacts on "premium" products attempt to convert Article 2.2 into a provision that protects a company's expectations to certain levels of profit or market share.⁷²⁰ Contrary to the complainants' claims, Article 2.2 protects the expectations of WTO Members that technical regulations will not limit *trade* to a greater extent than is necessary to fulfil a legitimate objective.

540. Even if downtrading effects were sufficient to establish that the tobacco plain packaging measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement, the complainants have failed to establish that downtrading is likely to occur in the Australian market as a result of the design, structure and operation of the tobacco plain packaging measure.

541. The complainants rely on Professor Steenkamp for the proposition that downtrading is a product of premium brands being more reliant on their packaging to attract a price premium than other products. However, as Professor Dubé, a Professor of Marketing at the University of Chicago Booth School of Business, notes "Steenkamp does not provide any evidence, theoretical or empirical, to support the conclusion that these measures will disproportionately affect premium brands".⁷²¹ That is, the complainants have not adduced any evidence to substantiate their claim that the impact of the tobacco plain packaging measure on brand differentiation will disproportionately affect premium products – a condition precedent for their

⁷²⁰ Ukraine even goes so far to argue that the effects of the tobacco plain packaging measure on the profits of its companies is one of the reasons why the tobacco plain packaging measure is "trade-restrictive". Australia sees no textual basis for the proposition that profits are legally relevant under Article 2.2. See Ukraine's first written submission, paras. 468-469.

⁷²¹ Expert Report of J.P. Dubé (9 March 2015), Exhibit AUS-11, para. 40.

downtrading claims. Further, the complainants' own evidence suggests that the tobacco plain packaging measure has not put any downward pricing pressure on the premium segment of the market.⁷²²

542. Moreover, the complainants have failed to demonstrate that any downtrading effects that have occurred in the Australian market are attributable to the tobacco plain packaging measure and not to other factors.

543. The complainants rely principally on a report from economic consultants IPE as evidence that downtrading is occurring in Australia as a result of the tobacco plain packaging measure.⁷²³ However, the report does not separate out the effects of the tobacco plain packaging measure from the other elements of Australia's comprehensive tobacco control policy. In particular, IPE does not take any account of the fact that the measure's implementation coincided with the introduction of updated and enlarged graphic health warnings.⁷²⁴ Consequently, the complainants have not discharged the burden which they assumed when they chose to confine this dispute to challenging Australia's tobacco plain packaging measure exclusively.

544. Further, the complainants' assertion that any downtrading effects in Australia are attributable to the tobacco plain packaging measure is contrary to the views of tobacco manufacturers operating in Australia, who have instead attributed downtrading effects to increases in excise taxes. For example, Australia notes that when BATA announced on 31 October 2014 its decision to close its Australian manufacturing facility, it stated that this decision was based in part on "smokers looking for lower priced tobacco because of excise ... Plain packaging was not a factor".⁷²⁵

⁷²² The evidence filed by the complainants in fact suggests that pricing in all segments including the premium segment of the market has trended upwards since the introduction of the tobacco plain packaging measure. See Expert Report of D. Neven, Exhibit-UKR-3, p. 11.

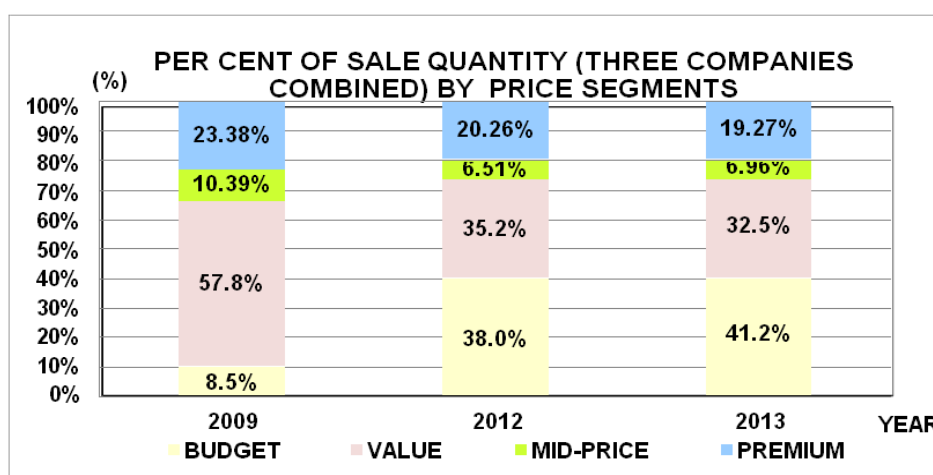
⁷²³ Expert Report of the Institute for Policy Evaluation, Exhibit DR-100.

⁷²⁴ Expert Report of the Institute for Policy Evaluation (7 October 2014), Exhibit DR-100 (see, e.g. second-last paragraph, p. 76).

⁷²⁵ British American Tobacco Australia Media Release "BAT forced to close Australian factory" (31 October 2014), available at

(continued)

545. The complainants' assertion also ignores the reality that downtrading is occurring in a number of markets globally, and is not unique to Australia.⁷²⁶ Given that Australia is the only country to have implemented tobacco plain packaging to date, downtrading effects in other markets cannot be attributed in any way to a "plain packaging effect". Australia notes, for example, that significant downtrading is occurring in New Zealand (a country used by the complainants' experts as a country of comparison), notwithstanding that New Zealand has not introduced tobacco plain packaging. The figure below sets out changes in the market shares by brand segment in New Zealand.



Source: ASH New Zealand, *Tobacco Returns Analysis 2013* (Figure 11 Percentage of sale quantity by price segments 2009, 2012 and 2013). Available at: <http://www.ash.org.nz/>

Figure 18: The changes in market share by brand segment in New Zealand

546. In sum, the complainants' argument that the tobacco plain packaging measure is trade-restrictive because of its alleged brand differentiation and downtrading effects must fail for three independent reasons. First, the complainants have failed to establish that these alleged effects have a limiting effect on trade in tobacco products.

[http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9FC38M/\\$FILE/medMD9QD9EF.pdf?openelement](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9FC38M/$FILE/medMD9QD9EF.pdf?openelement) (last accessed 6 March 2015), Exhibit AUS-255.

⁷²⁶ K. Shubber, "Tobacco Companies Feel the Heat as Emerging Markets Burn Out", *Financial Times* (18 November 2014), available at: <http://www.ft.com/intl/cms/s/0/c46596c2-68c4-11e4-9eeb-00144feabdc0.html#axzz3TV3pkq1I>, (last accessed 25 February 2015), Exhibit AUS-256.

Second, the complainants have failed to establish that these effects are likely to occur in the Australian market as a result of the design, structure and operation of the tobacco plain packaging measure. Third, the complainants have failed to establish that any such effects that have occurred in the Australian market are attributable to the tobacco plain packaging measure and not to other factors. The complainants have therefore failed entirely to discharge their *prima facie* burden of establishing that the tobacco plain packaging measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement on the basis of its alleged brand differentiation and downtrading effects.

4. The complainants have failed to establish that the tobacco plain packaging measure is trade-restrictive because it raises barriers to entry for the Australian tobacco market

547. Ukraine and Indonesia assert that the tobacco plain packaging measure has raised barriers to entry in the Australian tobacco market. While such barriers are potentially relevant in determining whether a measure has a limiting effect on trade, abstract and contradictory *speculation* to this effect is insufficient to establish that a measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement.

548. Ukraine argues that the tobacco plain packaging measure is trade-restrictive because it reduces opportunities for potential new market entrants in the Australian tobacco market.⁷²⁷ Similarly, Indonesia claims that, as a result of the tobacco plain packaging measure, premium foreign brands such as Indonesia's Djarum Super are no longer able to leverage their extensive investments in brand identity to introduce their products to the Australian market.⁷²⁸

549. Ukraine relies on the reports of Professors Winer and Neven to support its claims that the tobacco plain packaging measure has increased barriers to entry. Professor Winer claims that regulations reducing brand communications "give an

⁷²⁷ Ukraine's first written submission, paras. 467-474.

⁷²⁸ Indonesia's first written submission, para. 401.

advantage to brands that have already been introduced to consumers and discriminate against new entrants."⁷²⁹ Similarly, Professor Neven claims that the tobacco plain packaging measure increases barriers to entry because it reduces profit margins and the ability of a new entrant to communicate with potential customers.⁷³⁰

550. There are three distinct problems with these claims.

551. First, the conclusion that the tobacco plain packaging measure increases barriers to entry is directly contradicted by another of the complainants' experts, Professor Steenkamp. Professor Steenkamp claims that brand differentiation "creates barriers to entry that make it difficult for other firms to enter the market"; and the effect of plain packaging is to destroy such brand differentiation.⁷³¹ The logical conclusion of Professor Steenkamp's claims is that the tobacco plain packaging measure would *enhance* prospects of new entry.

552. Second, the complainants have not provided any evidence to support Professor Neven's conclusion that plain packaging has, or will result in, reduced profit margins. Rather, as noted above with respect to the complainants' downtrading claims, the complainants' evidence in fact demonstrates a continued upward trend in prices following adoption of the tobacco plain packaging measure.⁷³²

553. Finally, Professor Neven's claim that the tobacco plain packaging measure reduces the ability of new entrants to communicate with potential customers is made in the abstract, entirely divorced from the reality of Australia's dark market. Professor Neven makes no attempt to analyse the extent to which the capacity of a new entrant to communicate with potential customers in Australia had already been reduced by measures that are not challenged in this dispute – such as Australia's existing

⁷²⁹ Expert Report of R. Winer (22 November 2013), Exhibit UKR-9, para. 35.

⁷³⁰ Expert Report of D. Neven (2 October 2014), Exhibit UKR-3, pp. 39-40.

⁷³¹ Expert Report of J-B.E.M. Steenkamp (29 September 2014), Exhibit DR/HON-5, paras. 9-10 and 43.

⁷³² Expert Report of D. Neven (2 October 2014), Exhibit UKR-3, p. 11.

advertising and promotion restrictions, including point of sale and retail display bans.⁷³³

554. Contrary to the complainants' abstract and contradictory claims, the report by Houston Kemp demonstrates that the Australian market for tobacco products has been characterised by exceptionally high barriers to entry for a very long period.⁷³⁴ The oligopolistic nature of the Australian tobacco market, and the advantages that incumbent firms enjoy as a result, has long made market entry virtually impossible. Only one firm appears to have entered the Australian tobacco market in the last fifteen years, and that firm has attracted only limited market share.⁷³⁵ Houston Kemp thus concludes that there is no significant alteration to barriers to entry as a consequence of the tobacco plain packaging measure.⁷³⁶

555. Thus, while raised barriers to entry are potentially relevant in determining whether the tobacco plain packaging measure has a limiting effect on trade, the complainants have failed to establish that barriers to entry are likely to be raised as a result of the design, structure and operation of the tobacco plain packaging measure; or that any increased barriers to entry in the Australian market are attributable to the tobacco plain packaging measure and not to other factors. The complainants have thus failed to discharge their *prima facie* burden of establishing that the tobacco plain packaging measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement on the basis that it allegedly raises barriers to entry in the Australian tobacco market.

⁷³³ Australia's existing advertising and promotion restrictions, including point of sale and retail display bans, have been described at Part II.D.3 above, and Annexure C.

⁷³⁴ Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, pp. 23-29. [Contains SCI]

⁷³⁵ Since 2009, the only new tobacco manufacturer or importer to achieve a market share greater than 0.5 per cent is Richlands Express which appears to have a maximum market share of around 0.7%. See Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, p. 24. [Contains SCI]

⁷³⁶ Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, pp. 29-32. [Contains SCI]

5. The complainants have failed to establish that the tobacco plain packaging measure is trade-restrictive because it results in increased compliance costs

556. A number of the complainants argue that compliance with the tobacco plain packaging measure entails adaptation costs that act as a disincentive for the exportation of tobacco products to Australia because such costs allegedly make it more onerous to produce and export to that market.⁷³⁷ However, the fact that compliance with the tobacco plain packaging measure may entail adaptation costs is not sufficient to establish that the measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement.

557. With or without the tobacco plain packaging measure, if foreign producers wish to participate in the Australian tobacco market, they must be prepared to meet bespoke product⁷³⁸ and packaging⁷³⁹ requirements for the Australian market. While tobacco plain packaging has changed the *content* of these requirements, it has not changed the market condition itself.

558. In this respect, Australia is no different from other jurisdictions that impose bespoke requirements for tobacco products – such as requiring packaging to bear specific health warnings and in specific sizes; requiring tax stamps to be affixed; or regulating the ingredients of tobacco products.⁷⁴⁰ It is therefore untenable for Ukraine to assert that the tobacco plain packaging measure "effectively closes the Australian market to the sale of tobacco products ... in the form, shape, and packaging sold all

⁷³⁷ Ukraine's first written submission, para. 483; and Honduras' first written submission, para. 878.

⁷³⁸ Cigarettes manufactured or imported to Australia must meet government-mandated reduced fire risk requirements. *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk cigarettes) Regulations 2008* (Cth) (as amended), Exhibit AUS-257.

⁷³⁹ The *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Parts 2 - 9, requires retail packaging of cigarettes and non-cigarette products in Australia to display health warnings on the surface of the packaging. Sections 9.5 to 9.7 specify the manner in which these warnings are rotated, resulting in changes to packaging at least once per year.

⁷⁴⁰ See, e.g. the World Health Organization, "Health Warnings Database", (2015) available at: <http://www.who.int/tobacco/healthwarningsdatabase/en/>, (last accessed 8 February 2015), which contains information concerning different graphic health warnings used in jurisdictions across the world.

over the world".⁷⁴¹ Rather, a tobacco manufacturer must adapt its product, including the packaging, to suit the particular market where it wishes to sell its product.

559. Further, the complainants' arguments on adaptation and compliance costs are contrary to their own expert evidence about the impact of tobacco plain packaging on the costs faced by counterfeiters. Ukraine's expert, Richard Janeczko, asserts that tobacco plain packaging will significantly reduce cost and complexity for counterfeiters.⁷⁴² The complainants fail to explain why costs will decrease for counterfeiters, but increase for legitimate producers to such a level as to constitute a disincentive to export.⁷⁴³

560. Moreover, the complainants have not even attempted to identify the incremental cost of compliance or adaptation attributable to the tobacco plain packaging measure over and above the tobacco product and packaging requirements already in place in the Australian market. Nor have the complainants substantiated their claims with any evidence that these alleged costs are of such a magnitude that they have a limiting effect on trade.

561. Thus, while an increase in compliance costs is potentially relevant in determining whether the tobacco plain packaging measure has a limiting effect on trade, the complainants have failed entirely to establish that such an increase in compliance costs is likely to occur in the Australian market as a result of the design, structure and operation of the tobacco plain packaging measure; or that any increased compliance costs have in fact occurred in the Australian market as a result of the tobacco plain packaging measure. The complainants have thus failed to discharge their *prima facie* burden of establishing that the tobacco plain packaging measure is

⁷⁴¹ Ukraine's first written submission, para. 486.

⁷⁴² Expert Report of R. Janeczko, (20 December 2013), Exhibit UKR-10, para. 44.

⁷⁴³ Indeed, in a submission to the Australian Government during the public consultation process that led to the development of the tobacco plain packaging measure, the world's leading tobacco packaging manufacturer stated that "the level of technical difficulty to print generic tobacco packaging would be substantially lower than it is for current branded packs". Amcor, "Submission to the Australian public consultation on the exposure draft of the Tobacco Plain Packaging Bill 2011", (June 2011), Exhibit AUS-258, p. 14.

trade-restrictive within the meaning of Article 2.2 of the TBT Agreement on the basis that it allegedly increases compliance costs.

6. The complainants have failed to establish that the tobacco plain packaging measure is trade-restrictive because it operates as a condition for the importation of tobacco products into Australia or because technical regulations, by their nature, impose limits on trade

562. Finally, some of the complainants argue that the tobacco plain packaging measure is trade-restrictive because the mandatory requirements it imposes operate as a condition for the importation of tobacco products into Australia;⁷⁴⁴ or, similarly, because "technical regulations, by their very nature, impose limits on trade".⁷⁴⁵ However, the fact that the tobacco plain packaging measure is a technical regulation, or that compliance with the tobacco plain packaging measure operates as a condition on the sale of tobacco products in Australia is not sufficient to establish that the measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement.

563. Technical regulations, by their very nature, lay down product characteristics or their related processes and production methods, with which compliance is *mandatory*, and may include, inter alia, packaging, marking or labelling requirements as they apply to a product, process or production method.⁷⁴⁶

564. Notwithstanding the mandatory nature of a technical regulation, the Appellate Body in *US – Tuna II (Mexico)* and in *US – COOL* expressly recognized that there may be circumstances in which a technical regulation is *not* trade-restrictive.⁷⁴⁷ There is therefore no basis for alleging that a technical regulation is trade-restrictive solely

⁷⁴⁴ Dominican Republic's first written submission, para. 975 (referring to Appellate Body Report, *US – COOL*, para. 375), 976; Cuba's first written submission, para. 401.

⁷⁴⁵ Dominican Republic's first written submission, para. 973 (citing Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322 and *US – COOL*, para. 376. See also Dominican Republic's first written submission, para. 960.

⁷⁴⁶ Definition of "technical regulation" in the TBT Agreement, Annex 1.1. See also Appellate Body Report, *US - Clove Cigarettes*, para 169.

⁷⁴⁷ Appellate Body Report, *US – Tuna II (Mexico)*, fn 647, para. 322; Appellate Body Report, *US – COOL*, fn 748, para. 376.

because compliance with its requirements is mandatory; or that technical regulations are *per se* trade-restrictive.

565. However, this is precisely what the complainants seek to allege. Essentially, the complainants attempt to argue that the tobacco plain packaging measure has changed market conditions for tobacco products because the measure requires compliance with the mandatory requirements it lays down. In making such arguments, the complainants fail to address *how* such mandatory requirements, or any changed market conditions resulting from such mandatory requirements, have a *limiting effect on trade* in tobacco products. The complainants have thus failed to discharge their *prima facie* burden of establishing that the tobacco plain packaging measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement on an alleged *per se* basis.

7. Conclusion on trade-restrictiveness under Article 2.2

566. In summary, the complainants have failed to establish that the changes in market conditions that they have alleged are likely to occur in the Australian market as a result of the design, structure and operation of the tobacco plain packaging measure; or that such changes, if occurring in the Australian market, are attributable to the tobacco plain packaging measure and not to other factors. Moreover, the complainants have failed to establish that the alleged changes have a limiting effect on trade such as to constitute an obstacle to international trade in tobacco products. The complainants have therefore failed to make a *prima facie* case that the tobacco plain packaging measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement.

8. The complainants have failed to address that the tobacco plain packaging measure was adopted in accordance with relevant international standards under Article 2.5 of the TBT Agreement

567. The tobacco plain packaging measure was adopted for the protection of public health and to give effect to Australia's obligations under the FCTC. Specifically, the Guidelines for the implementation of Articles 11 and 13 of the FCTC recommend that parties consider the adoption of plain packaging of tobacco products. The FCTC

Guidelines are "relevant international standards" within the meaning of Article 2.5. Accordingly, and to the extent that the definition of a "technical regulation" encompasses measure affecting the use of a trademark, the tobacco plain packaging measure is presumed not to create an unnecessary obstacle to international trade under the second sentence of Article 2.5, and the complainants have not even begun to overcome this presumption. The complainants' failure to address this presumption compounds the difficulties in the complainants' *prima facie* case of trade-restrictiveness under Article 2.2.

568. The second sentence of Article 2.5 of the TBT Agreement provides:

Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.⁷⁴⁸

569. It is undisputed between the Parties that the tobacco plain packaging measure is a "technical regulation", adopted for the "legitimate objective" of the protection of human health, within the meaning of Article 2.2 of the TBT Agreement. In addition, as Australia will demonstrate in the following section, the FCTC Guidelines are "relevant international standards", and the tobacco plain packaging measure was adopted "in accordance with" those standards.

(a) The FCTC Guidelines are "relevant international standards" under Article 2.5

570. In the absence of an explicit definition of 'international standard' in the TBT Agreement recourse may be had to the ISO Guide definition, which provides that an "international standard" is a "standard that is adopted by an international standardizing/standards organization and made available to the public."⁷⁴⁹ To meet this definition of "international standard", a party must therefore demonstrate that

⁷⁴⁸ Article 2.5 of the TBT Agreement.

⁷⁴⁹ See Appellate Body Report, *US – Tuna II (Mexico)*, para. 353, citing ISO/IEC Guide 2:1991, General Terms and Their Definitions Concerning Standardization and Related Activities, 3.2.1 and Panel Report, *US – Tuna II (Mexico)*, para. 7.663.

there is: (i) a "standard"; (ii) adopted by an international standardizing/standards body or organization; and (iii) "made available" to the public.⁷⁵⁰

i. The FCTC Guidelines are "standards"

571. Annex 1.2 of the TBT Agreement defines a "standard" as follows:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.⁷⁵¹

572. An "explanatory note" further provides:

For the purpose of this Agreement *standards are defined as voluntary* and technical regulations as mandatory documents.
(emphasis added)

573. The FCTC Guidelines are "standards" within the meaning of the TBT Agreement. Each of the Guidelines is contained in a "document", and published in both print and electronic form. Each of the FCTC Guidelines is also a "guideline" designed for "common or repeated use", because the Guidelines are intended to help Parties to the FCTC to meet their obligations under the respective provisions of the Convention to which the Guidelines are directed, and "aim to reflect and promote best practices and standards that governments would benefit from in the treaty-implementation process".⁷⁵² The Guidelines relate both to "products" (tobacco) and "related processes and production methods" (tobacco manufacture and sale) and employ conditional rather than obligatory language.

⁷⁵⁰ Panel Report, *US-Tuna II (Mexico)*, para. 7.664.

⁷⁵¹ TBT Agreement, Annex 1.2.

⁷⁵² *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, p. v, foreword by Dr. Haik.

574. The FCTC Guidelines specifically recommend the adoption of tobacco plain packaging, as outlined extensively in Part II.F and in the Amicus Submission of the WHO and FCTC Secretariat.⁷⁵³

ii. The FCTC COP is an "international standardizing body or organization"

575. In *US – Tuna II (Mexico)*, the Appellate Body found that an international standardizing body is a body that has "recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members".⁷⁵⁴ The FCTC COP is such an international standardizing body.⁷⁵⁵ The FCTC COP was established by the States parties to the FCTC under Article 23 of the FCTC, to manage the implementation of the FCTC. The FCTC COP is empowered to "keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation (...)." ⁷⁵⁶ The FCTC COP is tasked with: promoting and facilitating the exchange of relevant information; promoting the development, implementation and evaluation of strategies, plans and programmes; and considering reports submitted by States parties.⁷⁵⁷ All States parties to the FCTC are members of the FCTC COP.⁷⁵⁸

576. Article 7 of the FCTC charges the Parties to the FCTC to:

⁷⁵³ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42.

⁷⁵⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 359.

⁷⁵⁵ Whether a standard has been adopted by an international standardizing body involves a consideration of: (i) the nature and function of the entity (a 'standardizing/standards body'); (ii) the degree to which that body is 'international' in character; and (iii) the process by which the entity has approved the standard ('adoption'). See Appellate Body Report, *US – Tuna II (Mexico)*, paras. 349 – 395.

⁷⁵⁶ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 23.

⁷⁵⁷ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 23(5).

⁷⁵⁸ While the FCTC does not set out the composition of the FCTC COP, in practice it is accepted that all States parties are members. Article 23(6) of the FCTC provides that the FCTC COP shall establish the criteria for the participation of observers at its proceedings.

adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.

577. As noted in the WHO and FCTC Amicus Submission,⁷⁵⁹ working groups comprised of representatives of parties to the FCTC prepare drafts of each of the FCTC Guidelines. The working groups rely on available scientific evidence and the experience of the parties to the FCTC. The Guidelines are then opened for consultations with all Parties to the FCTC, before being submitted to the FCTC COP for consideration, and adoption by consensus. The FCTC COP has adopted eight Guidelines for the implementation of nine Articles of the FCTC since 2007.⁷⁶⁰

578. The FCTC is "international" in character. In *US-Tuna II (Mexico)* the Appellate Body noted that "the larger the number of countries that participate in the development of the standard, the more likely it can be said that the respective body's activities in standardization are 'recognized'".⁷⁶¹ Such recognition is all the more likely where "a large number of WTO Members participate in the development of the standard, acknowledge the validity and legality of the standard, or the body follows the principles contained in the TBT Committee Decision [on international standards]."⁷⁶² The FCTC is one of the most widely ratified treaties, with 180 Parties. Of those 180 Parties, 148 are also Members of the WTO. Membership of the FCTC is open to all WTO Members.

579. The FCTC Guidelines were adopted by the FCTC COP by the same standard setting process as the other six Guidelines adopted to date, outlined above at Part II.F. The FCTC Guidelines are evidence of a "growing international consensus within the

⁷⁵⁹ World Health Organization and the WHO Framework on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42.

⁷⁶⁰ See *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109; World Health Organization Framework Convention on Tobacco Control, *Guidelines for implementation of Article 6 of the WHO FCTC* (2014), Exhibit AUS-111.

⁷⁶¹ Appellate Body Report, *US-Tuna II (Mexico)*, para 390.

⁷⁶² Appellate Body Report, *US-Tuna II (Mexico)*, para 394.

international community to strengthen tobacco control policies" with respect to labelling of tobacco products and bans on advertising and promotion of tobacco products.⁷⁶³

iii. The FCTC Guidelines Have Been Made Available to the Public

580. The adopted Guidelines have been printed, published and widely disseminated in both printed and electronic form, including on the WHO website, and are therefore available to the public.

iv. The FCTC Guidelines Are Relevant to the Tobacco Plain Packaging Measure

581. For the reasons set out above, the FCTC Guidelines are an "international standard". They are also an "international standard" that is "*relevant*" to the tobacco plain packaging measure. The FCTC Guidelines have been developed by the Parties to the FCTC to reflect the best scientific evidence and State practice, and to assist Parties in meeting their obligations under the FCTC as set out in detail in Part II.F. The Guidelines to Article 11 specifically recommend that in order to meet their obligations under the FCTC, "Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)".⁷⁶⁴ Similarly the Guidelines to Article 13 specifically recommend that "[P]arties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging." Australia's tobacco plain packaging legislation does precisely this. Indeed one of the broader objectives of

⁷⁶³ Cf. Panel Report, *US – Clove Cigarettes*, para. 7.230 – where, with respect to the Partial Guidelines for implementation of Articles 9 and 10 of the FCTC, the Panel stated that, "these Guidelines, drawing on the best available scientific evidence and the experience of Parties, do show a growing consensus within the international community to strengthen tobacco-control policies through regulation of the content of tobacco products, including additives that increase the attractiveness and palatability of cigarettes. Thus, we consider that the WHO *Partial Guidelines* corroborate our understanding."

⁷⁶⁴ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11, para. 46 (emphasis added).

the TPP Act is "to give effect to certain obligations that Australia has as a party to the [Framework] Convention on Tobacco Control".⁷⁶⁵

(b) The tobacco plain packaging measure is "in accordance with" the FCTC Guidelines

582. The tobacco plain packaging measure is in accordance with the FCTC Guidelines. As discussed above, the FCTC Guidelines specifically recommend tobacco plain packaging measures as a means to implement the obligations in Articles 11 and 13 of the FCTC regarding packaging and labelling of tobacco products and tobacco advertising, promotion and sponsorship, respectively.

9. Overall conclusion on "trade-restrictiveness"

583. Australia has demonstrated above that the complainants have failed to make a *prima facie* case that the tobacco plain packaging measure is trade-restrictive, because they have failed to demonstrate that the tobacco plain packaging measure has a limiting effect on trade in imported tobacco products.

584. Furthermore, the complainants have failed to address the implications of the fact that the tobacco plain packaging measure was adopted for the protection of public health and in accordance with the FCTC Guidelines to Articles 11 and 13, which Australia has demonstrated are relevant international standards under Article 2.5 of the TBT Agreement. The tobacco plain packaging measure should therefore be presumed not to constitute an "unnecessary obstacle to international trade" under Article 2.2 of the TBT Agreement, and the complainants have not even begun to rebut this presumption.

585. Given the complainants' failure to establish that the tobacco plain packaging measure is "trade-restrictive" within the meaning of Article 2.2, the Panel's analysis should end here. The Panel should find at this juncture that the complainants have failed to establish that the tobacco plain packaging measure is inconsistent with

⁷⁶⁵ TPP Act, Exhibit AUS-1, Section 3(1)(b).

Article 2.2 of the TBT Agreement, and that it is not required to engage in any further "relational analysis" under that provision.

B. THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT THE TOBACCO PLAIN PACKAGING MEASURE IS MORE TRADE-RESTRICTIVE THAN NECESSARY TO FULFIL A LEGITIMATE OBJECTIVE, TAKING ACCOUNT OF THE RISKS NON-FULFILMENT WOULD CREATE

1. Introduction

586. In the alternative, should the Panel find that the complainants have made a *prima facie* case that the tobacco plain packaging measure is trade-restrictive, Australia submits that the complainants have failed to establish that the tobacco plain packaging measure is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create", within the meaning of Article 2.2 of the TBT Agreement.

587. By its express terms, Article 2.2 allows WTO Members to adopt, prepare or apply trade-restrictive technical regulations that fulfil legitimate objectives. Therefore, in assessing claims of violation under Article 2.2, a panel must first ascertain the objective pursued by the tobacco plain packaging measure, and whether this objective is legitimate.⁷⁶⁶ If the objective pursued is one described in the non-exhaustive list of the third sentence of Article 2.2, no further inquiry into its legitimacy is necessary.⁷⁶⁷

588. The second step of a panel's analysis under Article 2.2 is to ascertain the "necessity" of the trade-restrictiveness of the technical regulation at issue. This involves a "relational analysis" of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create.⁷⁶⁸ In most cases, a panel will also need to

⁷⁶⁶ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 313 and 314; Appellate Body Report, *US – COOL*, paras. 371 and 372.

⁷⁶⁷ Appellate Body Report, *US – COOL*, para. 372.

⁷⁶⁸ Appellate Body Report, *US – COOL*, para. 374.

compare the technical regulation at issue with reasonably available alternatives that are less trade-restrictive while making an equivalent contribution to the legitimate objectives of the measure, taking into account the risks non-fulfilment would create.⁷⁶⁹

589. The Appellate Body has summarized the analysis under Article 2.2 as follows:

An assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade-restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.⁷⁷⁰

590. Therefore, in order to establish that the tobacco plain packaging measure is "more trade-restrictive than necessary" within the meaning of Article 2.2, the complainants must demonstrate that the degree of trade-restrictiveness of the measure outweighs the degree of contribution that it makes to its legitimate public health objectives, in light of the nature of the risks and the gravity of the consequences that would arise from non-fulfilment of those legitimate objectives. The complainants must also propose reasonably available alternative measures that are less trade-restrictive and make an equivalent contribution to the public health objectives of the measure, taking account of the risks non-fulfilment would create.

591. In Part A above, Australia has demonstrated that the complainants have failed to establish that the tobacco plain packaging measure is trade-restrictive, because they

⁷⁶⁹ Appellate Body Report, *US – COOL*, para. 376.

⁷⁷⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322; Appellate Body Report, *US – COOL*, para. 378.

have failed to demonstrate that it has a limiting effect on trade in imported tobacco products. The complainants have failed to substantiate their claims that the tobacco plain packaging measure is somehow trade-restrictive: because of its alleged effects on brand differentiation and downtrading; because it raises barriers to entry in the Australian market; because it results in increased compliance costs; or because it imposes mandatory conditions for the importation of tobacco products into Australia (or, relatedly, because technical regulations, by their very nature, impose limits on trade).

592. In the event that the Panel were to conclude, however, that the tobacco plain packaging measure is somehow trade-restrictive, for the reasons set out above with respect to each of the complainants' failures, any trade-restrictive effects could only be minimal. It follows that *any* degree of contribution, no matter how small, would suffice to demonstrate that the tobacco plain packaging measure is not "more trade-restrictive than necessary" to fulfil Australia's public health objectives.⁷⁷¹ In other words, if the Panel were to conclude that the complainants have established that the measure is trade-restrictive (which it should not) the degree of trade-restrictiveness would be negligible, so that, unless the complainants succeed in demonstrating that the tobacco plain packaging measure *does not contribute at all* to the fulfilment of the measure's public health objectives, they will have failed to establish that it is more trade-restrictive than necessary to fulfil those public health objectives.

593. In the sections that follow, Australia will demonstrate that the complainants have failed to discharge this burden. First, in Part 2, Australia will establish that the complainants have failed to demonstrate that the tobacco plain packaging measure does *not* contribute to its public health objectives as set out in subsection 3(1) of the TPP Act.

594. Australia will then demonstrate in Part 3 that the risks non-fulfilment would create are great, because the health risks at issue are both vital and important in the

⁷⁷¹ See Appellate Body Reports, *EC – Seal Products*, para. 5.216 (confirming that a panel is not required to apply a standard of "materiality" as a "generally applicable pre-determined threshold in its contribution analysis").

highest degree, and because the public health consequences that non-fulfilment of the measure's objectives would create are extremely grave.

595. Finally, in Part 4 Australia will demonstrate in the alternative that the complainants' approach to alternative measures marks a radical departure from prior jurisprudence, as all but one of the alternatives put forward are measures that are currently in place in Australia and are complementary to the tobacco plain packaging measure. Australia will also explain that these alternatives: fail to make an equivalent contribution to the tobacco plain packaging measure's objectives; are not less trade-restrictive than the tobacco plain packaging measure on the basis of the complainants' own assertions about what constitutes trade-restrictiveness; or are not reasonably available.

2. The complainants have failed to demonstrate that the tobacco plain packaging measure will not contribute to its legitimate objectives

(a) The legitimate objectives of the tobacco plain packaging measure

596. In *US – Tuna II (Mexico)*, the Appellate Body clarified that the first step in the panel's Article 2.2 analysis is an assessment of the objectives of the technical regulation at issue. In doing so, the Appellate Body explained that a panel "should take into account a Member's articulation of the objective(s) it pursues through its measures", but also explained that the panel is not bound by that characterization.⁷⁷² Instead, a panel must "objectively and independently assess" the objectives, by taking into account "the texts of the statutes, legislative history, and other evidence regarding the structure and operation of the measure".⁷⁷³

597. Pursuant to this analytical framework, Australia recalls that the objectives of Australia's tobacco plain packaging measure are set out in the text of section 3 of the TPP Act, and at Part II.H of this submission.

⁷⁷² Appellate Body Report, *EC – Seals Products*, para. 5.144; Appellate Body Report, *US – COOL*, para. 371.

⁷⁷³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

598. Subsection 3(1) of the TPP Act sets out the general objectives of the TPP Act, which are to improve public health by discouraging uptake, encouraging quitting, discouraging relapse, and reducing exposure to smoke. These objectives are shared by all comprehensive tobacco control strategies, which operate to improve public health by reducing smoking prevalence and tobacco-related disease and mortality.

599. The operation of subsection 3(2), as outlined extensively in Part II.H above, is designed to contribute to improving public health through *three specific mechanisms*: reducing the appeal of tobacco products; increasing the effectiveness of health warnings; and reducing the ability of retail packaging of tobacco products to mislead consumers about the harmful effects of smoking and use of tobacco products.

600. The structure and operation of subsections 3(1) and 3(2), operating together, make clear that the TPP Act specifies a causal pathway by which Australia's objectives of improving public health and giving effect to the FCTC may be achieved.⁷⁷⁴ That is, the achievement of the specific objectives under subsection 3(2) is a *direct means* by which the objective of improving public health under subsection 3(1) of the TPP Act is achieved.

⁷⁷⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 14-15.

601. The public health rationale underlying the TPP Act, and the means by which to achieve this objective, is supported by both the Explanatory Memorandum to the TPP Act⁷⁷⁵ and the FCTC Guidelines.⁷⁷⁶ Furthermore, the mediational model utilised by the TPP Act is expressly considered and endorsed by Australia's experts. Professor Fong, for example, states:

If the Objectives of the Act are achieved then this will lead to positive short-term and longer-term public health outcomes.⁷⁷⁷

602. In urging this Panel to focus exclusively on smoking prevalence as a basis for assessing the degree of the tobacco plain packaging measure's contribution to its objectives, the complainants in effect ask the Panel to ignore the causal pathway through which the tobacco plain packaging measure will ultimately contribute to the achievement of its broader objectives of improving public health by discouraging uptake, encouraging quitting, discouraging relapse and reducing exposure to smoke. This is an attempt by the complainants to artificially sever the causal link between the behavioural effects of the tobacco plain packaging measure, and their long-term effects on smoking prevalence.

603. The complainants' approach presupposes that consumer perceptions about tobacco products and intentions about tobacco use are *entirely irrelevant* for the purposes of assessing the effect of tobacco control policies. However, as Australia noted in Part II.I.2 above, tobacco control policies are *best* measured by their influence on "downstream psychosocial variables such as knowledge, beliefs,

⁷⁷⁵ *Acts Interpretation Act 1901* (Cth), Exhibit AUS-259, Section 15AB provides for the use of extrinsic material in the interpretation of an Act of Parliament. Included in the list of relevant extrinsic material is: any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted. Previously, Explanatory Memoranda had been used principally as an aid in the *legislative* process, but with this amendment, they assumed much more importance in the *interpretative* process: Patrick O'Neill, *Was There an EM? Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament* (12 September 2006), Exhibit AUS-260, Introduction.

⁷⁷⁶ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11; *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 13.

⁷⁷⁷ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 90.

attitudes and intentions, and on subsequent tobacco use behaviours."⁷⁷⁸ Indeed, marketing companies, the tobacco industry, and academics have measured these variables to evaluate the effects of tobacco control policies for years.⁷⁷⁹ Academic literature, quantitative reviews, and empirical studies in tobacco control policies show a strong correlation between intentions, attitudes, beliefs and smoking behaviour.⁷⁸⁰ These correlations have been evident in the assessment of the efficacy of tobacco control measures in countries such as Australia, the United States and the United Kingdom.⁷⁸¹

604. In the section that follows, Australia will demonstrate that the complainants have failed to make a *prima facie* case that the tobacco plain packaging measure makes *no* contribution to its legitimate objectives, as properly defined – that is, to reducing smoking rates in Australia by reducing the appeal of tobacco products,

⁷⁷⁸ G.T. Fong, K.M. Cummings, R. Borland, G. Hastings, A. Hyland, G.A. Giovino, D. Hammond, M.E. Thompson, "The conceptual framework of the International Tobacco Control (ITC) Policy Evaluation Project", *Tobacco Control*, Vol. 15 (Suppl III), iii3-iii11, (2006), Exhibit AUS-132, p.i10.

⁷⁷⁹ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, Section 5.4; H. Sheppard, J. Hartwick, P.R. Warshaw. "The theory of reasoned action: a meta-analysis of past research with recommendations for modifications and future research", *Journal of Consumer Research*, Vol. 15, No. 3 (1988), Exhibit AUS-133; P. Sheeran, "Intention-behavior relations: a conceptual and empirical review", *European Review of Social Psychology*, Vol. 12, No. 1, (2002), Exhibit AUS-134, p. 1-36.

⁷⁸⁰ H. Sheppard, J. Hartwick, P.R. Warshaw. "The theory of reasoned action: a meta-analysis of past research with recommendations for modifications and future research", *Journal of Consumer Research*, Vol. 15, No. 3 (1988), Exhibit AUS-133; P. Sheeran, "Intention-behavior relations: a conceptual and empirical review", *European Review of Social Psychology*, Vol. 12, No. 1, (2002), Exhibit AUS-134, p. 1-36; A. Hyland, R. Borland, Q. Li, H.H. Yong, A. McNeill, G.T. Fong, R.J. O'Connor, K.M. Cummings, "Individual-level predictors of cessation behaviours among participants in the International Tobacco Control (ITC) Four Country Survey", *Tobacco Control*, Vol. 15, No. III (2006), Exhibit AUS-226; L. Li, G. Feng, Y. Jiang, H.H. Yong, R. Borland, G.T. Fong, "Prospective predictors of quitting behaviours among adult smokers in six cities in China: Findings from the International Tobacco Control (ITC) China Survey", *Addiction*, Vol. 106, No. 7, (2011), Exhibit AUS-227; D. Hammond, J. Doxey, S. Daniel and M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine and Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157; C.M. White, D. Hammond, J.F. Thrasher and G.T. Fong, "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study", *BMC Public Health*, Vol. 12, No. 737 (2012), Exhibit AUS-160; D. Hammond, S. Daniel and C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52 (2013), Exhibit AUS-158.

⁷⁸¹ A. Hyland, R. Borland, Q. Li, H.H. Yong, A. McNeill, G.T. Fong, R.J. O'Connor, K.M. Cummings, "Individual-level predictors of cessation behaviours among participants in the International Tobacco Control (ITC) Four Country Survey", *Tobacco Control*, Vol. 15, No. III (2006), Exhibit AUS-226.

increasing the effectiveness of graphic health warnings, and reducing the ability of packages to mislead consumers about the harms of smoking. To the contrary, in Part II.I, paragraphs 142-205, Australia has provided a detailed explanation and the evidentiary foundation for the contribution that the tobacco plain packaging measure makes to these public health objectives. Australia will not repeat all the arguments and evidence here, but rather incorporates them by reference in this Part.

(b) The tobacco plain packaging measure is part of a comprehensive strategy of tobacco control measures

605. The contribution of the tobacco plain packaging measure to its public health objectives must be understood and evaluated in the context of Australia's comprehensive suite of tobacco control measures. As the Appellate Body explained in *Brazil – Retreaded Tyres*:

We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions - for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time - can only be evaluated with the benefit of time.⁷⁸²

606. As Australia has explained in Part II.D.1 above, given their synergies, adoption of a comprehensive suite of tobacco control measures leads to greater reductions in tobacco use than would result from the separate effects of individual tobacco control policies.⁷⁸³ The Appellate Body has expressly recognised the importance of such synergies between "mutually supportive pillars" to ensure the effectiveness of comprehensive policies dealing with complex public health

⁷⁸² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁷⁸³ See also United States Department of Health and Human Services, "Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General" (2012), Exhibit AUS-76, p. 6.

problems.⁷⁸⁴ As a measure introduced to target one of the last remaining vehicles for the advertising, marketing and promotion of tobacco products in Australia, the tobacco plain packaging measure makes a unique contribution to its general public health objectives and as such is a "key element"⁷⁸⁵ or "key component"⁷⁸⁶ of Australia's comprehensive suite of tobacco control measures.

(c) The complainants have failed to establish that the evidence supporting tobacco plain packaging should be rejected

607. Despite the wealth of evidence supporting the effectiveness of the tobacco plain packaging measure, each of the complainants asserts that the supporting literature "is neither reliable nor probative,"⁷⁸⁷ suffers from "significant limitations",⁷⁸⁸ has been "cherry-picked,"⁷⁸⁹ is "repetitive and reproduces the same flawed enquiry",⁷⁹⁰ and is "speculative in nature."⁷⁹¹ In support of these arguments, the complainants rely on three literature reviews: by Professor Inman et al; Kleijnen Systematic Reviews; and Professor Klick (hereafter "the complainants' literature experts").

608. Drawing on their extensive expertise in public health and epidemiology; psychology and consumer behaviour; and assessments of public health literature, Professor Fong and Professor Samet each considered the criticisms levelled at the body of tobacco plain packaging literature by the complainants' literature experts. Although each expert evaluated the reports independently, Professor Samet and Professor Fong each drew the same conclusion: the body of evidence supporting tobacco plain packaging is sound, and the complainants' expert reports are fundamentally flawed, incorrect, and misleading.

⁷⁸⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 154, 172, 211.

⁷⁸⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154.

⁷⁸⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.

⁷⁸⁷ Dominican Republic's first written submission, para. 57.

⁷⁸⁸ Cuba's first written submission, para. 170.

⁷⁸⁹ Indonesia's first written submission, para. 304.

⁷⁹⁰ Honduras' first written submission, para. 462.

⁷⁹¹ Ukraine's first written submission, para. 610.

609. Professor Samet served as Senior Scientific Editor several United States Surgeon General's Reports, including the 1990, 2004, 2006, and 2014 reports.⁷⁹² The 2004 report revisited and reaffirmed the criteria of causality proposed in the 1964 Surgeon General's Report, proposing a four-level scheme for classifying the strength of evidence for causation.⁷⁹³ Professor Samet has reviewed the critiques put forward by the complainants' literature experts, and concludes:

The methods used by Inman, Kleijnen and Klick document their sharply contrasting approaches to the accepted norms of evidence-based review. Their intent and strategies are shared and obvious; to carry out highly granular critiques that will find each study to be so flawed that its findings should be dismissed.⁷⁹⁴

610. Professor Fong reaches the same conclusion as Professor Samet and, in his expert report, outlines common, recurring flaws in the critiques of the tobacco plain packaging literature by the complainants' literature experts. These include: the mere illusion of scientific rigour;⁷⁹⁵ misidentified focus on prevalence as the focus for review;⁷⁹⁶ ignoring the real-world behavioural outcomes of the tobacco plain packaging measure;⁷⁹⁷ disregarding all non-experimental research;⁷⁹⁸ misleading or inaccurate reporting of evidence;⁷⁹⁹ overemphasis on social desirability bias and demand effects;⁸⁰⁰ a failure to address how these so-called flaws influence results;⁸⁰¹ and exaggerating the impact of study limitations and ignoring study strengths.⁸⁰²

611. Professor Fong outlines in detail why each of these critiques is unjustified, irrelevant, and misrepresentative of the body of literature supporting the tobacco plain

⁷⁹² Expert Report of J. Samet, (5 March 2015), Exhibit AUS-7, para. 10.

⁷⁹³ Expert Report of J. Samet, (5 March 2015), Exhibit AUS-7, para. 19.

⁷⁹⁴ Expert Report of J. Samet, (5 March 2015), Exhibit AUS-7, para. 152.

⁷⁹⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 446-450.

⁷⁹⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 451-457.

⁷⁹⁷ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 458-462.

⁷⁹⁸ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 463.

⁷⁹⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 464-467.

⁸⁰⁰ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 476-484.

⁸⁰¹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 485-488.

⁸⁰² Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 489.

packaging measure.⁸⁰³ Professor Fong's criticisms are outlined in detail in Annexure E to this submission and underscore that the approach taken by the complainants' literature experts – in critiquing each study individually – ignores the convergent nature of the tobacco plain packaging literature. Professor Fong finds that the complainants' literature experts:

do not synthesize the evidence and consider the literature as a whole, which demonstrates that despite minor flaws within each study, across studies with different methods and potential flaws, the pattern of findings is consistent and therefore the evidence as a whole overwhelmingly supports plain packaging.⁸⁰⁴

612. In stark contrast to the complainants' literature reviews, independent reviews of the literature, including the Stirling Reviews,⁸⁰⁵ and the 2012 United States Surgeon General's Report,⁸⁰⁶ have found that the weight of the evidence supports the effectiveness of tobacco plain packaging. Moodie et al, for example, found:

remarkable consistency in study findings regarding the potential impact of plain packaging. Across studies using different designs, conducted in a range of countries, with young and older populations, males and females and with smokers and non-smokers, the key findings are similar.⁸⁰⁷

613. This finding is confirmed by Sir Cyril Chantler, who was commissioned to review tobacco plain packaging for the United Kingdom Government in 2014, and who concluded that:

Together, the body of published, peer reviewed studies span research in ten different countries and deploy a wide range of

⁸⁰³ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 446-493.

⁸⁰⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 492.

⁸⁰⁵ C. Moodie, K. Angus, M. Stead and L. Bauld, "Plain tobacco packaging research: an update" *Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling* (2013), Exhibit AUS-216; C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angusa, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140; C. Moodie, G. Hastings and A. Ford, "A brief review of plain packaging research for tobacco products", *Institute for Social Marketing* (2009), Exhibit AUS-141.

⁸⁰⁶ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General* (2012), Exhibit AUS-76

⁸⁰⁷ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angusa, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140, p.90.

research methods, and overall show a high level of consistency in findings.⁸⁰⁸

614. The criticisms by the complainants' literature experts of the literature supporting tobacco plain packaging are therefore unfounded. Not only is there a far greater body of plain packaging literature available than that critiqued by the complainants, but the claims made by the complainants' literature experts with respect to the studies they did review are misconceived and unfounded. The weight of evidence is significant, and points to a consistent conclusion: tobacco plain packaging is effective and will contribute to the ultimate goal of improving public health by altering smoking behaviour through reducing the appeal of tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead consumers as to the harms of tobacco use.

(d) The complainants have failed to establish that packaging is irrelevant to consumer behaviour

i. Packaging is a form of advertising

615. Contrary to the claims of the complainants,⁸⁰⁹ it is the accepted view in the marketing profession that packaging functions as a form of advertising. Standard marketing texts confirm that packaging has a significant promotional function and that the reach and value of that function is great. As noted in Part II.E.2, the marketing text by Kotler & Keller (cited by Professor Steenkamp)⁸¹⁰ describes packaging as having the ability to "create a billboard effect" and to act as "five-second commercials" for the product".⁸¹¹ For example:

The Campbell Soup Company has estimated that the average shopper sees its familiar red-and-white can 76 times a year,

⁸⁰⁸ C. Chantler, *Standardised packaging of tobacco: A Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 4.10.

⁸⁰⁹ Dominican Republic's first written submission, paras. 681 – 682; Honduras' first written submission, para. 448; Cuba's first written submission, para. 198.

⁸¹⁰ Expert Report J-B.E.M. Steenkamp (29 September 2014), DR/HON-5, para. 29.

⁸¹¹ P. Kotler and K.L. Keller, *Marketing Management: Global Edition*, 14th ed. (Pearson Edition Limited, 2012), p.368; cited in Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 16.

creating the equivalent of millions of dollars' worth of advertising.⁸¹²

616. Further, it is not true, as the complainants claim, that packaging fails as an advertising medium on key dimensions such as function, reach, versatility, size and interactivity.⁸¹³ This proposition is rejected by both Professor Dubé and Professor Tavassoli.

617. In rejecting the complainants' arguments, Australia's experts point out that:

- although packaging has other functions, so do many advertising mediums (such as television);⁸¹⁴
- packaging has wide reach so that many more potential customers may see the package than see other forms of advertising – and at more opportune times;⁸¹⁵
- packaging is a versatile medium which can be used in a variety of ways⁸¹⁶ and can be changed quickly in response to marketing requirements;⁸¹⁷
- in terms of size limitations, packaging compares favourably to internet banner ads, paid product placements in movies or stadium billboards and Formula 1 cars when seen by television viewers;⁸¹⁸ and
- packaging is far more interactive than most forms of mass advertising such as television advertisements and billboards.⁸¹⁹

⁸¹² P. Kotler and K. L. Keller et al, *Marketing Management: First European Edition*, (Pearson Education Canada, 2009), p. 530, cited in Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 20.

⁸¹³ Dominican Republic's first written submission, para. 681; Honduras' first written submission, para. 447.

⁸¹⁴ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 18.

⁸¹⁵ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 20; Expert Report of J-P. Dubé (9 March 2015), Exhibit AUS-11, para. 31.

⁸¹⁶ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 21.

⁸¹⁷ Expert report of J.P. Dubé (9 March 2015), Exhibit AUS-11, para. 58.

⁸¹⁸ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 25.

⁸¹⁹ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10; para. 26; Expert Report of J-P. Dubé (9 March 2015), Exhibit AUS-11, para. 58.

618. Professors Dubé and Tavassoli also reject the complainants' experts' arguments that packaging cannot function well as a promotional tool in a dark market. For example, Professor Dubé points to studies which show that where partial advertising bans are in place, the media which are unrestricted become more effective.⁸²⁰

619. The powerful persuasive effect of packaging is well recognised and understood in the world of marketing. As Professor Tavassoli points out:

Packages ... transform ordinary things - like soap or hair spray or baby powder or muffin mix - into objects of desire ... designing, producing and marketing packages has grown into ... a business of equal parts art and artifice, science and deception.⁸²¹

620. The complainants' attempts to minimise and marginalise the persuasive effects of packaging are simply not credible.

ii. Advertising increases overall demand for tobacco products

621. Having wrongly concluded that packaging is either not advertising or a poor substitute for mass advertising, Professor Steenkamp⁸²² and Professor Winer⁸²³ both proceed to suggest that advertising and branding in a mature market, such as the tobacco market, are primarily tools for increasing the market share of particular brands, not a tool for expanding overall demand for tobacco products.

622. These conclusions are rejected by both Professors Tavassoli⁸²⁴ and Chaloupka.⁸²⁵ For example, Professor Tavassoli explains that even in mature markets, brands can aim to increase their sales via market expansion into new segments. He cites the example of the sophisticated marketing used by tobacco companies to

⁸²⁰ Expert Report of J.P. Dubé (9 March 2015), Exhibit AUS-11, para. 61

⁸²¹ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 57.

⁸²² Expert Report of J-B.E.M. Steenkamp (29 September 2014), Exhibit DR/HON-5, para. 90 and following.

⁸²³ Expert Report of R. Winer (22 November 2013), Exhibit UKR-9, para. 30 and following.

⁸²⁴ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para 42 and following.

⁸²⁵ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 57-88.

promote messages of empowerment aimed at women, particularly in societies that have undergone or are undergoing rapid social change.⁸²⁶

623. Professors Tavassoli and Chaloupka, observe that Professor Steenkamp concludes only that the "*main* demand effect" (emphasis added) of advertising is brand switching.⁸²⁷ This implies (and the evidence shows) that it also has a category expanding effect.

624. Second, Professor Winer only reaches his conclusion that "advertising did not increase overall demand" by mis-stating the results of one of the studies on which he relies. As Professor Chaloupka notes in his report:

...the paper itself [relied on by Professor Winer]...states that "the advertising elasticity, although small in magnitude and insignificant for most years, is generally larger than presented in earlier studies and tends to increase over time. It becomes significant (at the 10% level) after 1978" (Tegene (1991), page 1181)⁸²⁸

625. Third, when the studies on the effectiveness of advertising bans relied upon by Professors Winer and Steenkamp are properly analysed, and in particular when the focus is on studies dealing with the effectiveness of comprehensive rather than partial bans (which are the only studies relevant to the Australian situation), the weight of the evidence favours the view that "comprehensive cigarette advertising bans reduce overall cigarette consumption by almost 7 percent".⁸²⁹

626. Finally, it should be understood that the claims by Professors Steenkamp and Winer seek to re-agitate a debate which has been had and lost by the tobacco industry. The effect of advertising on tobacco consumption has been examined on multiple occasions by many independent bodies. The United States Surgeon General (in successive reports), the United States National Cancer Institute and the WHO have

⁸²⁶ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para 48.

⁸²⁷ Expert Report of J-B.E.M. Steenkamp (29 September 2014), Exhibit - DR/HON-5, para. 117.

⁸²⁸ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 82.

⁸²⁹ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 87.

consistently concluded that "bans on tobacco advertising, promotion and sponsorship are effective at reducing smoking".⁸³⁰

iii. Packaging influences adolescent behaviour

627. The complainants rely on the expert evidence of Professors Steinberg and Viscusi in an attempt to assert that packaging is irrelevant to adolescent decision-making, and therefore that the tobacco plain packaging measure is an ineffective way in which to reduce smoking initiation among young people. However, existing studies show the importance of packaging in influencing adolescent behaviour, a view confirmed by a number of psychologists commissioned by Australia, who specialise in adolescent behaviour and risk-taking.⁸³¹ This evidence is consistent with the conclusion that the tobacco plain packaging measure is well adapted to make an important contribution to reducing youth smoking initiation – one of the key objectives of the measure.

a. *The adolescent decision-making process is driven by emotion*

628. Adolescence is recognised to be a period of considerable biological, social and cognitive change,⁸³² and one which can be a time of increased sensation seeking, risk taking, and rebelliousness. This is recognised by the tobacco industry (which has concluded that "[C]onsumers are not logical OR analytical"⁸³³), the complainants (who agree that adolescents are attracted to risk-behaviours),⁸³⁴ and experts

⁸³⁰ For a fuller discussion, see Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 57-76.

⁸³¹ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13; Expert Report of Professor P. Slovic (4 March 2015), Exhibit AUS-12.

⁸³² This is recognised by Professor Steinberg, an expert commissioned by the complainants, in his work on adolescent behaviour. See Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 12 and 17.

⁸³³ Philip Morris, "Colmar Brunton Research" (No date), Bates No. 2504104635, Exhibit AUS-261.

⁸³⁴ Dominican Republic's first written submission, para. 83.

commissioned by the complainants (including Professors Steinberg, Viscusi, Mitchell and McKeganey).⁸³⁵

629. Australia agrees with this characterisation of the period of adolescence, and notes that, for young people and adolescents:

having a good time with friends and avoiding the risk of peer disapproval are examples of social factors in which affect (experiential thinking) dominates any tendency for analytic or deliberative thinking.⁸³⁶

b. Factors in the process of smoking initiation by adolescents

630. Despite their admission that adolescents are attracted to impulsive risk-behaviours, the complainants assert that adolescents are rational beings who "fully understand" the risks of smoking. Even if these two propositions were consistent, the evidence reviewed by Professor Slovic shows that, contrary to the opinion of Professor Viscusi:

Beginning smokers give little conscious thought to risk. They are lured into the behaviour by the prospects of fun, excitement, and adventure. Most begin to think of risk only after they have started to smoke regularly, become addicted, and gained what to them is new information and appreciation of smoking's health risks. They then wish that they had never begun to smoke.⁸³⁷

631. Medical science confirms that young people are motivated to try smoking because they have certain psychological needs, such as the desire for social integration and acceptance.⁸³⁸ As such, young people are particularly sensitive to rewards and social status linked to peer approval.⁸³⁹ These particular psychological

⁸³⁵ Expert Report of W.K. Viscusi (21 November 2013), Exhibit UKR-8, paras. 110-116; Expert Report of L. Steinberg (15 September 2014), Exhibit DR/HON-6, pages 3-4; Expert Report of G. Mitchell (30 July 2014), Exhibit UKR-154, para. 23; and Expert Report of N. McKeganey (5 August 2014), Exhibit UKR-155, pages 17-19.

⁸³⁶ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 60.

⁸³⁷ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 90.

⁸³⁸ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 21-24.

⁸³⁹ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 106.

needs of young people are reflected in their fear of social rejection, and what Dr Biglan terms their "desperate need" for acceptance from their peers.⁸⁴⁰

c. Tobacco marketing appeals to the special psychological needs of adolescents

632. Australia does not deny that the initiation of tobacco use by young people is complex, and that there are multiple causal factors affecting youth smoking behaviour. However, the complainants' attempt to exclude the role of marketing (including tobacco product packaging) from this range of multi-causal factors is untenable.

633. Despite the agreed risk behaviour of youths and adolescents, and despite the consistently strong evidence that tobacco marketing appeals to the special psychological needs of adolescents, the complainants assert that branding and package design play no role in smoking initiation. Professor Viscusi claims that the literature on drivers of initiation never mentions brands or package designs.⁸⁴¹ Not only is this claim refuted by actual tobacco industry practices, as outlined in Part II.E.3, but such a claim conflicts with the complainants' own expert evidence. For example, in reviewing Professor Steinberg's report, Professor Slovic states:

Professor Steinberg's disparagement of the likely benefits of plain packaging seems to have little connection to his insightful characterisations of youth risk taking.⁸⁴²

634. Again, this is a debate which has been had and lost by the tobacco industry, and is contradicted by the tobacco industry's own internal research. Tobacco industry documents are clear on the role advertising plays in appealing to the special psychological needs of adolescents:

younger adults center their lives on having fun in every way possible and at every time possible. Their definition of success is

⁸⁴⁰ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 18 citing National Cancer Institute (United States), *The role of the media in promoting and reducing tobacco use, Tobacco Control Monograph No. 19* (June 2008), Exhibit AUS-77.

⁸⁴¹ Expert Report of W.K. Viscusi (21 November 2013), Exhibit UKR-8, para. 118.

⁸⁴² Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 110.

"enjoying today" which differentiates them from other smokers. Advertising which incorporates an "exciting", "fun", "humorous" theme provides a way for these smokers to "feel good" about the message, and thus generates a positive and relevant emotional response.⁸⁴³

iv. Packaging influences cessation and relapse behaviour

635. The complainants have also sought to prove that tobacco plain packaging is irrelevant to overcoming addiction. Consequently, the complainants deny that plain packaging of tobacco products will assist with smoking cessation, or preventing the relapse of smokers who have quit.⁸⁴⁴

636. Australia accepts that there are multiple drivers of smoking and cessation behaviours, and has consistently adopted a comprehensive range of tobacco control measures to address the various factors influencing these behaviours. However, the weight of the evidence strongly favours the view that plain packaging of tobacco products can play a role in assisting cessation and preventing relapse.

a. *The factors involved in addiction of tobacco products are complex and multi-determined*

637. As noted in Part II.E.3 nicotine addiction is, according to Dr Brandon, "comparable in complexity and potency to other chemical addictions, including opiate addiction."⁸⁴⁵ Dr Brandon outlines the highly complex and multi-determined list of known descriptors, predictors or contributory causes of addiction,⁸⁴⁶ noting that various types of research into these factors are not mutually exclusive or competitive.⁸⁴⁷ He states:

⁸⁴³ R.J. Reynolds, "Camel Advertising Development 'White Paper'" (1986), Bates No. 506768775, Exhibit AUS-197, p. 9.

⁸⁴⁴ See, e.g. Indonesia's first written submission, para. 413; Ukraine's first written submission, para. 557; Dominican Republic's first written submission, para.84; Honduras' first written submission, paras. 426-442; Cuba's first written submissions, para. 214.

⁸⁴⁵ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 17.

⁸⁴⁶ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 37.

⁸⁴⁷ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 31.

[D]epending on one's level of analysis, one could contribute nicotine addiction to genetic factors, metabolic factors, nicotine withdrawal severity, or craving severity. There are many other possible levels of analysis, including interpersonal, societal, and economic. It would be incorrect to pit these explanations against each other or to assume that one particular level of analysis is more fundamental than other levels.⁸⁴⁸

638. Yet this is precisely what the complainants have sought to do. Both Dr Satel and Dr Fischer, commissioned by the complainants, focus on stable predictors of cessation and relapse while ignoring the effects of what Dr Brandon terms "more variable and proximal predictors...which could include tobacco packaging."⁸⁴⁹ It is disingenuous for the complainants' experts to rely upon a partial list of predictors, selectively reviewing broad predictors of smoking cessation and relapse, but ignoring the more comprehensive models of addiction which incorporate all variable factors.⁸⁵⁰

b. Tobacco product packaging can act as a conditioned stimulus for smokers, which undermines public health goals of cessation and relapse

639. Tobacco product packaging can act as a relevant variable which influences cessation and relapse of tobacco use. In particular, tobacco product packaging is a powerful conditioned cue to smoke. This conclusion is supported by Dr Brandon's expert report, and recent studies by Hogarth et al,⁸⁵¹ which show that smokers engaged in less tobacco-seeking behaviour in response to plain packaged tobacco products as compared with fully branded packages. It is further confirmed by studies examining the link between plain packaging and consumer behaviour.⁸⁵²

⁸⁴⁸ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 31.

⁸⁴⁹ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 71.

⁸⁵⁰ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, paras. 37, 71 and 79.

⁸⁵¹ L. Hogarth, O.M. Maynard and M.R. Munafo, "Plain cigarette packs do not exert Pavlovian to instrumental transfer over tobacco seeking", *Addiction*, Vol. 110, No. 1, (2015), Exhibit AUS-262, pp. 174-82.

⁸⁵² J.F. Thrasher, M.C. Rousu, D. Hammond, A. Navarro, J.R. Corrigan, "Estimating the impact of pictorial health warnings and 'plain' cigarette packaging: evidence from experimental auctions among adult smokers in the US", *Health Policy*, Vol. 102, No. 1, (2011), 41, Exhibit AUS-229; L.S. Brose, C.B. Chong, E. Aspinall, S. Michie and A. McEwen, "Effects of standardised cigarette

(continued)

640. Dr Brandon reviews these studies and concludes:

In summary, fully branded cigarette packaging has characteristics consistent with its being a potent conditioned cue for smoking. Additionally, there is substantial evidence that plain cigarette packaging is perceived as less appealing than fully branded cigarette packaging. Finally, the few studies that have directly examined packaging as a cue suggest that plain packaging reduced craving for cigarettes compared to fully branded packaging.⁸⁵³

641. While both Dr Satel and Dr Fischer claim that plain packaging will acquire a conditioned cue status, Dr Brandon notes that it is less likely that plain packaging would act as a conditioned cue than fully branded packaging.⁸⁵⁴ This is because:

Drab dark brown packaging with small, standardised text is designed to be less salient than fully branded tobacco packaging. Additionally, the tight contingency between viewing one's own brand and smoking is likely to be reduced. ... Moreover, the salience of the health-related images works against contingency, because multiple images are used. Thus, a smoker should be less likely to develop a strong association between his or her own brand packaging ... and nicotine delivery ... [P]lain packaging should [therefore] reduce the degree to which tobacco packaging serves as a personalized conditioned cue...⁸⁵⁵

c. *The complainants provide no evidence for rejecting the role of tobacco product packaging in ongoing tobacco use*

642. Despite the evidence demonstrating that tobacco plain packaging will decrease the ability of the pack to act as a conditioned cue, both Dr Satel and Dr Fischer reject the notion that plain pack design may influence cessation or relapse. Dr Brandon states that Dr Satel:

packaging on craving, motivation to stop and perceptions of cigarettes and packs", *Psychology and Health*, Vol. 1, No. 7, (2014), 849, Exhibit AUS-263.

⁸⁵³ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 69.

⁸⁵⁴ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 76.

⁸⁵⁵ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para 76.

does not present any basis for rejecting pack design as a contributory factor except that it does not fall within any of the predictors that she chose to mention.⁸⁵⁶

643. Likewise, Dr Brandon notes that Dr Fischer's examples from the literature are "incomplete or misleading,"⁸⁵⁷ and strongly disagrees with her conclusion that the academic literature provides "no support" for an effect of plain packaging on smoking behaviour.

644. However, Dr Fischer's conclusion that the number of smoking cues which might unconsciously precipitate relapse is "limitless"⁸⁵⁸ must necessarily include tobacco product packaging. To this end, Dr Brandon notes that:

It makes sense to begin with the most common, shared cues, such as the cigarette and its packaging. Because these are also the most proximal to, and contingent with, smoking, they are also likely to produce the greatest effect.⁸⁵⁹

d. Conclusion

645. The complainants have failed to establish that the tobacco plain packaging measure will not contribute to Australia's public health goals. The complainants' experts ignore the fact that the tobacco plain packaging measure removes the ability of the pack to function as a conditioned cue, and removes the contributory causal role the pack plays in nicotine addiction, including smoking maintenance, cessation, and relapse. The tobacco plain packaging measure therefore directly contributes to the objective of improving public health, by encouraging cessation and discouraging relapse, as part of a comprehensive tobacco control program.

⁸⁵⁶ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para 76.

⁸⁵⁷ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para 90.

⁸⁵⁸ Expert Report of G. Fischer (6 October 2014), Exhibit-DR/HON-007, para 75.

⁸⁵⁹ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para 87.

(e) The complainants have failed to establish that tobacco plain packaging will lead to the market effects alleged

646. Despite arguing that tobacco plain packaging will not reduce demand for cigarettes, the complainants claim that the tobacco plain packaging measure will significantly alter the functioning of the tobacco product market. They paint a picture of a commodity-like market in which manufacturers compete virtually exclusively on price following the introduction of tobacco plain packaging, and which leads to an increase in illicit trade. This theory depends on perceived quality convergence, reduced willingness to buy premium products and reduced prices.

i. The complainants have failed to establish that tobacco plain packaging will commoditise the market

647. No proper explanation for the claim of "a perceived quality convergence in the marketplace" is advanced by the complainants. Australia accepts that as a result of tobacco plain packaging, there will be less differentiation between products, limiting the tobacco industry's ability to target different demographics with their marketing. Indeed, that is precisely the aim. But whether less differentiation will manifest itself as perceived quality convergence is not established by any evidence. If, as some complainants assert, there are genuine quality differences between tobacco products,⁸⁶⁰ a smoker presumably will continue to perceive those genuine differences. Indeed, the empirical evidence supports such a conclusion. A recent study found that post-plain packaging, 92% of smokers still believe that brands do differ in taste, a change of only 1% from the pre-plain packaging level. While the same study revealed significant increases in the numbers of smokers who rated the quality, satisfaction and value of their cigarettes as lower post plain packaging,⁸⁶¹ which indicates the measure's effectiveness in reducing appeal, there is nothing in the research to suggest

⁸⁶⁰ Dominican Republic's first written submission, para 863; Indonesia's first written submission, para. 171.

⁸⁶¹ M.A. Wakefield, L. Hayes, S. Durkin and R. Borland, "Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study", *BMJ Open*, Vol. 3 (2013), Exhibit AUS-184.

that these altered perceptions were limited to any particular *category* of cigarettes. Rather, it would appear that the perceived quality of *all* cigarettes fell.

648. This evidence is consistent with the conclusion of Professor Dubé, that tobacco plain packaging:

Will likely reduce the desirability of all tobacco brands, including those in the discount segments. Steenkamp's conclusion about quality convergence requires a disproportionately high impact of TPP on perceptions for premium versus discount brands. Steenkamp does not provide any evidence, theoretical or empirical, to support the conclusion that the TPP measure will disproportionately affect premium brands.⁸⁶²

649. The same point can be made in respect of the second argument that willingness to pay will only change in relation to "higher range products". All tobacco products on the Australian market prior to tobacco plain packaging were sold in branded packaging. Following the introduction of tobacco plain packaging the evidence indicates that perceptions of all products will change, increasing the likelihood that a smoker will regard those products as being of lower quality, providing lower satisfaction and lower value than when they were marketed in branded packages.

650. Moreover, even if the complainants' arguments about differential impact were made out, they provide no proper basis for the ultimate conclusion that tobacco plain packaging will put downward pressure on price. As Professor Dubé points out, even if it were true to say that brand loyalty is reduced by the measure, the pricing incentives for firms are ambiguous. Professor Dubé concludes:

In fact, given recent empirical evidence from the CPG literature, one would more likely predict that reduced loyalty, should it in fact fall, would lead to higher equilibrium prices.⁸⁶³

651. Australia's expert economist Professor Michael Katz, Sarin Chair in Strategy and Leadership at the University of California, Berkeley, further explains why prices can in fact *increase* in response to declining demand:

⁸⁶² Expert Report of J.P. Dubé (9 March 2015), Exhibit AUS-11, para. 40.

⁸⁶³ Expert Report of J.P. Dubé (9 March 2015), Exhibit AUS-11, para. 47.

... in a market with declining demand ... the supplier may ... choose to forego attempting to attract the diminishing number of potential new customers and, instead, focus on its existing, loyal customers by charging higher prices.

That latter pricing approach is known in the marketing literature as a harvesting strategy. Such a strategy can be optimal in an industry with little prospect for future growth or, as in the case of the Australian tobacco market, is already in decline.⁸⁶⁴

652. Professor Katz notes that, in such a market, "the supplier may opt to harvest profits from its loyal customer base by charging high prices to reap higher margins".⁸⁶⁵ In this way, "a public policy that reduces future demand can trigger higher prices".⁸⁶⁶

ii. Tobacco plain packaging will not increase illicit trade in tobacco products

653. Further, contrary to the complainants' claims that the tobacco plain packaging measure will lead to an increase in illicit trade in tobacco products, the evidence suggests that illicit tobacco is not a significant part of the Australian market, and that the tobacco plain packaging measure has not had and it is not likely to have any discernible effect on illicit tobacco consumption in Australia.

654. In Professor Chaloupka's expert opinion, the KPMG survey commissioned by the tobacco industry, on which the complainants rely, has serious methodological flaws, and significantly overstates the size of the illicit tobacco market in Australia.⁸⁶⁷ On the basis of recent survey data, Professor Chaloupka estimates that illicit tobacco currently accounts for 3.2% of tobacco products consumed in Australia.⁸⁶⁸ This

⁸⁶⁴ Expert Report of M.Katz (9 March 2015), Exhibit AUS-18, paras. 37-38.

⁸⁶⁵ Expert Report of M.Katz (9 March 2015), Exhibit AUS-18, para. 38.

⁸⁶⁶ Expert Report of M.Katz (9 March 2015), Exhibit AUS-18, para. 38.

⁸⁶⁷ Expert Report of F. Chaloupka (Illicit Market) (6 March 2015), Exhibit AUS-8, paras. 10(d), 78-79. Relying on the KPMG report commissioned by the tobacco industry, the complainants suggest that the level of illicit tobacco product consumption grew by 2.1 percent in absolute terms between 2012 and 2013, from 11.8 to 13.9 percent of total consumption. (See Dominican Republic's First Written Submission, para. 536; Ukraine's First Written Submission, para. 667; Indonesia's First Written Submission, paras. 120 and 175 (referring to Exhibit DR-98).

⁸⁶⁸ Expert Report of F. Chaloupka (Illicit Market) (6 March 2015), Exhibit AUS-8, paras. 28-33.

finding is consistent with other independent non-tobacco industry estimates, which indicate that illicit tobacco has accounted for no more than three to five percent of the overall market for tobacco products in recent years.⁸⁶⁹

655. Professor Chaloupka also explains that, contrary to the complainants' claims,⁸⁷⁰ the tobacco plain packaging measure is unlikely to have any discernible impact on trade in illicit tobacco products in Australia.⁸⁷¹ According to Professor Chaloupka, the key factors that are likely to determine the extent of large-scale tobacco smuggling are the costs of supplying illicit tobacco to the market, which include the costs of acquiring, transporting and distributing illicit tobacco products, as well as expected legal costs.⁸⁷² The high costs of supplying illicit tobacco to Australia stem from Australia's tight control over the tobacco distribution chain, active enforcement of policies targeting the illicit tobacco trade, strong governance and low levels of corruption, and low demand for illicit tobacco among Australian smokers.⁸⁷³

656. Against this background, Professor Chaloupka determines that any theoretical impact that the tobacco plain packaging measure may have on the cost of producing counterfeit cigarettes will be "trivial" relative to the costs of supplying these illicit products to the Australian market, and therefore will have no meaningful impact on

⁸⁶⁹ Expert Report of F. Chaloupka (Illicit Market) (6 March 2015), Exhibit AUS-8, paras. 17-34.

⁸⁷⁰ The complainants claim, based on Peggy Chaudhry, Alan Murray, and Alan Zimmerman, "The impact of plain packaging on the illicit trade in tobacco products in Australia" (22 September 2014), Exhibit - DR/HON-2, that plain packaging has contributed to the increase in illicit tobacco trade by commoditizing the licit tobacco market and creating opportunities for illicit traders to sell *branded* tobacco products in Australia (Dominican Republic's first written submission, para. 544; Honduras' first written submission, paras. 552-556; Ukraine's first written submission, paras. 665-673; Indonesia's first written submission, para. 175); by reducing brand loyalty and making consumers more price sensitive, making it more likely that consumers will be willing to purchase illicit tobacco products (Dominican Republic's first written submission, para. 545; Honduras' first written submission, para. 561; Ukraine's first written submission, para. 675); and by making illicit packaging easier to produce and harder to detect (Dominican Republic's first written submission, paras. 546-548; Honduras' first written submission, paras. 557-560; Ukraine's first written submission, paras. 665, 673-685).

⁸⁷¹ Expert Report of F. Chaloupka (Illicit Market) (6 March 2015), Exhibit AUS-8, paras. 10(c), 67-78.

⁸⁷² Expert Report of F. Chaloupka (Illicit Market) (6 March 2015), Exhibit AUS-8, paras. 35-66.

⁸⁷³ Expert Report of F. Chaloupka (Illicit Market) (6 March 2015), Exhibit AUS-8, para. 66.

expected gains from illicit tobacco trade – and, consequently, on the levels of illicit tobacco trade – in Australia.⁸⁷⁴

657. Similarly, the allegation that the tobacco plain packaging measure makes it more difficult to detect illicit tobacco products is entirely speculative, and is directly contradicted by evidence suggesting an upward trend in the number of detections by the Australian Customs and Border Protection Service (ACBPS) subsequent to the introduction of the tobacco plain packaging measure. Even though the number of detections increased, the volume of illicit tobacco detected decreased over the same period. According to ACBPS, this "is suggestive of a shift in smuggling methodology rather than any overall increase in smuggling activities".⁸⁷⁵

658. Moreover, Australia notes that the complainants have failed to explain how illicit trade is even relevant to the question of the contribution that the tobacco plain packaging measure makes to its objectives.

(f) The complainants have failed to establish that tobacco plain packaging will increase tobacco consumption

659. The complainants also assert that the economic theory underlying tobacco plain packaging is flawed and that, properly understood, the measure will contribute to an increase in tobacco consumption. To substantiate this proposition, the complainants rely on the expert testimony of a Professor of Economics, Damien Neven.

⁸⁷⁴ Expert Report of F. Chaloupka (Illicit Market) (6 March 2015), Exhibit AUS-8, para. 96.

⁸⁷⁵ Australian Customs and Border Protection Service, *Second Annual Report 2013-2104* (September 2014), Exhibit AUS-264, pp. xi, 26.

660. Professor Neven attempts to construct a model that will accurately predict what will happen following the introduction of the tobacco plain packaging measure. The range of defects in the way Professor Neven undertakes this process are detailed in Section VI of the report of Professor Michael Katz. The principal defect with the model is that when compared to the real world:

- Dr Neven's simulation predicts that prices will fall when they have actually risen; and
- Dr Neven's simulation predicts a convergence in prices and an increase in own-price elasticities when in fact the opposite has occurred.⁸⁷⁶

661. Australia notes that when a simulation is carried out using the observed facts from the real world, Professor Neven's model predicts *higher* prices and *lower* consumption of tobacco products⁸⁷⁷ – that is, the opposite of what the complainants contend.

662. Further, Professor Katz observes that because of tobacco plain packaging, the overall portfolio of cigarette brands offered to consumers is less attractive. Thus, at any given price, cigarette consumption and smoking incidence can be expected to be lower as a consequence of this reduction in perceived quality.⁸⁷⁸

663. Contrary to their assertions, the economic evidence submitted by the complainants does not establish that the tobacco plain packaging measure will increase tobacco consumption. Annexure E elaborates in greater detail the flaws in the complainants' evidence upon which their arguments concerning tobacco consumption are based.

⁸⁷⁶ Expert Report of M. Katz (9 March 2015), Exhibit AUS-18, p. 44 and following.

⁸⁷⁷ Expert Report of M. Katz (9 March 2015), Exhibit AUS-18, paras. 80-82.

⁸⁷⁸ Expert Report of M. Katz (9 March 2015), Exhibit AUS-18, paras. 24, 26. See also Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 45.

(g) The complainants have failed to establish that prevalence and consumption have not declined since the introduction of tobacco plain packaging

664. In addition to their various claims of theoretical support, the complainants also attempt to support their claims that the tobacco plain packaging measure has not been effective on the basis of various analyses of smoking prevalence data and tobacco sales data.⁸⁷⁹ The complainants put forward a variety of statistical and econometric analyses that purport to show that tobacco plain packaging has not had an effect on prevalence or sales in the first 18 months following its implementation and they suggest that prevalence and tobacco sales may even be rising.⁸⁸⁰ The complainants claim that this confirms their arguments that tobacco plain packaging has had no effect. Ukraine goes so far as to claim that tobacco plain packaging has increased tobacco consumption.⁸⁸¹

665. Australia wholly rejects these claims.

i. Smoking prevalence and tobacco consumption have declined following the introduction of the tobacco plain packaging measure

666. Properly analysed data from Australia demonstrate that smoking prevalence and tobacco consumption unambiguously declined in the period following implementation of the tobacco plain packaging measure. The success of Australia's comprehensive approach to tobacco control in reducing prevalence, as reflected in the National Drug Strategy Household Survey, is discussed at Part II.D.2 above.⁸⁸²

⁸⁷⁹ Honduras' first written submission, paras. 349-402; Ukraine's first written submission, paras. 513-540; Dominican Republic's first written submission, paras. 428-493; Cuba's first written submission, paras. 99-144; Indonesia's first written submission, paras. 112-117, 323-352.

⁸⁸⁰ See, e.g. Honduras' first written submission, paras. 346, 395; Ukraine's first written submission, paras. 511, 514, 525; Dominican Republic's first written submission, paras. 485, 523; Cuba's first written submission, paras. 142, 163.

⁸⁸¹ Ukraine's first written submission, para. 588; Honduras' first written submission, para 346; Dominican Republic's first written submission, para. 485; Cuba's first written submission, para. 142.

⁸⁸² Daily smoking declined 15.23% between 2010 and 2013; the next largest decline (since 1991) was 11.01% between 1998 and 2001: Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian

(continued)

667. Other data sources confirm that smoking prevalence has continued to decline following the introduction of tobacco plain packaging.

668. Dr Chipty was asked to analyse smoking rates from the Roy Morgan Single Source survey before and after the introduction of tobacco plain packaging. According to the Roy Morgan data, overall smoking prevalence for people aged 14 or older decreased from 18.9% in the 12 months immediately prior to the introduction of the tobacco plain packaging measure, to 18.1% in the first year following the introduction of the measure, and 17.4% in the second year after implementation.⁸⁸³ The declines were statistically significant in each period.

669. Contrary to the findings of the complainants' experts, proper analysis of the retail and wholesale sales data submitted and relied on by the complainants showed declines in tobacco consumption in the period following the introduction of the tobacco plain packaging measure. This is because the experts either failed to account for strategic inventory management (resulting in a boost in wholesale shipments in late 2013 immediately prior to an announced excise increase, followed by a noticeable decline following introduction of the excise increase) or made key transcription and design errors. As the table below shows, a comparison of years beginning in October before and after the introduction of the tobacco plain packaging measure shows a reduction in sales volumes across all data sources relied on by the complainants' experts.⁸⁸⁴

Institute of Health and Welfare Survey (2014)), Exhibit AUS-48, supplementary tables, Table 1: Tobacco smoking status, people aged 14 years or older, 1991 to 2013.

⁸⁸³ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 77, Figure 15. Note that the prevalence rates from the Roy Morgan survey are higher than the National Drug Strategy Household Survey results because the Roy Morgan data included *all* smoking, not just *daily* smoking.

⁸⁸⁴ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 66, Table 12. See also paras. 55-69 and Annexure E, paras. 61-73. Indeed, a more appropriate analysis of IPE's own data suggests that there was a statistical *decrease* of about 5 to 6 percent in tobacco consumption following the implementation of the tobacco plain packaging measure (Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 67-69)

	Oct 11 – Sept 12 Before PP	Oct 12 – Sept 13 After PP	% Change
IMS	21.41	20.99	-1.96%
Nielsen	20.69	20.48	-1.01%
Aztec	13.73	13.65	-0.56%

Sources: IMS and Aztec data from IPE Report backup production. Nielsen data from Klick Pre/Post Report backup production.

Figure 19: Year-Over-Year Change, for Year Beginning October in Cigarette Sales Volume (CSE in Billions)

ii. The complainants' empirical evidence on prevalence and consumption is fundamentally flawed

670. At the outset, Australia notes that the complainants' reliance on analysis of short-term prevalence and consumption data to substantiate their claims regarding the effectiveness of the tobacco plain packaging measure ignores the contribution the measure makes to improving public health by discouraging uptake, encouraging quitting, discouraging relapse, and reducing exposure to smoke⁸⁸⁵ – effects that may not fully manifest in short-term datasets focused solely on prevalence and consumption.⁸⁸⁶ Australia has always maintained that the impact of tobacco plain packaging on smoking rates as part of a comprehensive suite of measures will be felt most significantly in the longer-term.⁸⁸⁷ As the measure's impact will be greatest on youth initiation; it will take time for the cohort of children, who have never been exposed to branded tobacco packaging, to reach adolescence and be included in national health surveys.⁸⁸⁸ Moreover, the addictive power of nicotine necessitates

⁸⁸⁵ These behavioural changes represent the broader objectives of the tobacco plain packaging measure through which the measure will reduce tobacco use. TPP Act, Exhibit AUS-1, Section 3(1).

⁸⁸⁶ Expert Report of T. Chitty (9 March 2015), Exhibit AUS-17, paras. 32-39.

⁸⁸⁷ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p. 1. See also Annexure E, paras. 11-14.

⁸⁸⁸ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p. 1.

multiple quit attempts before success.⁸⁸⁹ For many addicted smokers, multiple tobacco control measures over a period of time are required to provide them with the additional motivation to quit.⁸⁹⁰

671. Further, the complainants' evidence on prevalence and consumption is fundamentally flawed. A more comprehensive explanation of the defects in the complainants' data analysis is set out in Annexure E to these submissions. However, one study in particular warrants specific attention to underscore the lack of credibility of the complainants' conclusions.

672. To make out its empirical claims, Ukraine relies heavily on the longitudinal study conducted by Professor Klick which purports to determine the impact of tobacco plain packaging by surveying smokers in Australia, where the tobacco plain packaging measure was implemented, and smokers in New Zealand, where it was not.

673. Professor Klick has assembled and surveyed the same cohort of smokers and recent ex-smokers (to the extent that they were willing to continue to participate in the survey) across six waves from November/December 2012 to February 2014.

674. Professor Klick claims that the comparison between Australia and New Zealand involves a comparison between a country which adopted tobacco plain packaging and a country which did not. However, the survey in fact involves a comparison between two countries with comprehensive tobacco control programmes, one which adopted plain packaging, and one which adopted a 10% increase in excise during the survey period. The latter is a measure which all of the complainants concede represents a directly effective, *if not the most effective*, measure for controlling tobacco prevalence.⁸⁹¹ As Australia discusses below, when this is understood, Professor Klick's data supports a different conclusion to the one he reaches in his report.

⁸⁸⁹ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, paras. 45-49.

⁸⁹⁰ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 35.

⁸⁹¹ Ukraine's first written submission, para. 700; Honduras' first written submission, para 589; Dominican Republic's first written submission, para. 753; Cuba's first written submission, paras. 276-277; Indonesia's first written submissions, para. 430.

675. In fact, Professor Klick's own data demonstrates that daily smoking fell more in Australia than in New Zealand.⁸⁹² Daily smoking incidence in Australia fell by 5 percentage points, from 72 percent in Wave 1 to 67 percent by Wave 6. By contrast, daily smoking incidence in New Zealand fell by 3 percentage points, from 70 percent in Wave 1 to 67 percent by Wave 6. As Dr Tasneem Chipty observes in her report:

During most, if not all, of this time, Australia was under the effect of Plain Packaging, while New Zealand was under the effect of a new 10 percent excise tax increase ... Thus, on its face, the comparison in smoking incidence between Australia and New Zealand suggests that Plain Packaging may be having its intended effect.⁸⁹³

676. Further, consistent with the interpretation that tobacco plain packaging "may be having its intended effect", Dr Chipty notes that when asked about the primary reason for quitting, respondents in New Zealand tended to cite cost, while respondents in Australia tended to cite health risks.⁸⁹⁴

677. In her re-analysis of Professor Klick's data, Dr Chipty concludes that Wave 1 must be excluded from the dataset.⁸⁹⁵ Following the exclusion of Wave 1, Dr Chipty concludes that "daily smoking in Australia declined at an average of 1.3 percentage points per wave, while smoking rates in New Zealand approximately stayed flat over this period".⁸⁹⁶ This is demonstrated in the figure below:

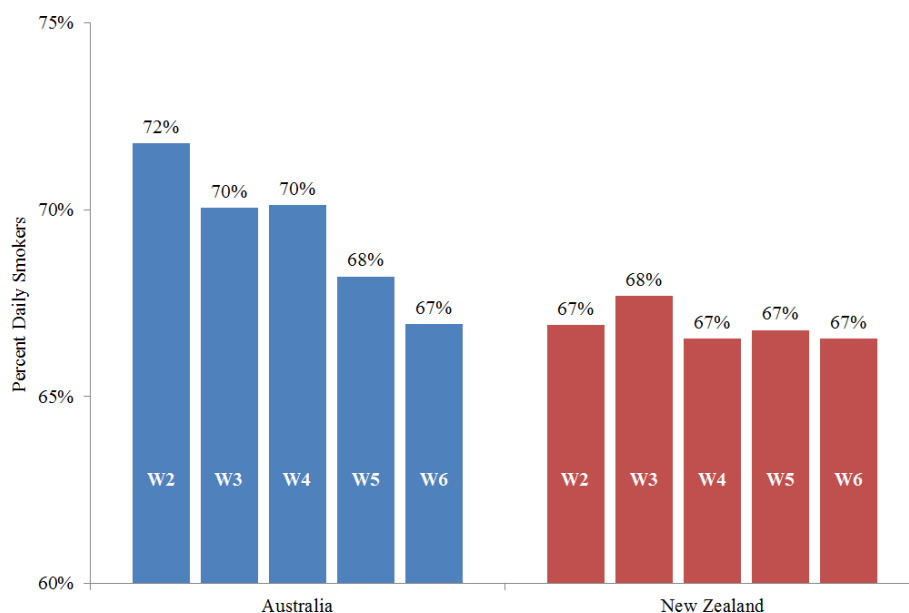
⁸⁹² Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, Table 4.

⁸⁹³ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 26-27.

⁸⁹⁴ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 26-27.

⁸⁹⁵ Wave 1 is excluded from the re-analysis because Dr. Chipty considers that over the shorter period (Waves 2 to 6), it is more likely than over the full period of Professor Klick's survey that the two jurisdictions were not experiencing country-specific changes, apart from the differences in their initial tobacco control policy: Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 28.

⁸⁹⁶ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 29-30.



Note: Chart reports the percentage of respondents that answered "Everyday" to the question, "At the present time, how often do you smoke cigarettes?"

Source: Commissioned Roy Morgan Survey data from Klick Pre/Post Report backup production.

Figure 20: Percentage of Klick's Survey Respondents that Reported Smoking Daily By Wave, Excluding Wave 1

678. After examining the daily smoking data more formally, Dr Chipty finds in the aggregate "that Australia is experiencing a faster decline in daily smoking than New Zealand, and this effect is statistically significant".⁸⁹⁷

679. Dr Chipty thus concludes:

Professor Klick's data show that Australia has experienced both a bigger absolute decline and faster rate of decline in daily smoking than New Zealand. There is no measurable decline in overall smoking, which includes daily and occasional smoking. Moreover, people in Australia appear to be quitting more for health reasons than in New Zealand. This evidence, while not conclusive, is consistent with the possibility that Plain Packaging is having its intended effect.⁸⁹⁸

⁸⁹⁷ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 29-30.

⁸⁹⁸ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 31.

680. That being the case, if the Panel were to adopt the approach to Professor Klick's study that is urged by Ukraine, "being the only proper longitudinal study of a representative sample with a proper counterfactual which allows for the drawing of scientifically sound conclusions on the effect of plain packaging", then it is open to the Panel to conclude that tobacco plain packaging has already had positive effect, as part of Australia's comprehensive suite of measures, in reducing daily smoking among Australians.

681. Given declining smoking prevalence and tobacco consumption in Australia, and the fundamental flaws in the empirical analyses relied on by the complainants (which are addressed in greater detail Annexure E), the complainants have failed to establish that the tobacco plain packaging measure has not contributed to its broader objectives of improving public health.

(h) Conclusion

682. For the reasons set out above, the complainants have failed to demonstrate that the tobacco plain packaging measure has not made, or is incapable of making *any* contribution to Australia's public health objectives, properly understood. In contrast, Australia has demonstrated that the tobacco plain packaging measure contributes to its public health objectives by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of tobacco retail packaging to mislead consumers about the harmful effects of smoking or using tobacco products, which in turn contributes to the broader objectives of discouraging uptake, encouraging quitting, discouraging relapse, and reducing exposure to smoke. Accordingly, in the event that the Panel were to engage in a "relational analysis", the element of contribution weighs strongly in favour of the conclusion that the tobacco plain packaging measure is not "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement.

3. The risks that non-fulfilment of the public health objectives of the tobacco plain packaging measure would create are great

683. Article 2.2 further requires panels to consider "the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the

legitimate objective."⁸⁹⁹ This introduces a "further element of weighing and balancing" in the relational analysis, and in the analysis of whether a less trade-restrictive alternative would make an equivalent contribution to the measure's objective, and is reasonably available.⁹⁰⁰

684. As Australia will discuss below, the nature of the risks at issue are "both vital and important in the highest degree", and the consequences that would arise from non-fulfilment of the legitimate objectives of the tobacco plain packaging measure are grave given the enormous harm caused by tobacco use. Therefore, the risks that non-fulfilment would create are great.⁹⁰¹

(a) The Nature of the Health Risks Addressed by the Tobacco Plain Packaging Measure Is Both Vital and Important to the Highest Degree

685. The complainants do not appear to dispute that the nature of the health risks addressed by the tobacco plain packaging measure is "both vital and important in the highest degree".⁹⁰²

686. As Australia has discussed in detail in Part II of this submission, the magnitude of the global tobacco epidemic, and the serious harms caused by tobacco use, are well-established. In addition, panels and the Appellate Body have recognised that the interests and values at stake in relation to measures to reduce the harm caused by the use of tobacco products are "both vital and important in the highest degree".⁹⁰³

⁸⁹⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

⁹⁰⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321; referring to Appellate Body Report, *US – Gambling*, para. 307; and Appellate Body Report, *US – COOL*, para. 377.

⁹⁰¹ Indonesia's first written submission, para. 427.

⁹⁰² See, e.g. Ukraine's first written submission, para. 688; Honduras' first written submission, paras. 891-892, 894; Dominican Republic's first written submission, para. 1029; Cuba's first written submission, para. 3; Indonesia's first written submission, para. 389.

⁹⁰³ In Panel Report, *US – Clove Cigarettes*, para. 7.347, the Panel stated, "[w]e have already concluded that the objective of the ban on clove cigarettes is to reduce youth smoking. It is self-evident that measures to reduce youth smoking are aimed the protection of human health, and Article 2.2 of the TBT Agreement explicitly mentions the "protection of human health" as one of the "legitimate objectives" covered by that provision." The GATT panel in GATT Panel Report, *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes*, para. 73, found that "smoking amounts to a serious risk to human health and accordingly, measures aimed at reducing the consumption of cigarettes fall within the scope of GATT Article XX(b) ".

(b) The consequences that would arise from non-fulfilment of the legitimate objective are grave

687. Several of the complainants argue that the consequences that would arise from non-fulfilment of the legitimate objectives of the tobacco plain packaging measure are not serious, because the tobacco plain packaging measure makes no contribution to the objective of reducing smoking prevalence, and in fact goes against this objective.⁹⁰⁴ In a similar vein, Indonesia argues that unless Australia believes there is a "near-term risk" of the tobacco plain packaging measure failing to achieve the objective of reducing smoking prevalence, the consequences of non-fulfilment of the measure's legitimate objectives are low.⁹⁰⁵

688. Setting aside the fact that the complainants erroneously focus on smoking prevalence rates as the measure of contribution and then proceed to mis-state this data, the complainants conflate "contribution" and "risks non-fulfilment would create" as elements of the relational analysis under Article 2.2.⁹⁰⁶ What has to be assessed and compared to the trade-restrictiveness of the measure, and the degree of contribution that the measure makes to its legitimate objectives, are the risks that would be created if such *legitimate objectives* are not fulfilled, and not the degree of contribution of the measure to those objectives.⁹⁰⁷

⁹⁰⁴ Ukraine's first written submission, para. 687; Cuba's first written submission, para. 416; Dominican Republic's first written submission, paras. 1029-1030.

⁹⁰⁵ Indonesia's first written submission, para. 427.

⁹⁰⁶ See Appellate Body Report, *EC – Seal Products*, para. 5.214, citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182, observing that a "necessity" analysis "involves a 'holistic' weighing and balancing exercise 'that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement.'" Cf Honduras' first written submission, para. 825.

⁹⁰⁷ See, e.g. Honduras' first written submission, paras. 814-822. See also Dominican Republic's first written submission, para. 1029: "in Article 2.2, that negative event' is the *consequence of the failure to fulfil the legitimate objective*". (emphasis added)

689. As the Dominican Republic recognizes, the consequences that would arise from non-fulfilment of Australia's legitimate public health objectives are "both serious and grave".⁹⁰⁸

690. As Australia discussed in Part II.D.3, Australia introduced the tobacco plain packaging measure to address the significant and ongoing burden of death and disease caused by tobacco use in Australia. The adoption of tobacco plain packaging, as recommended in the FCTC Guidelines, was a logical extension of Australia's existing restrictions on the advertising and promotion of tobacco products, as part of Australia's comprehensive suite of tobacco control measures.

691. If the tobacco plain packaging measure's public health objectives were not fulfilled, tobacco packaging would continue to appeal to consumers, in particular to the most vulnerable segments of society, including adolescents. Graphic health warnings would be less effective in alerting consumers to the risks of smoking, and tobacco packages would continue to mislead consumers about the harmful effects of tobacco use. Consequently, the unique and important contribution that the tobacco plain packaging measure makes, over time, to the general objectives of discouraging uptake, encouraging quitting, discouraging relapse and reducing exposure to smoke, in particular among certain segments of the population, would be impeded, resulting in more tobacco related premature death and serious disease in Australia than would otherwise be the case.

692. Referring to Article 15 of the TPP Act, Indonesia makes a further, somewhat puzzling, argument that "[b]ecause Australia is willing to 'walk away' from PP rather than pay compensation, it is clear that Australia believes there is little risk to public

⁹⁰⁸ "In this dispute, the consequences of failure would be serious and grave. If tobacco use does not decrease to a greater extent than would otherwise be the case in the absence of PP, then more Australian citizens would suffer from the adverse health impacts of smoking": Dominican Republic's first written submission, para. 1029.

health from not allowing PP to fulfil its public health objective (i.e. the risk of non-fulfilment is negligible)".⁹⁰⁹

693. Indonesia entirely mischaracterizes and selectively quotes the text of section 15 of the TPP Act. As is evident from a proper reading of the text of section 15 of the TPP Act,⁹¹⁰ this section is a savings provision⁹¹¹ and is specifically intended to *preserve* the requirements of the TPP Act with respect to the retail packaging of tobacco products and the appearance of tobacco products to the *greatest extent possible*, in the unlikely event that it was found to be inconsistent with the Australian Constitution. The High Court of Australia upheld the Constitutionality of the tobacco plain packaging measure in its decision in *JTI v Commonwealth*.⁹¹²

(c) Conclusion on "risks non-fulfilment would create"

694. Australia has demonstrated that the risks non-fulfilment would create are great, because the *nature of the risks* at issue is "both vital and important in the highest degree", and the *consequences* that would arise from non-fulfilment of the

⁹⁰⁹ Indonesia's first written submission, para. 425. Australia notes that Ukraine makes a similar argument in its first written submission at fn 236 to para. 259.

⁹¹⁰ TPP Act, Exhibit AUS-1, Section 15 provides in relevant part: (emphasis added)

(1) This Act does not apply *to the extent (if any)* that its operation would result in an acquisition of property from a person otherwise than on just terms.

(2) In particular, if, apart from this section, this Act would result in such an acquisition of property because it would prevent the use of a trade mark or other sign on or in relation to the retail packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark or sign may be used on or in relation to the retail packaging of tobacco products, or on tobacco products, *subject to any requirements that may be prescribed in the regulations for the purposes of this subsection*.

...

(3) To avoid doubt, any tobacco product requirement (within the meaning of para. (a) or (b) of the definition of tobacco product requirement) that does not result in such an acquisition of property *continues to apply* in relation to:

- (a) the retail packaging of tobacco products; and
- (b) the appearance of tobacco products.

⁹¹¹ Section 15 of the TPP Act is a savings provision and is concerned with potential *invalidity*, not potential *liability*. It has the same effect as section 15A of the *Acts Interpretation Act 1901 (Cth)*, Exhibit AUS-259, which requires that all Commonwealth Acts be read subject to the Australian Constitution. Section 15 of the TPP Act was included out of an abundance of caution, and provisions such as section 15 have been included in other Commonwealth Acts for similar reasons.

⁹¹² See Annexure D: Protection of Trademarks and Geographical Indications in Australia.

legitimate objectives of the tobacco plain packaging measure are grave. This factor of the relational analysis therefore also strongly weighs in favour of the conclusion that the tobacco plain packaging measure is not "more trade-restrictive than necessary" within the meaning of Article 2.2.

(d) Overall conclusion on the "relational analysis"

695. For the foregoing reasons, the outcome of the "relational analysis" is that the complainants have failed to establish that the tobacco plain packaging measure is more trade-restrictive than necessary to fulfil its legitimate public health objectives, taking account of the risks non-fulfilment would create. First, the complainants have failed to establish a *prima facie* case that the tobacco plain packaging measure is at all trade-restrictive. Even if the Panel were to find that the complainants have established some limiting effect on trade, any such trade-restrictive effects are minimal.

696. Second, the complainants have failed to demonstrate that the tobacco plain packaging measure makes *no* contribution to the fulfilment of the measure's public health objectives. To the contrary, Australia has amply demonstrated in this submission that tobacco plain packaging measure contributes to the fulfilment of Australia's public health objectives of discouraging uptake, encouraging quitting, discouraging relapse and reducing exposure to smoke by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of retail packaging to mislead about the harmful effects of smoking.

697. Finally, Australia has demonstrated that the risks of non-fulfilment are great, because the interests at stake are of the utmost importance, and the consequences that would arise from non-fulfilment, which include higher incidence of tobacco-related disease and mortality in Australia, are extremely grave.

698. In sum, when the above three factors are weighed and balanced against each other, the minimal (if any) trade-restrictiveness of the tobacco plain packaging measure is vastly outweighed both by the degree of contribution that the measure makes to its legitimate public health objectives, and the risks that non-fulfilment would create. For this reason, even if the Panel were to proceed to conduct the

'relational analysis', the Panel should conclude that the tobacco plain packaging measure is no "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create" under Article 2.2.

699. While not strictly required, given the complainants' failure to make a *prima facie* case with respect to elements of Article 2.2 already addressed, Australia will demonstrate in the next section that the comparative assessment of alleged "alternative" measures put forward by the complainants further corroborates the consistency of Australia's measure with Article 2.2 of the TBT Agreement.

4. The proposed alternatives are not reasonably available, less trade-restrictive or able to make an equivalent contribution to the objectives of the tobacco plain packaging measure

(a) Introduction

700. Australia believes that a comparison of the tobacco plain packaging measure with the alternatives proposed by the complainants is not required because the complainants have not established that the tobacco plain packaging measure is trade-restrictive.⁹¹³ However, in this section, Australia will demonstrate, in the alternative, that even if the Panel were to proceed with such a comparison, it should still conclude that the tobacco plain packaging measure is no more trade-restrictive than necessary to fulfil its legitimate objectives.

701. In *US – Tuna II (Mexico)*, the Appellate Body explained that a comparison with reasonably available alternative measures is a "conceptual tool" for the purposes of ascertaining whether the technical regulation at issue is more trade-restrictive than necessary.⁹¹⁴ In most cases, it involves:

... a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available and

⁹¹³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322, fn 647.

⁹¹⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

less trade-restrictive than the challenged measure, taking account of the risks non-fulfilment would create.⁹¹⁵

702. In this section, Australia will demonstrate that the alternative measures proposed by the complainants are not true "alternatives"; will not make an equivalent contribution to the objectives of the tobacco plain packaging measure; are not less trade-restrictive; or are not reasonably available.⁹¹⁶

(b) The measures proposed by the complainants are not "alternatives"

703. The complainants' approach to the comparison of alternatives in this dispute represents a radical departure from the applicable jurisprudence as the "alternative" measures proposed, with one exception, are already being implemented as part of Australia's comprehensive tobacco control policy. On no view can such measures be considered "alternatives".

704. In *Brazil – Retreaded Tyres*, both the panel and the Appellate Body concluded that measures which were already elements of a comprehensive strategy to address health problems were not valid "alternatives". The panel found that the proposed "alternative" measures had already been implemented, in whole or in part, or were in the process of being implemented, as part of a comprehensive approach to addressing a risk to human, plant and animal life and health. In this context, the proposed "alternatives" were in fact complements to, rather than substitutes for, the challenged measure.⁹¹⁷ The Appellate Body agreed with this analysis and added:

[T]hese [proposed alternative] measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres. Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect.⁹¹⁸

⁹¹⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

⁹¹⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

⁹¹⁷ Panel Report, *Brazil – Retreaded Tyres*, paras. 7.169, 7.171-7.172.

⁹¹⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172. Although the Appellate Body's reasoning in *Brazil – Retreaded Tyres* is directly applicable to this case, not one of the complainants refers to it. Rather, the Dominican Republic and Honduras attempt to justify proposing

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705. Apart from the proposed "pre-vetting scheme", the "alternatives" proposed by the complainants are either precise replicas of, or in the case of the proposed increase in the minimum legal age of purchase, slight variations on, measures that Australia has already implemented.

706. Australia has already explained at Part II.D why a comprehensive and dynamic approach to tobacco control is required. In this light, each proposed "alternative" cannot substitute for the contribution of the tobacco plain packaging measure to its objectives because that measure plays a distinct and complementary role within Australia's suite of tobacco control measures.

i. Excise increases

707. Each of the complainants has proposed "excise tax increases" as an "alternative" measure to tobacco plain packaging. This is simply not an "alternative". Australia implements regular and substantial increases in its tobacco excise duties and, as outlined in the *National Tobacco Strategy 2012-2018*, plans to do so in the future.⁹¹⁹ Since the introduction of tobacco plain packaging, Australia has increased its taxes by 12.5% on two separate occasions, with two further such increases scheduled to be implemented in 2015 and 2016.⁹²⁰ Due to the compounding effect of these four staged increases, they will account for a total increase in tobacco excise of 60%.⁹²¹ This is in addition to the bi-annual indexation of tobacco excise with average weekly ordinary time earnings⁹²² and the 25% excise increase in April 2010.⁹²³

"alternative" measures that have already been adopted by Australia by reference to an unappealed aspect of the panel's *arguendo* reasoning in *China – Rare Earths* (Dominican Republic's first written submission, para. 747 and Honduras' first written submission para 823). However, in that case the panel merely noted that no explanation was provided by China regarding why a variation to an existing measure could not constitute an alternative (Panel Report, *China – Rare Earths*, para. 7.186; see also para. 7.140). This is in contrast to Australia's submissions in this case.

⁹¹⁹ Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018 — A Strategy to Improve the Health of all Australians by Reducing the Prevalence of Smoking and its Associated Health, Social and Economic Costs, and the Inequalities it Causes* (2012), Exhibit AUS-129, pp. iii, 20.

⁹²⁰ Commonwealth of Australia, *Economic Statement*, Statement by the Honourable Chris Bowen MP and Senator the Honourable Penny Wong, August 2013, Exhibit AUS-265, p. 33.

⁹²¹ This can be seen by way of example: prior to the first 12.5% excise increase, the per-stick rate of excise was \$0.35731. Leaving aside the increases in the excise rate due to indexation, the rate

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708. Three of the complainants attempt to compare Australia's policy unfavourably with the WHO recommendation that taxes account for 70% of the retail prices of tobacco products.⁹²⁴ These attempts are not credible. Australia's excise taxes and tobacco prices are among the highest in the world.⁹²⁵ Both Professor Chaloupka and Houston Kemp observe that average tobacco prices in Australia have continued to increase above the rate of inflation. Further, the tobacco industry in Australia has typically "over-shifted" excise increases.⁹²⁶ While both of these phenomena result in higher prices and are therefore positive from a tobacco control perspective, the effect is that the 70% tax/price ratio effectively becomes a moving target.⁹²⁷ According to Professor Chaloupka, had Australian prices not increased above the rate of inflation over the period 2001-2014, total taxes would account for 85% of the retail price of tobacco products and excise taxes would account for 76%.⁹²⁸

ii. Youth access to tobacco products

709. The Dominican Republic and Honduras propose an increase in the minimum legal purchase age for tobacco products from 18 to 21 years as an alternative to tobacco plain packaging.⁹²⁹ This is not an "alternative" measure, but rather a slight

after the four 12.5% increases is calculated as: $\$0.35731 \times (1.125)^4 = \0.57234 . This represents an increase of 60% on \$0.35731.

⁹²² Effective 1 March 2014. Prior to this the Consumer Price Index was used as the relevant index. Commonwealth of Australia, "Budget Measures: Budget Paper No. 2", (2013-2014), Exhibit AUS-266, p 25.

⁹²³ Prime Minister Rudd and Health Minister Roxon, "Anti-Smoking Action", Media Release (29 April 2010), Exhibit AUS-115.

⁹²⁴ Ukraine's first written submission, para. 706; Honduras' first written submission, para. 595; Indonesia's first written submission, para. 432.

⁹²⁵ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 41.

⁹²⁶ That is, the industry has increased prices by more than the excise increase. Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, Section 3.3 and Figure 3.8 [Contains SCI]; and Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 40.

⁹²⁷ Indeed, the limitations of assessing excise policy by reference to tax as a share of price are acknowledged in the World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2011: Warning about the Dangers of Tobacco* (2011), Exhibit AUS-43, p. 91, Technical Note III – Tobacco Taxes in WHO Member States.

⁹²⁸ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 40.

⁹²⁹ Dominican Republic's first written submission, paras. 763-778; and Honduras' first written submission, paras. 567-586. Cuba "adopts" and Indonesia "endorses" this proposal (Cuba's first written submission, para. 287; and Indonesia's first written submission, para. 457).

variation to a measure Australia has already implemented. Similarly, Ukraine proposes enforcement of Australia's existing laws forbidding sales to minors.⁹³⁰ This again, does not constitute an "alternative" measure.

710. Each of Australia's states and territories has already increased the minimum legal purchase age – from 16 to 18 years – over the period 1990 to 1998.⁹³¹ Further, Australia has a broad range of policies directed at restricting youth access to tobacco products. These measures include prohibitions on selling tobacco products to minors, purchasing on behalf of minors and using false identification documents to purchase tobacco products.⁹³² Some states have also implemented laws authorising the seizure of tobacco products being smoked or in the possession of a person under the age of 18 years.⁹³³ These measures are complements to, rather than substitutes for, tobacco plain packaging.⁹³⁴

711. Contrary to the suggestion of Ukraine, each of Australia's states and territories actively and effectively enforces their laws prohibiting sales to minors. All states and territories impose significant fines on individuals or corporations found to have sold tobacco products to minors.⁹³⁵ Primary enforcement activities implemented by each state and territory include controlled purchasing operations,⁹³⁶ "retailer education"

⁹³⁰ Ukraine's first written submission, paras. 734-739.

⁹³¹ With the exception of Western Australia, where the legal age of purchase has been 18 years since 1916. See Annexure B: Tobacco Control in Australia for more information.

⁹³² Further details of measures to restrict youth access to tobacco products are provided at Annexure B: Tobacco Control in Australia.

⁹³³ See Annexure B: Tobacco Control in Australia.

⁹³⁴ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 53.

⁹³⁵ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 46-47 and Annexure C. See *Public Health (Tobacco) Act 2008* (NSW), Exhibit AUS-267, Section 22; *Tobacco Act 1987* (Vic), Exhibit AUS-268, section 12(1); *Tobacco and Other Smoking Products Act 1998* (Qld), Exhibit AUS-269, Section 10; *Tobacco Products Regulation Act 1997* (SA), Exhibit AUS-270, Section 38A(1); *Tobacco Products Control Act 2006* (WA), Exhibit AUS-271, Section 6; *Public Health Act 1997* (Tas), Exhibit AUS-272, Section 64; *Tobacco Control Act* (NT), Exhibit AUS-273 Section 42(1); *Tobacco Act 1927* (ACT) (as amended), Exhibit AUS-274, Section 14(1).

⁹³⁶ See, e.g. Government of South Australia, *South Australian Tobacco Control Strategy, 2011-2016* (May 2011), Exhibit AUS-275, p. 20; and Quit Tasmania, *Suitcase to Glovebox, Retailer Compliance Survey 2010*, Exhibit AUS-276.

programmes,⁹³⁷ and the use of licensing regimes to enforce the legal obligations that apply to tobacco retailers.⁹³⁸ Therefore, in no way can the complainants' proposals with respect to youth access to tobacco products be considered "alternative" measures.

iii. Australian Consumer Law

712. Ukraine proposes existing Commonwealth legislation, namely the Australian Consumer Law ("ACL"), which is a schedule to the Competition and Consumer Act 2010 (Cth), as an "alternative" measure. Neither Ukraine, nor its expert Mr Heydon, explains how existing legislation can constitute an "alternative". While Ukraine refers to the "proper enforcement" of existing consumer law provisions as the alternative, this is inconsistent with Mr Heydon's report, which proceeds on the basis that the ACL is currently "enforced in a determined way".⁹³⁹ Therefore, Ukraine's proposal according to its own experts in no way constitutes an "alternative" measure.

iv. Social marketing campaigns

713. The Dominican Republic and Honduras propose changes to Australia's existing anti-tobacco social marketing campaigns as an "alternative" to tobacco plain packaging.⁹⁴⁰

714. The attempt to dress-up an existing Australian tobacco control measure as an "alternative" is simply not credible. Australia has a long history of using education

⁹³⁷ Retailer education programmes may include, for example, guidelines, brochures and websites detailing the obligations which bind tobacco retailers (see, e.g. Department of Health and Human Services Tasmania, *Tobacco Retailers Guide 2012* (1 March 2012), Exhibit AUS-277; and South Australia Health, "Sales of Tobacco to Minors" available at: <http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/protecting+public+health/tobacco+laws+and+businesses/requirements+for+licensed+tobacco+premises/sale+of+tobacco+to+minors#Signage> (last accessed 6 March 2015), Exhibit AUS-278; and state-provided education and training for tobacco retailers (see, e.g. Department of Health, Victoria, *Tobacco Retailer Guide* (February 2013), Exhibit AUS-279, p. 24 (tobacco inspectors make "education visits" to retailers).

⁹³⁸ See Annexure B: Tobacco Control in Australia.

⁹³⁹ Expert Report of J.D. Heydon (28 March 2014), Exhibit UKR-11, p. 4.

⁹⁴⁰ Dominican Republic's first written submission, paras. 779-798 and Honduras' first written submission, paras. 626-642. Cuba "adopts" and Indonesia "endorses" this proposal (Cuba's first written submission, para. 288 and Indonesia's first written submission, para. 457).

and social marketing campaigns as a tobacco control measure⁹⁴¹ and is regarded as a world leader in this area.⁹⁴² Campaigns developed in Australia have been adapted for broadcast in a wide range of other countries, including Cambodia, Canada, China, Egypt, Greece, Iceland, India, Mauritius, Mongolia, New Zealand, Norway, the Philippines, Poland, Russia, Singapore, Turkey, the United States and Vietnam.⁹⁴³

715. Professor Keller's critique of Australia's social marketing campaigns, on which the complainants seek to rely, is fundamentally misconceived. Professor Keller attempts to highlight deficiencies in Australia's approach to its anti-tobacco social marketing strategy, by critiquing the Federal Government's social marketing campaigns. Leaving aside the fact that her criticisms of Australia's federal social marketing campaigns are unwarranted Professor Keller entirely overlooks the campaigns run by Australia's states and territories, which are a major and critical component of Australia's social marketing efforts.

716. By ignoring state and territory campaigns, Professor Keller misrepresents, for example, the extent to which "new communication" channels are an element in Australia's social marketing mix;⁹⁴⁴ the extent to which "personal influencers", such

⁹⁴¹ See Annexure B: Tobacco Control in Australia.

⁹⁴² Australian National Preventive Health Agency, "Evidence Brief: Tobacco Control and Mass Media Campaigns", (2013), Exhibit AUS-280, p. 5. Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para 22; See also, *World Health Organization Report on the Global Tobacco Epidemic – Country Profile – Australia* (2013), Exhibit AUS-281, page 5, where Australia receives positive reviews across all metrics used by the WHO to analyse campaigns, including "evidence-based planning", "implementation" and "evaluation".

⁹⁴³ Australian National Preventive Health Agency, "Evidence Brief: Tobacco Control and Mass Media Campaigns", (2013), Exhibit AUS-280, p.5 and M. Scollo and M. H. Winstanley, *Tobacco in Australia: Facts and issues*, 4th ed. (Cancer Council Victoria, 2012), Exhibit AUS-282, Chapter 14.3.3.

⁹⁴⁴ Expert Report of P. A. Keller (29 September 2014), Exhibit DR/HON-008, paras. 102-105. The states and territories have campaign websites to support their campaigns, as well as mHealth applications, community forums for quitters, YouTube campaigns (using "personal testimonies", as advocated by Professor Keller) and personalised online support in quitting. See, e.g. Cancer Institute New South Wales "iCanQuit" website, available at: <http://www.icanquit.com.au/> (last accessed 4 March 2015), Exhibit AUS-283, which includes links to the "My Journey" quit support programme, YouTube testimonials and a community forum, NSW Cancer institute; and the Quit Victorian website, which includes links to the mHealth QuitTxt application, Quit Victoria campaign website, available at: <http://www.quit.org.au/preparing-to-quit/choosing-best-way-to-quit/quittxt>, (last accessed 5 March 2015), Exhibit AUS-284.

as healthcare providers are used as a communication channel;⁹⁴⁵ the extent to which audiences are exposed to positive messages, which provide guidelines regarding how to quit and highlight the social consequences of smoking;⁹⁴⁶ and the extent to which Australia's social marketing campaigns target specific audiences.⁹⁴⁷

717. Professor Keller's sweeping conclusions regarding the adequacy of Australia's approach to social marketing campaigns are therefore fundamentally flawed and the Panel should attribute no weight to them.

(c) None of the proposed "alternatives" makes an equivalent contribution to the objectives of the measure

718. The complainants have failed to show that the proposed "alternatives" are capable of making an equivalent contribution to the specific and broader objectives of the tobacco plain packaging measure. Further, unlike the tobacco plain packaging measure, the proposed "alternative" measures fail to achieve what the tobacco plain

⁹⁴⁵ Expert Report of P. A. Keller (29 September 2014), Exhibit DR/HON-008, paras. 104-105. See, e.g. Queensland Health "SmokeCheck - Indigenous Smoking Program" website, available at: <http://www.health.qld.gov.au/atod/prevention/smokecheck.asp> (last accessed 4 March 2015) (Exhibit AUS-285).

⁹⁴⁶ Expert Report of P. A. Keller, (29 September 2014), Exhibit DR/HON-008, paras. 97-101. For example, the "Butt out boondah (smoke)" cessation and healthy lifestyle program for Aboriginal communities in New South Wales, <http://www.healthinfonet.ecu.edu.au/key-resources/programs-projects?pid=2173> (last accessed 8 March 2015). Exhibit AUS-286; the Quit Victoria campaign "Triggers", which "targets smokers in the contemplation, preparation and action phases of the quitting process and aims to increase their confidence, motivation and ability to quit" available at: <http://www.quit.org.au/staying-quit/triggers> (last accessed 8 March 2015), Exhibit AUS-287; the New South Wales Government's YouTube personal testimonial by "credible source" Michael O'Loughlin, an Australian Rules footballer, in which he encourages the audience to "pledge to quit smoking today or show your support for a smoker you know": see, e.g. <http://www.cancerinstitute.org.au/prevention-and-early-detection/public-education-campaigns/tobacco-control/we-can-quit> (last accessed 4 March 2015), Exhibit AUS-288; and the Queensland Health campaigns "Cost" ("Every dollar you send on cigarettes is money you could be spending on your family") and "Support" ("If you're thinking of quitting, you don't have to do it alone"), see, e.g. http://www.health.qld.gov.au/atod/prevention/quit_campaign.asp, last accessed (8 March 2015), Exhibit AUS-289.

⁹⁴⁷ Expert Report of P. A. Keller (29 September 2014), Exhibit DR/HON-008, paras. 89-92. For instance, the Queensland Health's "Your Future's Not Pretty Campaign" is targeted at women aged 18-24 years (Queensland Health, Quit Campaign, available at: www.health.qld.gov.au/atod/prevention/quit_campaign.asp (last accessed 6 March 2015) Exhibit AUS-289.

packaging measure has already achieved, namely removing one of the last remaining frontiers for tobacco advertising in Australia.

i. Excise

719. While it is recognised that taxation of tobacco products is the single most effective policy for reducing tobacco use (i.e. if only *one* measure were used), Professor Chaloupka confirms that the best approach to tobacco control is a comprehensive one.⁹⁴⁸

720. As explained by Professor Fong, the tobacco plain packaging measure impacts smoking behaviour through its three specific objectives, namely decreasing the appeal of tobacco products, increasing the effectiveness of health warnings and reducing the ability of the retail packaging of tobacco products to mislead consumers.⁹⁴⁹ Taxation measures cannot achieve these objectives.⁹⁵⁰ Rather, excise increases "directly impact tobacco use by changing the economic accessibility of tobacco products through increases in retail prices".⁹⁵¹ Professor Chaloupka notes that "the same consumer may respond differently to tobacco control interventions depending on where they are in their life-cycle and smoking history".⁹⁵² Professor Chaloupka also observes that some consumers adopt avoidance tactics in response to tax increases. This limits the extent to which excise increases are able to influence the smoking behaviour of *all* consumers or potential consumers.⁹⁵³

721. The different causal pathways by which tobacco plain packaging and excise influence consumer (and potential consumer) behaviour means that together they are able to influence a broader range of consumers than either measure acting alone. In

⁹⁴⁸ Expert Report of F. Chaloupka (Public Health) (7 March 2014), Exhibit AUS-9, para. 11. See also *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Articles 4(4) and 5(1).

⁹⁴⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras 14-16.

⁹⁵⁰ Expert Report of F. Chaloupka (Public Health) (7 March 2014), Exhibit AUS-9, para. 43.

⁹⁵¹ Expert Report of F. Chaloupka (Public Health) (7 March 2014), Exhibit AUS-9, para. 37.

⁹⁵² Expert Report of F. Chaloupka (Public Health) (7 March 2014), Exhibit AUS-9, para. 35.

⁹⁵³ Expert Report of F. Chaloupka (Public Health) (7 March 2014), Exhibit AUS-9, paras. 42,

particular, tobacco plain packaging may impact consumers and potential consumers who are impervious to price increases.

ii. Youth Access to tobacco products

722. Similarly, replacing tobacco plain packaging with a variation to Australia's existing policies restricting youth access to tobacco products, namely by increasing the minimum legal purchase age to 21 years, would not achieve the objectives of Australia's tobacco plain packaging measure. For instance, such an "alternative" would not be effective in decreasing the appeal of tobacco products. This is accepted by Professor Steinberg⁹⁵⁴ and is confirmed by Professor Slovic:

Sadly, [Steinberg] neglects to consider restricting the availability of brands and other marketing imagery that have been designed to exploit the vulnerability of immature brains by enhancing the emotional appeal of tobacco products. This reduction in appeal is important and is a central objective of plain packaging.⁹⁵⁵

723. The only stated aim of the proposals to restrict access to tobacco products is to discourage a certain segment of the population (adolescents) from taking up smoking. The measures would have no impact on those aged over 21 years; nor would they encourage quitting or discourage relapse.⁹⁵⁶ In contrast, the plain packaging measure has the potential to influence all consumers and potential consumers of tobacco products.

724. Furthermore, it is far from clear that restricting youth access to tobacco products is a "proven strategy".⁹⁵⁷ Dr Biglan and Professor Chaloupka both observe

⁹⁵⁴ Steinberg supports an increase in the minimum legal age of purchase because, in his view, "interventions that affect the availability of cigarettes to adolescents are far more effective than those that seek to influence adolescents' demand for them" (Expert Report of L. Steinberg, (15 September 2014), Exhibit DR/HON-006, para. 49). He accepts that raising the minimum legal age of purchase will not affect an adolescent's desire or demand for tobacco products.

⁹⁵⁵ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 114.

⁹⁵⁶ See Section 3(1) of the TPP Act, Exhibit AUS-1 for a statement of the broader objectives.

⁹⁵⁷ Expert Report of L. Steinberg, (15 September 2014), Exhibit DR/HON-006, p. 6.

that the evidence in support of an increase in the minimum legal age of purchase, and associated enforcement activities, is equivocal.⁹⁵⁸

iii. Pre-vetting scheme

725. Underlying Mr Shavin's Expert Report, and prompting his pre-vetting proposal, is his assumption that tobacco plain packaging goes "much further than is required to achieve [its] public policy objectives"⁹⁵⁹ and that "the physical features of tobacco packaging and sticks regulated under the PP measures ... are unlikely to encourage consumption of tobacco products".⁹⁶⁰ However, Australia notes that Mr Shavin has absolutely no expertise upon which to base such assertions.

726. Moreover, the pre-vetting proposal proposed by Mr Shavin cannot make an equivalent contribution to the objectives of Australia's tobacco plain packaging measure. Under the scheme, Australia's competition regulator, the Australian Competition and Consumer Commission ("ACCC"), would be required to evaluate every feature of every type of packaging and tobacco product that the tobacco industry intends to release onto the market. As noted in the evidence of Mr Sims, Chairman of the ACCC, the assessment of whether a particular feature of tobacco packaging is appealing or may diminish the effectiveness of the required graphic health warnings is not within the ACCC's area of expertise.⁹⁶¹ The scheme would require testing thousands of combinations of packaging features, across many brands, against the proposed disqualifying criteria.⁹⁶² In the absence of adequate time during the pre-vetting phase to collect relevant evidence and conduct such testing, the

⁹⁵⁸ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 51-53; and Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 190-193.

⁹⁵⁹ Expert Report of D. Shavin (4 October 2014), Exhibit DR/HON-009, para. 35.

⁹⁶⁰ Expert Report of D. Shavin (4 October 2014), Exhibit DR/HON-009, para. 34. See also, para. 33, where Mr Shavin states: "[a] sign that is directed to distinguishing the goods of one trader from those of another will not in many circumstances, if at all, act in a way that is likely to undermine the information conveyed by the graphic health warnings...or that is otherwise likely to mislead or encourage smoking of tobacco products".

⁹⁶¹ Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, para. 6.11. [Contains SCI]

⁹⁶² Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 128.

products would be allowed on the market.⁹⁶³ While Mr Shavin's scheme allows the ACCC to commence proceedings to restrain the use of previously approved packaging if it subsequently forms the view that the packaging meets the disqualifying criteria, in the meantime, the packaging may have been on the market for a number of years, continuing to induce consumption. The very fact that the scheme contemplates this kind of failure demonstrates that it is an inadequate substitute for tobacco plain packaging.

727. The Dominican Republic cites a "pre-vetting" process for tobacco product packaging in Turkey as support for the notion that such a system is capable of achieving the same objectives as the tobacco plain packaging measure.⁹⁶⁴ However, the types of packages that have been approved for release onto the Turkish market under this process are precisely of the kind that Australia's experts have established appeal to particular segments of the market, mislead regarding the harmful effects of smoking and reduce the effectiveness of health warnings (see picture below of Turkish packs).⁹⁶⁵ On this basis, it is clear that a pre-vetting scheme is inadequate to meet Australia's objectives.

⁹⁶³ Expert Report of D. Shavin (4 October 2014), Exhibit DR/HON-009, para. 56; and Expert Report of R. Sims, (24 February 2015), Exhibit AUS-22, para 6.12. [Contains SCI]

⁹⁶⁴ Dominican Republic's first written submission, paras. 806-807.

⁹⁶⁵ In particular, Professor Fong observes that slim packs (such as the "Vogue Menthe" pack depicted) appeal to females (Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 169 and 205). Further, he notes colours such as silver and gold, as depicted on the "Kent" pack, are appealing and also mislead regarding the strength and harmfulness of the product (Expert Report of G. Fong, Exhibit AUS-14, paras. 48, 364, 397). Finally, a number of Australia's expert reports, establish that branding elements on the pack reduce the effective of graphic health warnings (see, e.g. Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, paras. 85-86).



Figure 21: Examples of Turkish tobacco packaging

728. Rather, as noted by Australia's experts in the fields of public health and psychology, the effectiveness of packaging restrictions in achieving the specific objectives of the measure is dependent upon *standardised packaging*, including the standardisation of both the graphic and structural features of the pack.⁹⁶⁶ A relaxation of the restrictions imposed by the tobacco plain packaging measure would lead to packaging "innovations that make the initiation and continuance of smoking more likely to occur".⁹⁶⁷

iv. The Australian Consumer Law

729. Mr Heydon's report, suggesting that the Australian Consumer Law (ACL) can achieve all the objectives of tobacco plain packaging, is fundamentally flawed and entirely unconvincing. The premise of Mr Heydon's report is that all of the specific objectives of the tobacco plain packaging measure, as expressed in subsection 3(2) of the TPP Act, are directed at disciplining misleading and deceptive conduct.⁹⁶⁸ This is simply incorrect. The clear text of subsection 3(2) of the TPP Act establishes that the

⁹⁶⁶ Expert Report G. Fong (4 March 2015), Exhibit AUS-14. See, e.g. paras. 21, 37, 124-126, 183.

⁹⁶⁷ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 134.

⁹⁶⁸ Expert Report of J.D. Heydon (26 March 2014), Exhibit UKR- 11, para. 24.

objectives of the measure are not confined to preventing misleading and deceptive conduct. This is further confirmed in the Expert Reports of the Honourable Ray Finkelstein QC and Mr Sims.⁹⁶⁹

730. The Expert Reports of Mr Shavin, engaged by the Dominican Republic and Honduras, also contradict Mr Heydon on this point. In particular, Mr Shavin limits his argument regarding the similarities between the objectives of the TPP Act and the ACL to subsection 3(2)(c) of the TPP Act. He does not argue that the objectives expressed in subsection 3(2)(a) and (b) are directed at preventing misleading consumers and that these aims can be achieved through the ACL. Rather, Mr Shavin argues that his "pre-vetting scheme" is necessary to achieve these objectives.⁹⁷⁰

731. Even with respect to the objective expressed under subsection 3(2)(c) of the TPP Act, which the ACL *could* be used to address, the ACL is not nearly as effective in achieving this objective as the tobacco plain packaging measure. Tobacco plain packaging has prevented any misleading package from being released onto the Australian market since its full implementation in December 2012. In contrast, using litigation under the ACL to restrain the use of misleading packaging would involve: a case-by-case approach⁹⁷¹ and significant cost and uncertainty of outcome, even in circumstances where Australia has extensive evidence to demonstrate that particular packaging techniques are misleading.⁹⁷²

732. Further, to allow misleading packaging to remain on the market while litigation is pursued would not make an equivalent contribution to Australia's tobacco

⁹⁶⁹ Expert Report of R. Finkelstein (11 March 2015), Exhibit AUS-21, paras. 37-70; and Expert Report of Mr Sims (24 February 2015), Exhibit AUS-22, paras. 5.4 and 5.8. [Contains SCI]

⁹⁷⁰ See Expert Reports of D. Shavin (4 October 2014) DR-HON-001, paras. 11-12 and DR-HON-009, paras. 11-16. It is perhaps not surprising that Mr Heydon is in the minority on this point; during his final year on the High Court, Mr Heydon dissented in 40% of cases, including the Constitutional challenge to the tobacco plain packaging measure (University of New South Wales Newsroom, "The New Great Dissenter" (15 February 2013), available at: <http://newsroom.unsw.edu.au/news/law/new-great-dissenter> (last accessed 8 February 2015), Exhibit AUS-290).

⁹⁷¹ Expert Report of R. Finkelstein (11 March 2015), Exhibit AUS-21, para 93.

⁹⁷² Expert Report of R. Finkelstein (11 March 2015), Exhibit AUS-21, paras. 78, 84-89, 92, 123; and Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, paras. 5.10-5.11. [Contains SCI]

plain packaging measure. While injunctions may restrain the use of packaging as litigation proceeds, whether a court would agree to the grant of an injunction is as uncertain as the litigation itself.⁹⁷³

733. Mr Heydon argues that apart from litigation, there are other means available to the ACCC to enforce the ACL. He contends that the ACCC could accept undertakings from the tobacco companies, as occurred at the conclusion of the "light" and "mild" investigation. However, the process of extracting undertakings from the tobacco industry in that investigation was long, difficult and costly.⁹⁷⁴ In fact, at the time of that investigation, the then-Chairman of the ACCC discussed the difficulties the ACCC was experiencing and noted that if settlement could not be reached, the alternative course was "regulation or legislation".⁹⁷⁵

(d) The "alternatives" proposed by the complainants are more trade-restrictive than the tobacco plain packaging measure

734. On the complainants' own interpretations of trade-restrictiveness, it is clear that they have not proposed less trade-restrictive "alternatives".⁹⁷⁶ In particular, the complainants argue that if a measure leads to downtrading⁹⁷⁷, increased compliance costs,⁹⁷⁸ uncertainty affecting investment plans⁹⁷⁹ or the risk of severe financial and

⁹⁷³ Expert Report of R. Finkelstein (11 March 2015), Exhibit AUS-21, para. 91 and Expert Report of Mr Sims (24 February 2015), Exhibit AUS-22, para. 5.12. [Contains SCI]

⁹⁷⁴ Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, paras. 4.7-4.15. [Contains SCI]

⁹⁷⁵ Commonwealth of Australia, *Official Committee Hansard, Senate: Community Affairs Legislation Committee, Reference: Tobacco Advertising Promotion* (12 August 2004), Exhibit AUS-291, p. CA40.

⁹⁷⁶ Australia proceeds on the assumption that if the Panel reaches the stage of examining the "alternative" measures, it has accepted the complainants' very broad approach to trade-restrictiveness. Therefore, Australia considers the trade-restrictiveness of the proposed "alternatives" on this basis.

⁹⁷⁷ Ukraine's first written submission, para. 471; Honduras' first written submission, para. 875, Indonesia's first written submission, para. 398.

⁹⁷⁸ Cuba's first written submission, para. 404; Honduras' first written submission, para. 857; and Ukraine's first written submission, paras. 480-484.

⁹⁷⁹ Cuba's first written submission, para. 400.

criminal penalties⁹⁸⁰, then it is trade-restrictive. While the tobacco plain packaging measure does not have these effects, it is clear that some of the "alternatives" do.

i. Excise increases

735. If downtrading from premium to economy brands were sufficient to establish trade-restrictiveness, then excise increases must be trade-restrictive. The evidence of both Houston Kemp and Professor Chaloupka establishes the link between tax increases and downtrading.⁹⁸¹ Indeed, the tobacco industry has long accepted that excise increases cause downtrading.⁹⁸²

ii. The pre-vetting scheme

736. The proposed pre-vetting scheme would be "user-pays" and would therefore add a very significant expense for producers selling their products in the Australian market. Indeed, the costs would be far greater than any of the alleged costs of complying with the tobacco plain packaging measure.⁹⁸³ Given the extent to which tobacco producers have changed their packaging in the Australian market in the past,⁹⁸⁴ the pre-vetting system would require the commitment of significant resources by the ACCC. Further, the system is likely to be highly litigious, with several avenues of appeal of any decision.⁹⁸⁵ Moreover, if a producer were required to change its

⁹⁸⁰ Ukraine's first written submission, paras. 485-486.

⁹⁸¹ Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, Section 3.3, p. 18 [Contains SCI]; and Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para 42.

⁹⁸² The Treasury, "Post-Implementation Review: 25% Tobacco Excise Increase" (February 2013), Exhibit AUS-292, p. 26. See also e.g. Exhibit AUS-293 including Remarks by Matteo Pelligrini, President, Asia Region, Philip Morris "International Inc, Investor Day, Lausanne" (26 June 2014), p. 14; Philip Morris International, *Annual Report 2011* (March 5 2012), p. 26; Imperial Tobacco, *Annual Report 2008* (26 November 2008), p. 15; and Japan Tobacco Inc, *Annual Report 2011* (June 2011) Exhibit AUS-293, p. 8.

⁹⁸³ See Expert Report of D. Shavin (October 2014), Exhibit DR/HON-009, paras. 74-75.

⁹⁸⁴ See Quit Victoria, Cancer Council of Victoria, *The Packaging of tobacco products in Australia* (September 2013), Exhibit AUS-89, pp. 23-33.

⁹⁸⁵ Expert Report of Mr Finkelstein (11 March 2015), Exhibit AUS-21, paras. 130-146. An ACCC decision may be appealed before the Australian Competition Tribunal, whose decisions are themselves susceptible to judicial review in the Federal Court (which also has an appeal process).

packaging as a result of the scheme, additional costs would be incurred.⁹⁸⁶ Given that the tobacco industry would be required to meet all of these costs, on the complainants' own terms, the system would be highly trade-restrictive.

iii. Australian Consumer Law

737. The costs to the tobacco industry of defending repeated lawsuits brought against it would dwarf any of the alleged costs of adapting to tobacco plain packaging. Further, if the risk of severe financial and criminal penalties is a form of trade-restrictiveness, the ACL is not a less trade-restrictive alternative. In the expert report submitted by the complainants, Mr Heydon argues that remedies under the ACL are "as important and more diverse" than those available under the tobacco plain packaging measure.⁹⁸⁷

(e) **The alternatives are not "reasonably available"**

i. Excise increases

738. The complainants do not specify with any precision the magnitude of the "excise increases" they propose as an "alternative" measure. To the extent the complainants advocate excise increases greater than the increases Australia has introduced, or is in the process of introducing, Australia notes that in implementing tobacco excise increases, it balances its tobacco control objectives against other considerations, such as the extent to which tax increases result in financial hardship for those smokers who are unable to give up their addiction:

The Government is conscious that, while increased prices can induce some smokers to quit and present a higher barrier to smoking uptake by young people, they can also induce financial stress among people who continue to smoke. The Government has

⁹⁸⁶ Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, section 6.2, pp. 55-56. [Contains SCI]

⁹⁸⁷ Expert Report of J.D. Heydon (26 August 2014), Exhibit UKR-11, p. 15.

therefore not decided to pursue the full 68% increase in excise advocated by the Preventative Health Taskforce at this time.⁹⁸⁸

739. This approach is entirely consistent with the FCTC, Article 6 of which states that its recommendations are "[w]ithout prejudice to the sovereign right of the Parties to determine and establish their taxation policies".

ii. Pre-vetting scheme

740. The complainants contend that the pre-vetting scheme is "reasonably available" on the basis that the role allocated to the ACCC would be similar to that which it assumes in other contexts.⁹⁸⁹ As explained in the evidence of Mr Sims, the analogy that the complainants draw is inapposite. In particular, while the ACCC has the expertise and experience which would enable it to assess whether packaging is likely to mislead or deceive, it does not have the expertise to assess whether aspects of packaging, including colour, pictures and other devices, might separately or in combination make the packaging appealing or diminish the effectiveness of the required health warnings.⁹⁹⁰ Further, Mr Sims explains that the ACCC does not issue advisory opinions on whether a corporation has engaged in misleading and deceptive conduct.⁹⁹¹ The proposal that it should do so would "impose a considerable burden on the ACCC".⁹⁹²

⁹⁸⁸ Australian Government National Preventative Health Taskforce, *Taking preventative action - A response to Australia: the healthiest country by 2020* (15 May 2010), Exhibit AUS-116, p. 63.

⁹⁸⁹ Expert Report of D. Shavin (4 October 2014), Exhibit DR/HON-009, paras. 76-92; Indonesia's first written submission, para. 448; Honduras' first written submission, para. 616; and Dominican Republic's first written submission, para. 825.

⁹⁹⁰ Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, paras. 6.8-6.9 and 6.11. [Contains SCI]

⁹⁹¹ Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, para 6.10. [Contains SCI]

⁹⁹² Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, para 6.10. [Contains SCI]

iii. Australian Consumer Law

741. Ukraine's proposed "alternative" measure regarding use of the ACL would be resource-intensive and costly.⁹⁹³ An "alternative" that would require the ACCC or an individual to litigate or otherwise take action against the tobacco industry under the ACL to achieve the same outcome as tobacco plain packaging, namely complete suppression of misleading packaging, is simply not reasonably available.⁹⁹⁴ Rather, the proposal imposes "prohibitive costs".⁹⁹⁵

(f) **Conclusion on the proposed "alternative" measures**

742. While the Panel does not need to consider the alternatives proposed by the complainants for the reasons set out above, Australia has nonetheless demonstrated in this section that the measures proposed are either not true "alternatives"; not able to make an equivalent contribution to the achievement of the objectives of plain packaging; not less trade-restrictive; or not reasonably available. Thus the complainants have failed to establish that the tobacco plain packaging measure is more trade-restrictive than necessary to fulfil its legitimate objectives.

C. **CONCLUSION UNDER ARTICLE 2.2 OF THE TBT AGREEMENT**

743. For the reasons set out in Part A, the complainants have failed to establish, as a threshold matter, that the tobacco plain packaging measure is "trade-restrictive" under a proper reading of Article 2.2 of the TBT Agreement. In the alternative, should the Panel conclude that the complainants have made such a *prima facie* case, Australia submits that the complainants have failed to establish that the tobacco plain packaging measure is more trade-restrictive than necessary to fulfil its legitimate public health objectives, taking account of the risks non-fulfilment would create.

⁹⁹³ Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, para. 5.9-5.10; see also paras. 4.4-4.15 [Contains SCI]; and Expert Report of R. Finkelstein (11 March 2015), Exhibit AUS-21, paras. 83-89 and 92.

⁹⁹⁴ As explained in Part V.B.4(c)iv, the suppression of appealing packaging and packaging which reduces the effectiveness of health warnings is not possible under the ACL.

⁹⁹⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308).

Accordingly, Australia respectfully requests that the complainants' claims under Article 2.2 be rejected in their entirety.

VI. CUBA HAS FAILED TO MAKE A *PRIMA FACIE* CASE UNDER ARTICLE IX:4 OF GATT 1994

744. Cuba argues that because the "Habanos" label can no longer be affixed to the packaging of cigars exported from Cuba, the value of large, hand-made ("LHM") cigars is "materially reduced". Consequently, Cuba claims that the tobacco plain packaging measure is inconsistent with Article IX:4 of the GATT 1994.

A. THE PROHIBITION ON THE USE OF "HABANOS" ON CIGAR PACKAGING DOES NOT FALL WITHIN THE SCOPE OF ARTICLE IX:4 OF THE GATT

1. Article IX of the GATT 1994 disciplines measures that require the application of marks of origin

745. Article IX of the GATT 1994 disciplines measures which *require* the application of marks of origin. It does not apply to measures which *prohibit* the application of such marks.

746. In particular, Article IX:1 imposes a most-favoured-nation obligation in relation to marking *requirements*. Article IX:3 relates to the time at which *required* marks of origin may be affixed. Further, Article IX:5 addresses the circumstances in which the imposition of penalties is permissible when there has been a failure to comply with marking *requirements*. Although Article IX:2 does not mention "required" marks of origin, it is clear that the provision is directed at measures imposing such an obligation. In particular, Article IX:2 provides that Members should keep to a minimum the "difficulties and inconveniences" that measures relating to marks of origin may cause. Difficulties and inconveniences clearly arise in the process of affixing a mark to a product, rather than in not doing so.

747. Interpreting Article IX:4 of the GATT 1994 in this context, it is clear that Cuba's complaint does not fall within the scope of the provision. Article IX:4 provides that laws and regulations relating to the marking of imported products "shall be such as to permit compliance without seriously damaging the products, or materially

reducing their value, or unreasonably increasing their cost". The provision clearly disciplines measures which *require* the application of marks of origin and imposes conditions on the impact that such measures may have on the product concerned.

748. Australia notes that in 1958, the CONTRACTING PARTIES to the GATT reached agreement regarding the application of Article IX.⁹⁹⁶ The agreement consisted of a series of recommendations for contracting parties to adopt in imposing rules on marks of origin. This agreement supports the interpretation advanced in the preceding paragraphs. In particular, each of the recommendations relates either to marking requirements⁹⁹⁷ or exemptions from marking requirements.⁹⁹⁸ The few recommendations that do not explicitly mention marking "requirements" are directed at reducing the inconvenience associated with applying a mark of origin to a product.⁹⁹⁹ The preamble makes clear that the purpose of the recommendation was to reduce the difficulties that imposing marks of origin may cause for exporting countries. This is borne out clearly in the first paragraph of the recommendation, which suggests that countries should reduce the number of cases in which marks of origin are required.¹⁰⁰⁰

749. Therefore, in Australia's view it is clear that Article IX of the GATT was adopted to allow Members to require marks of origin on goods exported to their markets. However, Article IX requires that such measures not discriminate between

⁹⁹⁶ GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev 1 (22 November 1958), Exhibit AUS-294. This agreement must be taken into account in interpreting the provision in accordance with Article 31(3)(a) of the Vienna Convention.

⁹⁹⁷ GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev 1 (22 November 1958), Exhibit AUS-294. See, e.g. recommendations 1, 2, 3, 14, pp. 2-3.

⁹⁹⁸ GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev 1 (22 November 1958), Exhibit AUS-294. See, e.g. recommendations 7, 9, 10, 11, p. 3.

⁹⁹⁹ GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev 1 (22 November 1958), Exhibit AUS-294. See, e.g. recommendations 5, 6, 8, 12, p. 3.

¹⁰⁰⁰ GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev 1 (22 November 1958), Exhibit AUS-294, p. 2.

exporters or impose unnecessary burdens upon them.¹⁰⁰¹ Cuba's interpretation, which would expand the scope of Article IX to discipline measures which *prohibit* certain markings, is unfounded. Cuba argues that in being prevented from applying the mark "Habanos" to its cigar packaging, the price it can charge for Cuban cigars falls, thereby reducing its "value". However, Cuba fails to recognise that Article IX does not create a right for a Member to apply a particular marking to a product just because the Member considers that the mark will allow it to increase the price it charges for the product.

2. Article IX of the GATT 1994 applies only to country of origin markings

750. Even if Cuba were correct (which it is not) and Article IX applied to measures which *prevent* the application of certain marks to a product or its packaging, Article IX applies only to *country of origin* markings and not to the "Habanos" geographical indication. The title of Article IX indicates that the provision applies to "marks of origin". Although this term is not defined, Article IX:1 indicates that the term refers to the *country of origin* of the good, rather than something more narrow, such as the factory or region of origin. In particular, Article IX:1 imposes a "most-favoured-nation" requirement relating to marks of origin. There is no similar "national treatment" provision found within Article IX. A GATT panel which considered Article IX concluded that this indicated that the provision was intended to regulate the

¹⁰⁰¹ Australia notes that its interpretation of Article IX of the GATT is supported by the preparatory work of the GATT 1947. The origin of Article IX is Article 37 of the Havana Charter, with only minor differences between the two provisions. Article 37 was itself based on a report of the Economic Committee of the League of Nations, which was "an almost complete enumeration" of the problems with mark of origin requirements (a history of marks of origin and Article IX was prepared by the GATT Secretariat in 1956: GATT Secretariat, *Marks of Origin: Note by the GATT Secretariat Concerning the ICC Proposal*, L/556 (19 October 1956), Exhibit AUS-295). The League of Nations Report approves the following principle: "[i]t appears impossible to refuse States the right to take measures to enable the consumer to distinguish home from foreign merchandise, but the means to be employed by States for this purpose should be such as to reduce to a minimum the difficulties and inconvenience which the regulations may cause to the commerce and industry of exporting countries" (League of Nations, Economic Committee, *Report to the Council on the Work of the Thirty-Fifth Session*, C.427.M.177 (1931), Exhibit AUS-296, Appendix III (III)). A review of the preparatory history reveals that this principle permeates the drafting of the provisions of both Article 37 of the Havana Charter and Article IX of the GATT 1947 (See GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev 1 (22 November 1958), Exhibit AUS-294).

marking of origin of imported products, but not the marking of products generally.¹⁰⁰² This indicates that the provision is directed at alerting consumers to the foreign origin of goods, rather than providing more general information about the region of manufacture. If the provision were intended to cover the factory or region of origin, for example, presumably consumers would be equally interested in this information whether the manufacturer were domestic or foreign.

751. This interpretation is also supported by the agreement relating to the application of Article IX reached by the CONTRACTING PARTIES in 1958.¹⁰⁰³ In particular, the agreement recommends:

5. Countries should accept as a satisfactory marking the indication of the name of the country of origin in the English language introduced by the words "made in".

6. Commonly-used abbreviations, which unmistakably indicate the country of origin, such as UK and USA, should be considered a satisfactory replacement for the full name of the country concerned.

752. On this basis, it is clear that the phrase "marks of origin" under Article IX relates to *country of origin* marking requirements. There is no basis in the text of Article IX, the agreement relating to its application or the preparatory work for GATT 1947 to conclude that the provision applies to the "Habanos" geographical indication.¹⁰⁰⁴

¹⁰⁰² GATT Panel Report, *US – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, para. 5.41.

¹⁰⁰³ GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev 1 (22 November 1958), Exhibit AUS-294. This agreement must be taken into account in interpreting the provision in accordance with Article 31(3)(a) of the Vienna Convention.

¹⁰⁰⁴ Again, this interpretation is supported by the preparatory work of the GATT 1947. All of the preparatory documents proceed on the basis that the marking requirements are marks of country of origin. The summary of the history of the provision in L/556 notes that marks of origin requirements were imposed "to protect the domestic producer by branding the foreign product as foreign" (GATT Secretariat, *Marks of Origin: Note by the GATT Secretariat Concerning the ICC Proposal*, L/556 (19 October 1956), Exhibit AUS-295, p. 1). Further, the report of the Economic Committee of the League of Nations, upon which Article 37 of the Havana Charter was based (GATT Secretariat, *Marks of Origin: Note by the GATT Secretariat Concerning the ICC Proposal*, L/556 (19 October 1956), Exhibit AUS-295, page 2), refers to the right of States to "distinguish home from foreign merchandise". The report's discussion of the "form of marks of origin" also makes clear that the relevant mark is that of the

(continued)

3. Conclusion on Article IX:4

753. Cuba's claim does not fall within the scope of Article IX:4 of the GATT 1994. Consequently, Australia does not need to address Cuba's assertions regarding the alleged impact of the prohibition on the use of the "Habanos" label on the "value" of LHM Cuban cigars.

B. IN ANY EVENT, THE ARTICLE XX EXCEPTION UNDER THE GATT 1994 APPLIES

754. Even if the panel were to conclude that Australia's tobacco plain packaging measure is inconsistent with Article IX:4 of the GATT 1994 (it is not), the exception under Article XX(b) of the GATT applies. In particular, Australia's measure, which standardises the appearance of tobacco packaging is "necessary to protect human ... life or health".

755. The Appellate Body has established, on numerous occasions, that the assessment of a claim of justification under Article XX:

[I]nvolves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the chapeau of Article XX...[P]rovisional justification under one of the subparagraphs requires that a challenged measure 'address the particular interest specified in the paragraph' and that 'there be a sufficient nexus between the measure and the interest protected'...[A] necessity analysis involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.¹⁰⁰⁵

country of origin (League of Nations, Economic Committee, *Report to the Council on the Work of the Thirty-Fifth Session*, C.427.M.177 (1931), Exhibit AUS-296, Appendix III (III) and (VIII).

Although Cuba argues (Cuba's first written submission, fn 443) that Article XI:6 of GATT refers to "regional or geographical names" and therefore the obligations in the other provisions of Article IX must extend to geographical indications, this is incorrect. Article IX:6 is distinct in that, unlike the other sub-sections of Article IX, it does not refer to "marks of origin" or "markings". The fact that "regional and geographical names" are referred to instead of "marks of origin" indicates that such names are not considered to be "marks of origin".

¹⁰⁰⁵ See, e.g. Appellate Body Report, *EC – Seal Products*, para. 5.169.

756. In relation to the second tier of the analysis, namely the appraisal of the measure under the chapeau of Article XX, the focus is on the *application* of a measure provisionally justified under one of the sub-paragraphs of Article XX. In particular, the measure must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Second, the measure must not be applied in a manner that would constitute a "disguised restriction on international trade".¹⁰⁰⁶

1. Provisional justification under Article XX(b)

757. Australia has established, in the context of the claim under Article 2.2 of the TBT Agreement, that the objective of the measure, in standardising packaging, including through regulating the marks that may appear on it, is the protection of human life and health. Further, Australia has established beyond doubt that the interests and values at stake in pursuing this objective are "both vital and important in the highest degree".¹⁰⁰⁷

758. Similarly, Australia has led voluminous evidence in Part II.I demonstrating that the tobacco plain packaging measure, through regulating the marks that may appear on packaging, is both apt to contribute, and is in fact already contributing to, its objectives. This is clearly sufficient to demonstrate a nexus between the measure and the protection of human life and health. Australia has also established in the context of Article 2.2 that the tobacco plain packaging measure is not trade-restrictive in any sense.

759. In these circumstances the 'weighing and balancing' process is a simple one – the measure, including those aspects of it that regulate the marks that may appear on the retail packaging of tobacco products, is provisionally justified under Article XX(b).

¹⁰⁰⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.

¹⁰⁰⁷ Appellate Body Report, *EC – Asbestos*, para. 172; and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144.

2. Chapeau

760. The tobacco plain packaging measure is applied in an even-handed manner. It applies to all tobacco products, regardless of their origin. There is no aspect of the measure that can be considered discriminatory in any form and this is not alleged by any of the complainants. Similarly, all complainants recognise that the objective of the measure is the protection of public health. No complainant attempts to argue that the measure is a disguised restriction on international trade. In Australia's view, it is therefore clear that the measure satisfies the requirements of the chapeau to Article XX of the GATT 1994.

3. Conclusion

761. The tobacco plain packaging measure is not inconsistent with Article IX:4 of the GATT 1994. Even if it were, the exception under Article XX(b) of the GATT applies, as the measure is necessary to protect human life and health, is applied in a non-discriminatory manner and is not a disguised restriction on international trade.

VII. AUSTRALIA HAS NOT NULLIFIED OR IMPAIRED BENEFITS ACCRUING DIRECTLY OR INDIRECTLY TO THE COMPLAINANTS

762. As Australia has acted consistently with its obligations under the TRIPS Agreement, TBT Agreement and GATT 1994, Australia has not nullified or impaired benefits accruing directly or indirectly to Ukraine (with respect to DS434), Honduras (with respect to DS435), the Dominican Republic (with respect to DS441), Cuba (with respect to DS458) and Indonesia (with respect to DS467).

VIII. CONCLUSION

763. For the foregoing reasons, Australia respectfully requests that the Panel reject the complainants' claims under Articles 2.1 (incorporating Article 6*quinquies* A(1) and Article 10*bis* of the Paris Convention), 15.1, 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, Article 2.2 of the TBT Agreement, and Article IX:4 of the GATT 1994 in their entirety.

ANNEXURE A: DETAILS OF AUSTRALIA'S TOBACCO PLAIN PACKAGING MEASURE

1. This annexure provides further detail regarding Australia's tobacco plain packaging measure.

A. AUSTRALIA'S TOBACCO PLAIN PACKAGING MEASURE

1. Tobacco plain packaging legislation

2. As noted in Part II.G.2, the legislative instruments that implement the tobacco plain packaging measure are the *Tobacco Plain Packaging Act 2011* (Cth),¹⁰⁰⁸ the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth),¹⁰⁰⁹ and the *Tobacco Plain Packaging Regulations 2011*.¹⁰¹⁰
3. Under the measure, tobacco companies manufacturing or packaging tobacco products in Australia for domestic consumption have been required to produce products in plain packaging from 1 October 2012, and all tobacco products sold in Australia have been required to be sold in plain packaging from 1 December 2012.

2. General legislative requirements for all tobacco products¹⁰¹¹

4. The following requirements relate to all tobacco products:

	Tobacco products before the plain packaging laws applied	All tobacco products post 1 December 2012
Colour of packaging	No specific requirements relating to colour of packaging.	All outer surfaces of the retail packaging of all tobacco products, including

¹⁰⁰⁸ TPP Act, Exhibit AUS-1.

¹⁰⁰⁹ *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth), Exhibit AUS-4.

¹⁰¹⁰ TPP Regulations, Exhibit AUS-3.

¹⁰¹¹ Under the TPP Act, Exhibit AUS-1, a tobacco product includes, along with cigarettes and cigars, any product that is processed tobacco, or contains tobacco, that is manufactured for smoking, sucking, chewing or snuffing (with some exceptions).

<p>Use of trade marks, brand and variant names</p>	<p>No specific requirements other than the general restriction on the use of misleading and deceptive terms.</p>	<p>any linings, (but not including the health warnings) must be in a matt finish and coloured a standardised drab dark brown (Pantone 448C), while all inner surfaces of cigarette packaging must be white, and for non-cigarette tobacco packaging must be white or the colour of the packaging material in its natural state.¹⁰¹²</p> <p>No trade mark may be used on the retail packaging of a tobacco product except as permitted by the legislation or regulations.¹⁰¹³ The legislation permits the brand, business or company name, and any variant name to appear if they comply with the following requirements: any name must appear in 'Lucida Sans' typeface no larger than 14 points in size and variant name no larger than 10 points in size, with the first letter in each word capitalised, and in Pantone Cool Gray 2C.¹⁰¹⁴ In addition, no trade mark may appear anywhere on a tobacco product itself, other than as permitted by the regulations. The regulations</p>
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¹⁰¹² TPP Act, Exhibit AUS-1, Section 19(1) and TPP Regulations, Exhibit AUS-3, Regulations 2.2.1(2)-(3).

¹⁰¹³ TPP Act, Exhibit AUS-1, Section 20 and TPP Regulations, Exhibit AUS-3, Regulations 2.3.1-2.3.8. Note that the Regulations do not currently permit trade marks to appear on retail packaging other than the brand/company/business/variant name in standardized font, as well as a origin mark, measurement mark/trade description, bar code, fire risk statement, locally made product statement, name and address.

¹⁰¹⁴ TPP Act, Exhibit AUS-1, Sections 20-21 and TPP Regulations, Exhibit AUS-3, Regulations 2.4.1-2.

Use of origin marks	No specific requirements relating to use of origin marks.	do not currently allow any trademarks to appear on tobacco products, except as set out for cigars below ¹⁰¹⁵ Alphanumeric codes or covert marks that are not visible to the naked eye may be used on packaging. An alphanumeric code must appear only once on the retail packaging in Lucida Sans typeface, no larger than 10 points in size, in either white or black. ¹⁰¹⁶
Outer surface of retail packaging	No specific requirements relating to outer surfaces of retail packaging of tobacco products.	The outer surfaces of retail packaging of tobacco products must not have any decorative ridges, embossing, bulges, textures or any other embellishments. ¹⁰¹⁷ Other than a wrapper, retail packaging of tobacco products must not have a cut-out area or window that enables the contents of the packaging to be visible. ¹⁰¹⁸
Wrappers of retail packaging	No specific requirements relating to wrappers of retail packaging of tobacco products.	Wrappers of retail packaging of tobacco products must be transparent and not coloured, marked, textured, or embellished in any way ¹⁰¹⁹ apart from a black tear strip or a transparent tear strip which may have a black line indicating where the tear strip begins. ¹⁰²⁰
Noise, scent or other	No specific requirements	Tobacco retail packaging

¹⁰¹⁵ TPP Act, Exhibit AUS-1, Section 26.

¹⁰¹⁶ TPP Regulations, Exhibit AUS-3, Regulation 2.3.2.

¹⁰¹⁷ TPP Act, Exhibit AUS-1, Section 18(1).

¹⁰¹⁸ TPP Regulations, Exhibit AUS-3, Regulation 2.1.6.

¹⁰¹⁹ TPP Act, Exhibit AUS-1, Section 22.

¹⁰²⁰ TPP Regulations, Exhibit AUS-1, Regulation 2.5.2.

miscellaneous features of retail packaging	relating to noise, scent or other miscellaneous features of retail packaging of tobacco products.	must not produce any noise or scent, contain any insert or onserts other than as permitted by regulations, and the packaging must not contain any features designed to change after retail sale (such as inks that appear fluorescent in certain light). ¹⁰²¹
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3. Requirements specific to cigarettes

5. There are specific requirements for cigarettes:

	Cigarettes before the plain packaging laws applied	Cigarettes post 1 December 2012
Graphic health warnings	Since 2006, at least 30% of the front surface of the pack and at least 90% of the back surface of the pack had to be covered with a graphic health warning, along with an information message on one side of the pack. ¹⁰²²	At least 75% of the front surface of the pack and at least 90% of the back surface of the pack must be covered with a graphic health warning, along with a corresponding information message on one side of the pack. ¹⁰²³
Appearance of brand, business, company or any variant names	No specific requirements relating to appearance of brand, business or company name, or any variant names on cigarette packs or cartons apart from the general restriction on the use of misleading and deceptive terms.	Any brand, business or company, or any variant name which appears on the retail packaging of cigarettes must appear horizontally below, and in the same orientation as the graphic health warning on the front of a cigarette pack, and

¹⁰²¹ TPP Act, Exhibit AUS-1, Sections 23-25. The Regulations currently permit an adhesive label bearing a health warning to be applied to retail packaging of tobacco products, and also permit use of inserts to avoid damage to tobacco products, other than, for cigarette packaging: TPP Regulations, Exhibit AUS-3, Regulations 2.6.1-2.6.2.

¹⁰²² *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as amended), Exhibit AUS-297, Schedule 2, Division 2.1.1. Note that these Regulations were made in 2004, but full compliance was not required until 1 March 2006.

¹⁰²³ Requirements for health warnings are contained in the *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Section 2.2 and Part 9, Division 4.

Construction of cigarette packs and cartons	No specific requirements relating to construction of retail packaging of cigarette packs and cartons.	<p>horizontally and in the centre of any other outer surface of a cigarette pack or carton.¹⁰²⁴ The brand, business or company name, or any variant name may be printed on the retail packaging of cigarette packs or cartons, but any names which do appear must be in 'Lucida Sans' typeface no larger than 14 points in size for the brand, business or company name, and the variant name no larger than 10 points in size, with the first letter in each word capitalised. The names must appear in Pantone Cool Gray 2C.¹⁰²⁵</p> <p>Cigarette packs and cartons must be rigid and made only of cardboard. Cigarette packs and cartons must have outer surfaces in rectangular shapes and surfaces which meet at 90 degree angles, and all edges must be straight and rigid.¹⁰²⁶ A cigarette pack must only have one opening which must be a flip-top lid which is hinged only at the back of the pack and which has straight edges. The inside lip must have straight edges (other than the corners which may be rounded) and it must not be embellished in</p>
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¹⁰²⁴ TPP Act, Exhibit AUS-1, Section 21.

¹⁰²⁵ TPP Act, Exhibit AUS-1, Sections 20-21 and TPP Regulations, Exhibit AUS-3, Regulation 2.4.1.

¹⁰²⁶ TPP Act, Exhibit AUS-1, Section 18(2).

Size of cigarette packs	No specific requirements relating to size of cigarette packs.	<p>anyway.¹⁰²⁷</p> <p>A cigarette carton may include a perforated strip for opening the carton.¹⁰²⁸</p> <p>A cigarette pack must comply with certain dimensions.¹⁰²⁹ Namely,</p> <ul style="list-style-type: none"> - Height – must not be less than 85mm or more than 125mm - Width – must not be less than 55mm or more than 82mm - Depth – must not be less than 20mm or more than 42mm
Lining of cigarette packs	No specific requirements relating to linings of cigarette packs.	<p>A cigarette pack may only be lined with foil backed with paper. The lining may be textured for the purpose of automated manufacture, but any marks must not form an image or other symbol, or constitute tobacco advertising and promotion.¹⁰³⁰</p>
Appearance of cigarettes	No specific requirements relating to the appearance of cigarettes.	<p>The paper casing for cigarettes must be white, or white with an imitation cork tip, and any filter tip must be white.¹⁰³¹ An alphanumeric code may appear only once on the cigarette, parallel to and not more than 38 mm from the end of the cigarette</p>

¹⁰²⁷ TPP Act, Exhibit AUS-1, Section 18(3)(b)-(c).

¹⁰²⁸ TPP Regulations, Exhibit AUS-3, Regulation 2.1.2.

¹⁰²⁹ TPP Act, Exhibit AUS-1, Section 18(3)(a) and TPP Regulations, Exhibit AUS-3, Regulation 2.1.1. State and territory regulations require cigarette packs to contain a minimum of 20 cigarette sticks.

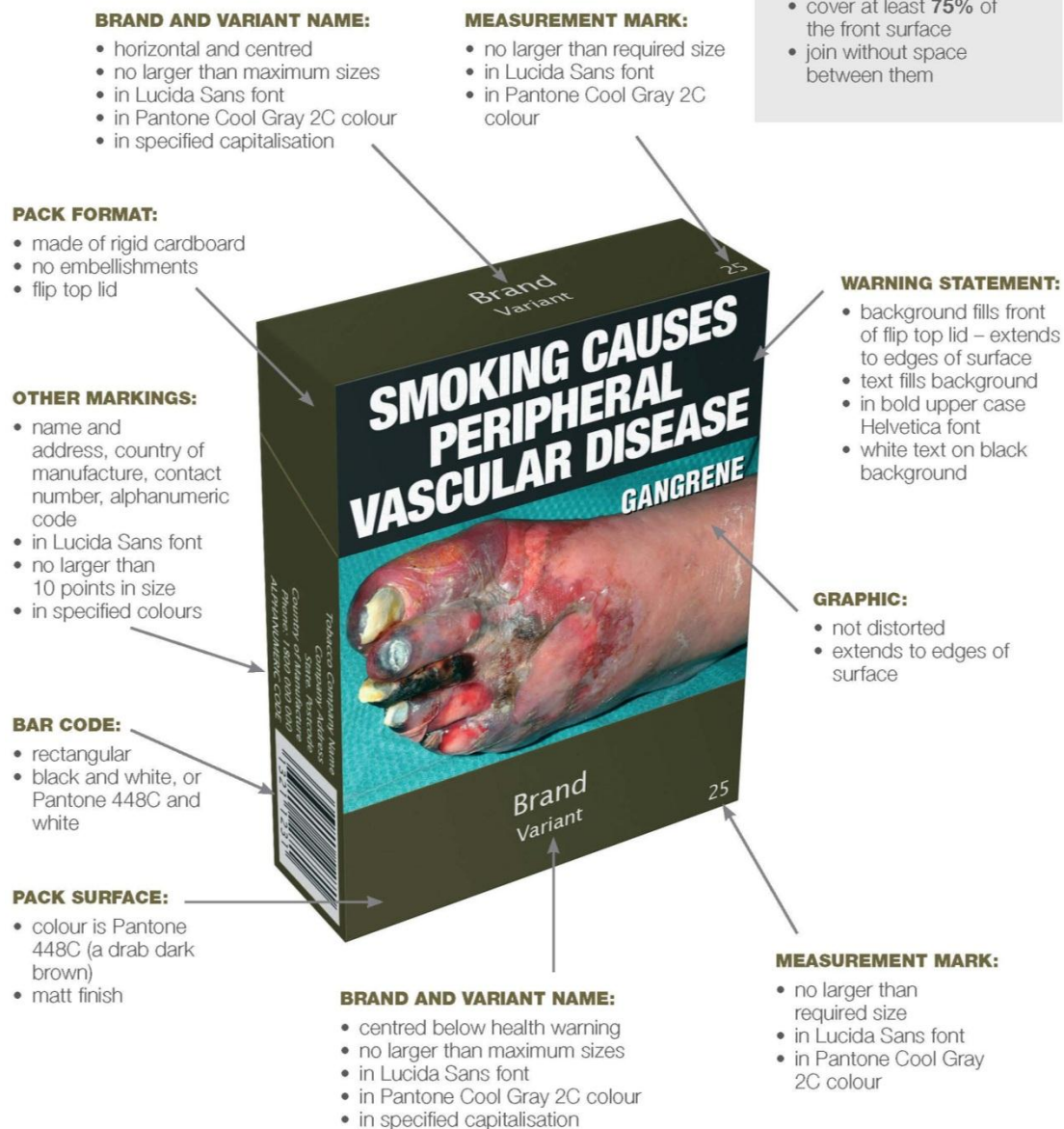
¹⁰³⁰ TPP Act, Exhibit AUS-1, Section 18(3)(d) and TPP Regulations, Exhibit AUS-3, regulation 2.1.3.

¹⁰³¹ TPP Regulations, Exhibit AUS-3, Regulations 3.1.1 and 3.1.3.

that is not designed to be lit, and must be printed in normal weighted Lucida Sans typeface, no larger than 8 points in size, in black. It must not constitute advertising and promotion, provide access to advertising and promotion, be false or misleading as to the cigarette's characteristics and health effects, create the impression that the cigarette is less harmful than other tobacco products, or be related or in any way linked to the emission yields (nicotine, tar, or carbon monoxide) of the cigarette. The alphanumeric code must not represent, or be related in any way to, the brand or variant name of the cigarette.¹⁰³²

¹⁰³² TPP Regulations, Exhibit AUS-3, Regulation 3.1.2(2) and (3).

CIGARETTE PACK – FRONT



CIGARETTE PACK – BACK

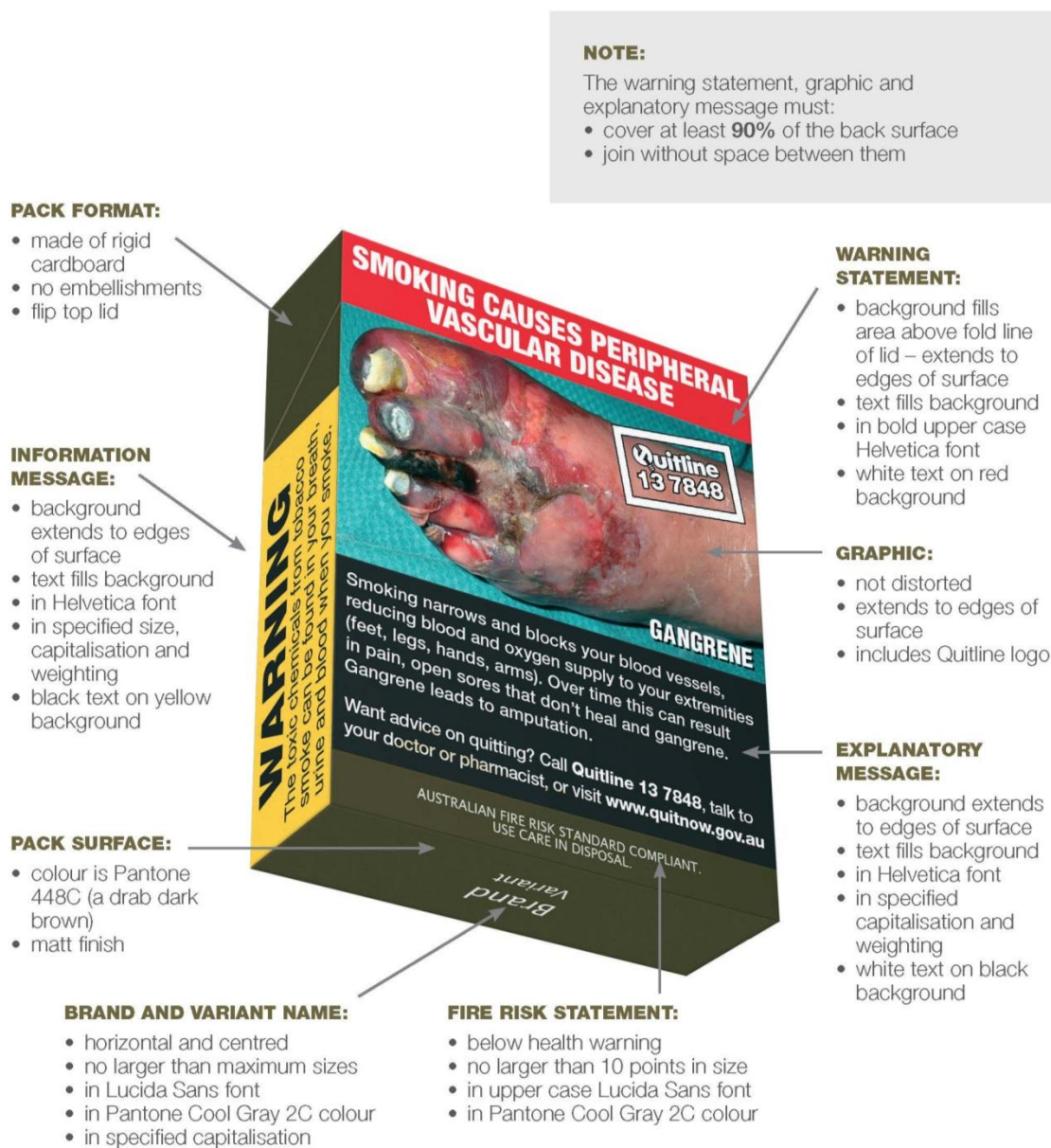


Figure 1: The requirements of tobacco plain packaging as they apply to cigarette packaging

CIGARETTE

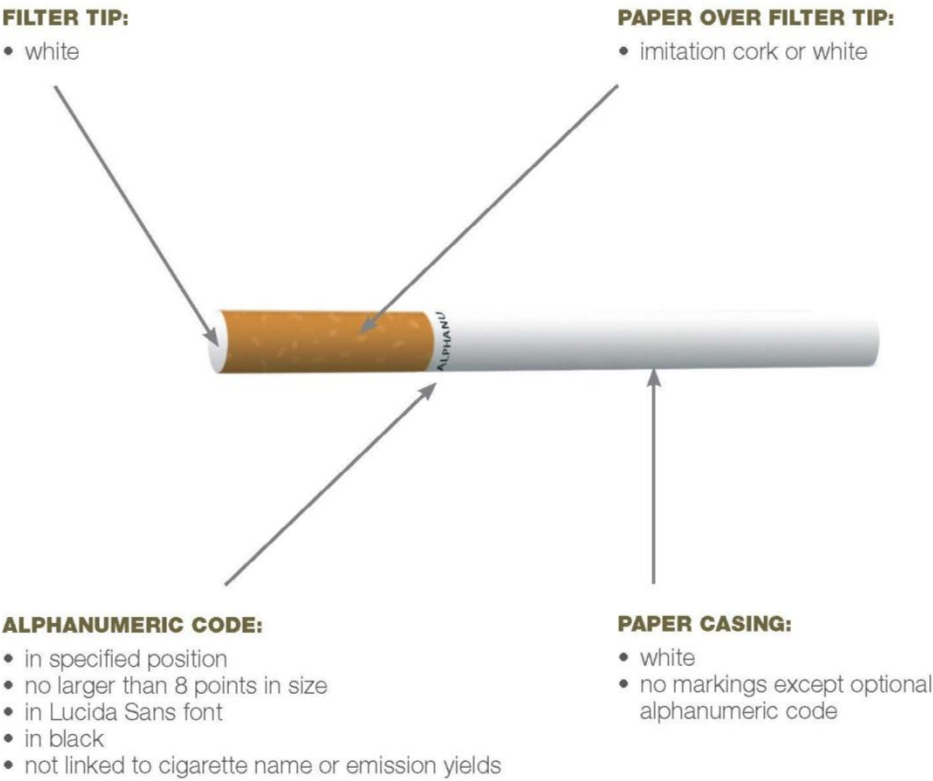


Figure 2: The requirements for tobacco plain packaging as they apply to a cigarette stick

4. Requirements specific to cigars

6. There are also specific requirements for cigars:

	Cigars before the plain packaging laws applied	Cigars post 1 December 2012
Health warnings	Retail packaging of cigars were required to have graphic health warnings	Retail packaging of cigars (including single cigars not in tubes) must have graphic

	cover at least 25% of the total area on the front surface and 33% of the area on the back surface. ¹⁰³³ No information message was required. ¹⁰³⁴ The health warning requirements did not apply to cigars sold singly. ¹⁰³⁵	health warnings which cover at least 75% of the total area on the front surface and 75% of the area on the back surface. ¹⁰³⁶ No information message is required. Single cigars in cigar tubes must have text health warnings which cover at least 95% of the total length of the outer surface and extend at least 60% of the circumference of the outer surface. ¹⁰³⁷
Appearance of cigars	No specific requirements relating to the appearance of cigars.	A single band may appear around the circumference of a cigar in the colour Pantone 448C. ¹⁰³⁸ The band may be an adhesive band that completely covers the existing band or bands. ¹⁰³⁹
Brand, business or company name, or variant name on cigar band.	No specific requirements relating to the appearance of brand, business or company name, or variant name on cigars.	A brand, business or company name, or variant name of the cigar may appear on the band on a cigar only once, and in Lucida Sans typeface, no larger than 10 points in size, in Pantone Cool Gray

¹⁰³³ Requirements for large retail packages of cigars are based on the dimensions of the product, as set out in *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as amended), Exhibit AUS-297, Regulation 43.

¹⁰³⁴ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth), Exhibit AUS-297, Regulations 40-44 and Schedule 2, Division 2.1.3. Requirements for large retail packages of cigars are based on the dimensions of the product, as set out in *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth), Exhibit AUS-297, Regulation 43.

¹⁰³⁵ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as amended), Exhibit AUS-297, Regulation 4(2).

¹⁰³⁶ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Sections 9.13-9.14 and 9.24.

¹⁰³⁷ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit-128, Section 9.16.

¹⁰³⁸ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1 (1)

¹⁰³⁹ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1 (2)

Name of the country in which the cigar was produced on cigar band	No specific requirements relating to the appearance of the name of the country in which the cigar was produced.	2C. ¹⁰⁴⁰ It must be placed horizontally along the length of the band to run around the circumference of the cigar. ¹⁰⁴¹ The name of the country in which the cigar was made or produced may appear only once on the cigar band and must be printed in Lucida Sans typeface, no larger than 10 points in size, in Pantone Cool Gray 2C . ¹⁰⁴²
An alphanumeric code on cigar band ¹⁰⁴³	No specific requirements relating to the appearance of alphanumeric codes on cigars.	An alphanumeric code may appear only once on the cigar band and must be printed in Lucida Sans typeface, no larger than 10 points in size, in Pantone Cool Gray 2C. It must not constitute advertising and promotion, provide access to advertising and promotion, be false or misleading as to the cigar's characteristics and health effects, create the impression that the cigar is less harmful than other tobacco products, or be related or in any way linked to the emission yields (nicotine, tar, or carbon monoxide) of the cigar. ¹⁰⁴⁴

¹⁰⁴⁰ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1 (3) and (5)

¹⁰⁴¹ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1 (6).

¹⁰⁴² TPP Regulations, Exhibit AUS-3, Regulation 3.2.1 (3) and (5).

¹⁰⁴³ Note that an alphanumeric code may be an origin mark within the meaning of the TPP Regulations, Exhibit AUS-3 (Regulation 2.3.2). An origin mark is "a mark on the retail packaging of tobacco products to distinguish the origin of the tobacco products and does not include a date by which it is recommended that the product is used" (Regulation 1.1.3).

¹⁰⁴⁴ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1 (3), (5) and (7).

Covert mark on cigar band ¹⁰⁴⁵	No specific requirements relating to the appearance of covert marks on cigars.	The cigar band may contain a covert mark that is not visible to the naked eye and that does not provide access to tobacco advertising and promotion. ¹⁰⁴⁶
Brand, business or company name, or any variant name on the retail packaging	No specific requirements relating to the appearance of brand, business or company name, or any variant name on retail packaging of cigars.	Any brand, business or company name, or any variant name which appears on the retail packaging, including cigar tubes, must either be printed on the packaging, or on an adhesive label fixed to the packaging so as to not be easily removable. ¹⁰⁴⁷ These names must appear in Lucida Sans typeface no larger than 14 points in size for brand, business or company name, and no larger than 10 points in size for any variant name, in Pantone Cool Grey 2C. An adhesive label must be in Pantone 448C, and be no longer than necessary to print the brand, business or company name, and any variant name, in the prescribed sizes. ¹⁰⁴⁸ On cigar tubes, these names must appear across one line only and only once on the tube. ¹⁰⁴⁹
Construction of cigar tubes	No specific requirements relating to the construction of cigar tubes.	Cigar tubes must be cylindrical and rigid, and the opening to a cigar tube must

¹⁰⁴⁵ Note that a covert mark may also be an origin mark within the meaning of the TPP Regulations, Exhibit AUS-3 (Regulation 2.3.2).

¹⁰⁴⁶ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1(4).

¹⁰⁴⁷ TPP Regulations, Exhibit AUS-3, Regulation 2.4.2 (2) and (3).

¹⁰⁴⁸ TPP Regulations, Exhibit AUS-3, Regulation 2.4.2(3).

¹⁰⁴⁹ TPP Regulations, Exhibit AUS-3, Regulation 2.4.3 (1).

be at least 15mm in
diameter. A cigar tube may
have one or both ends
tapered or rounded.¹⁰⁵⁰

7. There are several options available for the packaging of cigars, including cigar tubes, cigar bags and cigar boxes.

¹⁰⁵⁰ TPP Regulations, Exhibit AUS-3, Regulation 2.1.4.

CIGAR TUBES

HEALTH WARNING:

- must be one of five cigar-specific warning statements
- cover at least 95% of the total length
- extend to at least 60% of the circumference
- can be broken when the tube is opened

NOTE:

Transparent/clear plastic tubes and bare metal tubes are **not** permitted.



NOTE:

Adhesive labels may be used on packaging to display:

- Brand and variant names
- Health warnings

Handwritten labels are **not** permitted.

NOTE: rotation of health warnings

If a retailer/person places a cigar/s into retail packaging, including repackaging into compliant packaging, the onus is then on that retailer/person to ensure that the cigar is placed into packaging that contains a correct cigar health warning and to ensure that rotation requirements are met.

CIGAR



Figure 4: The requirements of tobacco plain packaging as they apply to cigar products themselves

5. Requirements specific to other products and packaging formats

8. In addition to the requirements for cigarette packs and cartons, and cigar packaging and tubes outlined above, a number of specific plain packaging and/or health warning requirements apply to other tobacco products and/or retail packaging of those products.¹⁰⁵¹ These include:

- Pouches for loose tobacco such as roll your own tobacco;¹⁰⁵²
- Packaging and appearance of bidis;¹⁰⁵³
- Packaging of smokeless tobacco;
- Inserts used to avoid damage to tobacco products;¹⁰⁵⁴
- Large cylinders; and
- Small cylinders.

9. Further information on these requirements is set out in the TPP Regulations 2011¹⁰⁵⁵, and the Competition and Consumer (Tobacco) Information Standard 2011.¹⁰⁵⁶

¹⁰⁵¹ See generally, TPP Act, Exhibit AUS-1, Part 2, Division 1, and TPP Regulations, Exhibit AUS-3, Regulation 2.1.5. The definition of retail packaging of a tobacco product is set out in section 4 of the TPP Act.

¹⁰⁵² TPP Regulations, Exhibit AUS-3, Regulation 2.2.1(6).

¹⁰⁵³ TPP Regulations, Exhibit AUS-3, Regulation 3.2.2.

¹⁰⁵⁴ TPP Regulations, Exhibit AUS-3, Regulation 2.6.2.

¹⁰⁵⁵ TPP Regulations, Exhibit AUS-3.

¹⁰⁵⁶ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128.

ANNEXURE B: TOBACCO CONTROL IN AUSTRALIA

1. This annexure provides further detail on Australia's comprehensive suite of tobacco control strategies. Details of measures specific to Australia's prohibition of tobacco advertising and promotion are at Annexure C.

2. Tobacco control measures implemented in Australia over time by the Commonwealth, state and territory governments are detailed below, apart from restrictions on tobacco advertising and promotion. These include (but are not limited to):

- a. mandatory text and graphic health warnings on tobacco packaging;
- b. restrictions on the sale of tobacco products;
- c. bans on smoking in workplaces and public places;
- d. increasing prices of tobacco products through excise and customs duty;
- e. combating illicit tobacco through various means; and
- f. investing in anti-smoking initiatives.

A. HEALTH WARNINGS ON TOBACCO PACKAGING

1. Warning labelling requirements

- 1972 - State and territory governments agreed on the need for and scope of uniform legislation requiring health warning labels on cigarette containers.¹⁰⁵⁷
- 1973 - Each state and territory had enacted legislation requiring all cigarettes to be sold in packages that displayed the words:

WARNING - SMOKING IS A HEALTH HAZARD.¹⁰⁵⁸

¹⁰⁵⁷ Explanatory Statement, *Cigarette Containers (Labelling) Ordinance 1972* (ACT), Exhibit AUS-298.

¹⁰⁵⁸ *Cigarette Containers (Labelling) Ordinance 1972* (Cth) (as made), Exhibit AUS-299, Section 5(1) (in force in the ACT); *Cigarette Containers (Labelling) Ordinance 1972* (NT) (as made),

(continued)

- 1972 - The *Broadcasting and Television Act 1942* (Cth) was amended to require each advertisement broadcast or televised for cigarettes or cigarette tobacco to be followed immediately by the statement "Medical authorities warn that smoking is a health hazard."¹⁰⁵⁹ The requirement applied to advertisements for cigarettes and cigarette tobacco (with no specific reference to cigars or other tobacco products).
- 1986 - The Australian Health Ministers' Advisory Council agreed that legislation for new health warnings would be prepared for all Australian states and territories effective from 1 July 1987.¹⁰⁶⁰ By 7 October 1987 legislation had commenced in all states and territories requiring the new warnings (which were required to be rotated), which read:

SMOKING	CAUSES	LUNG	CANCER
Health Authority Warning			
SMOKING	CAUSES	HEART	DISEASE
Health Authority Warning			
SMOKING	DAMAGES	YOUR	LUNGS
Health Authority Warning			
SMOKING	REDUCES	YOUR	FITNESS
Health Authority Warning. ¹⁰⁶¹			

Exhibit AUS-300, Section 4; *Cigarette Package Labelling Regulations 1972* (Vic) (as made), Exhibit AUS-301, Regulations 3-4 and 6; and *Cigarettes (Labelling) Regulations 1972* (WA) (as made), Exhibit AUS-302, Regulations 3-4, which all commenced on 1 January 1973. Note Tasmanian, New South Wales and South Australian legislation did not commence until 1 July 1973, see *Cigarettes (Labelling) Act 1972* (NSW) (as made), Exhibit AUS-303, Section 4 and *Cigarettes (Labelling) Regulations 1973* (NSW) (as made), Exhibit AUS-304, Regulation 4; *Cigarettes (Labelling) Act 1972* (Tas) (as made), Exhibit AUS-305, Sections 3-4 and *(Cigarettes (Labelling) Regulations 1973* (Tas) (as made), Exhibit AUS-306, Regulation 3; *Cigarettes (Labelling) Regulations 1971-1972* (SA) (as made), Exhibit AUS-307, Regulations 2, 3. Queensland's legislation did not commence until 1 May 1973, see *Food and Drug Amendment Regulations 1973* (Qld), Exhibit AUS-308, inserting Regulation 79A in the *Food and Drug Regulations 1964* (Qld).

¹⁰⁵⁹ *Broadcasting and Television Act 1972* (Cth), Exhibit AUS-309, Section 3 inserting Section 100A(1) in the *Broadcasting and Television Act 1942* (Cth).

¹⁰⁶⁰ See Explanatory Statement, *Tobacco Products (Health Warnings) (Amendment) Ordinance 1987* (ACT), Exhibit AUS-310.

¹⁰⁶¹ See *Tobacco Products (Health Warnings) Ordinance 1986* (Cth) / *Tobacco Products (Health Warnings) Act 1986* (ACT), Exhibit AUS-311, Sections 4-5 as amended by *Tobacco Products (Health Warnings) (Amendment) Ordinance 1987* (Cth), Exhibit AUS-312, Sections 5-6; *Public Health (Tobacco) Amendment Act 1986* (NSW) Exhibit AUS-313, Schedule 1 item 1, inserting Part VIIIA and

(continued)

- 1993 – The Commonwealth Government agreed to introduce a national system for health warnings under Commonwealth legislation¹⁰⁶² which required that from 1 January 1995, retail packages of tobacco products manufactured or imported into Australia (which included non-cigarette products such as cigars, but did not include cigars sold singly) meet the following requirements:
 - the packet was required to bear a warning message and in most cases a corresponding explanatory message,¹⁰⁶³ along with the words "Government Health Warning";¹⁰⁶⁴
 - the messages were to be printed within a black rectangular or square border on a white background, in black Helvetica font;¹⁰⁶⁵
 - the warning message was to appear at the top of the front of the packet, while the explanatory message was to appear at the top of the back of the packet;¹⁰⁶⁶
 - on most packaging, the warning message was to cover at least 25% of the front of the packet, while the explanatory message was to cover at least 33 1/3% of the back of the packet;¹⁰⁶⁷ and

item 2 inserting Schedule 3 item 2(1) in the *Public Health Act 1902* (NSW); *Cigarette Containers (Labelling) Regulations 1987* (NT) (as made), Exhibit AUS-314, Regulation 4; *Therapeutic Goods and Other Drugs Amendment Regulations 1986* (Qld), Exhibit AUS-315, Regulation 3, replacing Regulation 9 of the *Therapeutic Goods and Other Drugs Regulations 1982* (Qld); *Tobacco Products Control Regulations 1987* (SA) (as made), Exhibit AUS-316, Regulation 4; *Tobacco Products (Labelling) Act 1987* (Tas) (as made), Exhibit AUS-317, Sections 6-7 and *Tobacco Products (Labelling) Regulations 1987* (Tas) (as made), Exhibit AUS-318, Regulation 5; *Health (Tobacco Warning Labels) Regulations 1986* (Vic) (as made), Exhibit AUS-319, Regulation 9 and Schedule item 1; and *Tobacco (Warning Labels) Regulations 1987* (WA) (as made), Exhibit AUS-320, Regulation 4, Schedule item 1.

¹⁰⁶² This was done under the *Trade Practices Act 1974* (Cth). See Explanatory Statement, *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth), Exhibit AUS-321, referring to a Commonwealth Cabinet decision of 6 October 1993.

¹⁰⁶³ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth) (as made), Exhibit AUS-322, Regulation 7.

¹⁰⁶⁴ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth) (as made), Exhibit AUS-322, Regulation 9(c).

¹⁰⁶⁵ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth) (as made), Exhibit AUS-322, Regulation 9(a)-(b).

¹⁰⁶⁶ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth) (as made), Exhibit AUS-322, Regulation 10(1).

- explanatory messages corresponding to six different warning messages which were to be rotated so that each message appeared as nearly as possible an equal number of times each year.¹⁰⁶⁸
- 2004 - New regulations were made in 2004 under the *Trade Practices Act 1974* (Cth) requiring "graphic health warnings" on the packaging of most tobacco products imported into, or manufactured in, Australia by 1 March 2006 (including cigarettes, cigars, loose or pipe tobacco, but not including cigars sold singly or tobacco for export).¹⁰⁶⁹ The size of the warnings differed for the various tobacco products:
 - for cigarettes, the warnings were required to cover 30% of the front of the pack and 90% of the back of the pack;¹⁰⁷⁰
 - for cigars, the warnings were required to cover 25% of the total area on the front surface and 33% of the area on the back surface;¹⁰⁷¹
 - for nasal snuff, the warning message was required to cover at least 25% of the total area of the face of the lid of the package;¹⁰⁷²
 - for loose and pipe tobacco, the warning message was required to cover 30% of the front and 50% of the back of the packs; and¹⁰⁷³
 - for bidis, the warning message on the back of the pack was also required to be in a rectangle measuring at least 50mm by 20mm.¹⁰⁷⁴

¹⁰⁶⁷ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth) (as made), Exhibit AUS-322, Regulations 11(1)(b), 11(2)(b).

¹⁰⁶⁸ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth) (as made), Exhibit AUS-322, Regulation 15(1).

¹⁰⁶⁹ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323, Regulations 4 and 7.

¹⁰⁷⁰ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323, Regulation 35, Schedule 2, Div. 2.1.1.

¹⁰⁷¹ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323, Regulation 42, Schedule 2, Div. 2.1.3.

¹⁰⁷² *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323, Regulation 51.

¹⁰⁷³ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323, Regulation 35(2), Schedule 2, Div. 2.1.2.

- 22 December 2011 - The *Competition and Consumer (Tobacco) Information Standard 2011* (Cth)¹⁰⁷⁵ was made under the *Competition and Consumer Act 2010* (Cth).¹⁰⁷⁶ The Standard required all tobacco products supplied within Australia to display the new health warnings and graphic health warnings. Cigars sold singly are also required to have health warnings for the first time under the Standard.¹⁰⁷⁷ The Standard commenced operation on 1 January 2012, however compliance with the new health warnings only became mandatory from 1 December 2012.¹⁰⁷⁸ The Standard introduced a comprehensive suite of explanatory messages, information messages and graphic health warnings for all tobacco products, and included a range of new health warnings comprising warning statements and corresponding graphics, explanatory messages and information messages for most smoked tobacco products (except cigar tubes and bidis).¹⁰⁷⁹ Warnings are required to cover 75% of the front and 90% of the back of cigarette packs and cartons. The size of warnings for most other smoked tobacco products (except cigar tubes and bidis) was increased to 75% on both the front and back of the package.¹⁰⁸⁰ Cigar tubes are required to have text only health warnings which cover at least 95% of the total length of the outer surface and extend to at least 60% of the circumference of

¹⁰⁷⁴ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323, Regulation 47.

¹⁰⁷⁵ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128.

¹⁰⁷⁶ *Competition and Consumer Act 2010* (Cth), Exhibit AUS-127, Schedule 2, item 134

¹⁰⁷⁷ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) Exhibit AUS-128, Section 9.16.

¹⁰⁷⁸ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) Exhibit AUS-128, Section 1.5. Note that between 1 January 2012 and 30 November 2012, tobacco products could continue to display health warnings in accordance with the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323; *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Sections 1.5(2), 1.5(3).

¹⁰⁷⁹ ACCC, "Consultation Paper: Proposed Tobacco Labelling (Graphic Health Warnings) Mandatory Standard" (September 2011), Exhibit AUS-324, p. 20; Health Warning Information Standard, Exhibit x, Section 2.2 and Part 9, Division 4.

¹⁰⁸⁰ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Sections 9.13-9.14, 9.24.

the outer surface. Text only warnings are also required on bidis and smokeless tobacco.¹⁰⁸¹

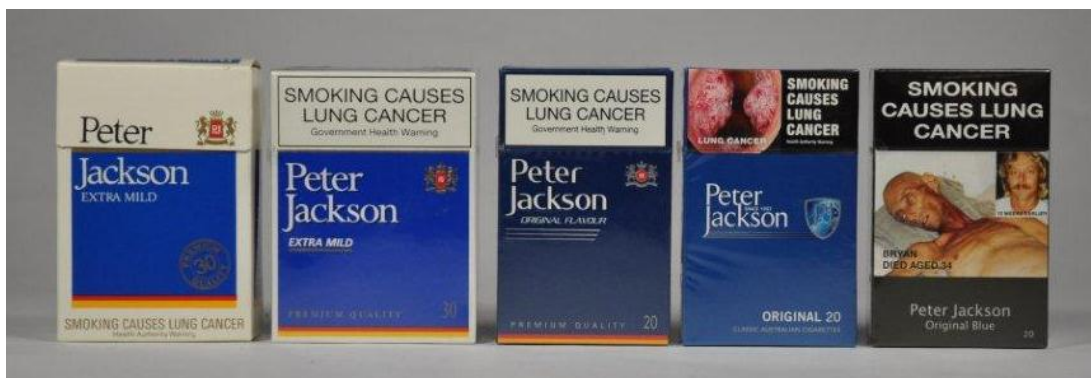


Figure 1: Evolution of health warnings on tobacco products in Australia¹⁰⁸²

- 24 July 2013 – Amendments were made to the Standard to remove, where possible, the legal requirements for retailers of most tobacco products to rotate health warnings on the retail packaging of tobacco products, as it was seen to be too onerous operationally and financially.¹⁰⁸³ The responsibility for rotation now applies to manufacturers and importers of tobacco products in Australia, and commenced operation in July 2013.¹⁰⁸⁴

2. Tar and nicotine labelling requirements

- 1981 to 1994 - Agreements between the Commonwealth Government and the tobacco industry required cigarette packages to carry a label specifying the yield

¹⁰⁸¹ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Sections 7.2 and 8.2.

¹⁰⁸² Image courtesy of Cancer Council Victoria. Please note the image does not include a picture of a package with the Health Warning "Warning – Smoking is a Health Hazard", which was introduced in 1973.

¹⁰⁸³ *Competition and Consumer (Tobacco) Amendment (Rotation of Health Warnings) Information Standard 2013* (Cth), Exhibit AUS-325, Section 4 and Schedule 1; Explanatory Statement, *Consumer (Tobacco) Amendment (Rotation of Health Warnings) Information Standard 2013* (Cth), Exhibit AUS-326, p. 1

¹⁰⁸⁴ *Competition and Consumer (Tobacco) Amendment (Rotation of Health Warnings) Information Standard 2013* (Cth), Exhibit AUS-325, Sections 2, 4 and Schedule 1; Explanatory Statement to the *Consumer (Tobacco) Amendment (Rotation of Health Warnings) Information Standard 2013* (Cth), Exhibit AUS-326, p. 2.

levels of Corrected Particulate Matter (CPM or "tar") and nicotine per cigarette, and prescribing upper limits of those substances per cigarette.¹⁰⁸⁵

- 1987 - The agreements also required display of yield information for, and established upper limits of, carbon monoxide per cigarette.¹⁰⁸⁶
- 1995 - Regulations under the *Trade Practices Act 1974* (Cth) required cigarette packages to specify the amount of tar, nicotine and carbon monoxide on the retail packaging as part of the health warning requirements.¹⁰⁸⁷
- 2004 – Following an Australian Competition and Consumer Commission ("ACCC") investigation into the use of the terms "light" and "mild" by the tobacco industry, the requirement to print average yield levels on tobacco packaging was removed when new health warning regulations were passed in 2004. As of 1 March 2006, tar, nicotine and carbon monoxide figures on packaging were replaced with a requirement to print a qualitative message on tobacco packaging about harmful smoke constituents.¹⁰⁸⁸

¹⁰⁸⁵ Philip Morris "Voluntary Code in Respect of CPM ("Tar") and Nicotine Labelling on Cigarette Packaging" (1981), paras. 1.1, 5.1, Bates No. 2023084800/4805, Exhibit AUS-327.

¹⁰⁸⁶ Philip Morris "Voluntary Code in Respect of CPM ("Tar") and Nicotine Labelling on Cigarette Packaging" (1981), 1.1, 5.2, Bates No. 2023084800/4805, AUS-327.

¹⁰⁸⁷ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth) (as made), Exhibit AUS-321, Regulation 17(3)

¹⁰⁸⁸ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (as made), Exhibit AUS-323, Regulation 7(2), Schedule 2, Part 2.5.

- 2005 - The ACCC accepted voluntary, court-enforceable undertakings from three of the major Australian tobacco manufacturers (Philip Morris Australia/Philip Morris Limited, British American Tobacco Australia Limited and Imperial Tobacco Australia Limited) in which the companies agreed, amongst other things, not to use the following terms as descriptors in brand names or on cigarette packaging:
 - "light", "low", "medium", "mild", "ultra mild", "extra mild", "super mild", "special mild", "super lights", "micro", "micro mild", "ultra lights", "extra lights"; and
 - numbers, including numerals or words, which referred to the average levels of machine tested tar, nicotine, and/or carbon monoxide emitted from cigarettes.¹⁰⁸⁹

3. Tobacco ingredient disclosure

- 2000 - Philip Morris Limited, British American Tobacco Australia Limited and Imperial Tobacco Australia Limited entered into a voluntary agreement with the Commonwealth Government for the disclosure of all ingredients of cigarettes.¹⁰⁹⁰ Under this agreement, the companies provided annual cigarette ingredient reports, which are posted unchanged on the Department of Health website.¹⁰⁹¹
- 2001 - The three companies party to the agreement also agreed to undertake cigarette emissions testing of selected Australian cigarette brand variants on a

¹⁰⁸⁹ ACCC, *Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Trade Practices Act 1974 by Philip Morris* (10 May 2005), Exhibit AUS-328, para. 16, Glossary; ACCC, *Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Trade Practices Act 1974 by British American Tobacco Australia Limited* (11 May 2005), Exhibit AUS-329, para. 18, Glossary; ACCC, *Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Trade Practices Act 1974 by Imperial Tobacco Australia Limited* (7 November 2005), Exhibit AUS-330, para. 17, Glossary.

¹⁰⁹⁰ "Voluntary Agreement for the Disclosure of the Ingredients of Cigarettes" (December 2000), Exhibit AUS-331.

¹⁰⁹¹ Australian Department of Health and Ageing, "Australian cigarette ingredient information" (27 June 2013), Exhibit AUS-332.

one-off basis, and to supply the results to Department of Health within the spirit of the voluntary agreement for the disclosure of ingredients of cigarettes.

4. Reduced fire risk cigarettes

- 23 September 2010 - All cigarettes sold in Australia since have been required to comply with the mandatory standard for reduced fire risk.¹⁰⁹² This compliance must be stated on the packaging.¹⁰⁹³ These are requirements in regulations made under the *Competition and Consumer Act 2010* (Cth), formerly the *Trade Practices Act 1974* (Cth), administered by the ACCC.¹⁰⁹⁴

B. RESTRICTIONS ON THE SALE OF TOBACCO PRODUCTS

- Australia has regulated the sale of tobacco products in terms of who can sell tobacco products, who can purchase tobacco products, what tobacco products can be sold, and how those products may be sold. The details of these restrictions are set out below.

1. Retailer and wholesaler licensing: regulating who can sell tobacco products

- 1972 - Tasmania became the first state to introduce a modern tobacco licensing scheme.¹⁰⁹⁵ Victoria's scheme required both wholesalers and retailers of tobacco to hold licences, from 1 January and 1 July 1975 (respectively).¹⁰⁹⁶ NSW also reintroduced a tobacco licensing scheme at this time.

¹⁰⁹² *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008* (Cth) (as made), Exhibit AUS-333, Regulations 4(2); Standards Australia, "Australian Standard 4830–2007, Determination of the extinction propensity of cigarettes" (2007), Exhibit AUS-334.

¹⁰⁹³ *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008* (Cth) (as made), Exhibit AUS-333, Regulation 14(2).

¹⁰⁹⁴ *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008* (Cth) (as made), Exhibit AUS-333.

¹⁰⁹⁵ *Tobacco Act 1972* (Tas) (as made), Exhibit AUS-335, Part III.

¹⁰⁹⁶ *Business Franchise (Tobacco) Act 1974* (Vic) (as made), Exhibit AUS-336, Sections 6-7.

- 1970s to 1980s - Other states and territories enacted similar schemes.¹⁰⁹⁷
- 1970s to 1997 - The states and territories charged increasingly substantial fees for tobacco retailer licences based on the quantity of tobacco sold.¹⁰⁹⁸
- 1998 to 2002 – As a result of a decision of the High Court of Australia, states and territories reformed their tobacco licensing regimes to create simplified, nominal licence fees.¹⁰⁹⁹
- 2009 - The NPHT recommended that the states and territories ensure that all tobacco retailers and wholesalers be licensed.¹¹⁰⁰ Currently the ACT, South Australia, Tasmania, Western Australia and the Northern Territory require retailers of tobacco products to be licensed.¹¹⁰¹ Whilst not having licensing regimes similar to the other states and territories, Queensland, NSW and Victoria do have "negative" licensing schemes that similarly assist in enforcement of tobacco laws.

¹⁰⁹⁷ See *Business Franchise (Tobacco and Petroleum Products) Ordinance 1984* (Cth) (as made) / *Tobacco Licensing Act 1984* (ACT) (as made), Exhibit AUS-337, Section 28; *Tobacco Products (Licensing) Act 1988* (Qld) (as made), Exhibit AUS-338, Sections 15, 16; *Business Franchise (Tobacco) Act 1981* (NT) (as made), Exhibit AUS-339, Sections 14, 23; *Tobacco Products (Licensing) Act 1986* (SA) (as made), Exhibit AUS-340 (although note that South Australia's licensing scheme was a voluntary scheme), Section 10; *Tobacco Business Franchise Licences Act 1980* (Tas) (as made), Exhibit AUS-341, Section 16; and *Business Franchise (Tobacco) Act 1975* (WA) (as made), Exhibit AUS-342, Section 6.

¹⁰⁹⁸ M Scollo, "The pricing and taxation of tobacco products in Australia" in M Scollo and M Winstanley (eds), *Tobacco in Australia: Facts and Issues* (Cancer Council Victoria, 3rd ed, 2008), Exhibit AUS-343, Section 13.6.2, Table 13.6.2.

¹⁰⁹⁹ See *Tobacco Licensing (Amendment) Act 1998* (ACT), Exhibit AUS-344, Section 11, substituting Section 28 of the *Business Franchise (Tobacco and Petroleum Products) Act 1984* (ACT); *Tobacco Products Regulation (Licence Fees) Amendment Act 1998* (SA), Exhibit AUS-345, Section 7, substituting Part 2 of the *Tobacco Products Regulation Act 1997* (SA); *Tobacco Control Act 2002* (NT) (as made) Part 4, Exhibit AUS-374.

¹¹⁰⁰ Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020, National Preventative Health Strategy - the roadmap for action* (30 June 2009), Exhibit AUS-67, p. 204.

¹¹⁰¹ *Tobacco Act 1927* (ACT) (as made) Exhibit AUS-347, Part 7, Sections 61, 63; *Tobacco Products Regulation Act 1997* (SA) Exhibit AUS-348, Section 6; *Public Health Act 1997* (Tas) (as amended) Exhibit AUS-349, Section 74A; *Tobacco Products Control Act 2006* (WA) (as made) Exhibit AUS-350, Sections 16-18; *Tobacco Control Act 2002* (NT) (as amended), Exhibit AUS-346, Section 28.

2. Who can purchase tobacco products

(a) Minimum age restrictions

- 1998 – In all states and territories, minimum age restrictions, restricting the sale of cigarettes to persons under 18 years of age, were in place.¹¹⁰² Additionally, some states and territories passed legislation specifically prohibiting the purchase of tobacco products on behalf of persons under 18 years of age.¹¹⁰³ Further laws authorised the seizure of tobacco products being smoked or in the possession of a person under the age of 18.¹¹⁰⁴

3. What can be sold and in what quantity

(a) Minimum pack sizes

- 2007 - Every state and territory had introduced minimum pack sizes as part of a suite of measures targeting youth smoking. On 28 February 2007, Western Australia introduced a prohibition on selling cigarettes in packages of less than 20.¹¹⁰⁵

¹¹⁰² See *Tobacco (Amendment) Act 1990* (ACT), Exhibit AUS-351, Section 5, amending Section 4(1) of the *Tobacco Act 1927* (ACT); *Public Health Act 1991* (NSW) (as made), Exhibit AUS-352, Section 59; *Tobacco Products (Prevention of Supply to Children) Act 1998* (Qld) (as made), Exhibit AUS-353, Schedule, defining "child" in the Dictionary as someone under 18 years of age; *Tobacco Products Control (Miscellaneous) Amendment Act 1993* (SA), Exhibit AUS-354, Section 3(a), amending the definition of "child" in Section 3 of the *Tobacco Products Control Act 1986* (SA); *Tobacco Act 1992* (NT) (as made), Exhibit AUS-355, Sections 3, 9; *Public Health Amendment Act 1996* (Tas), Exhibit AUS-356, Section 4, inserting Part VIIIA (especially Section 121A) into the *Public Health Act 1962* (Tas); *Tobacco (Amendment) Act 1993* (Vic), Exhibit AUS-357, Section 4 amending Section 12 of the *Tobacco Act 1987* (Vic). Western Australia already had a minimum age of 18.

¹¹⁰³ See, e.g., *Tobacco (Amendment) Act 1990* (ACT), Exhibit AUS-351, Section 5 substituting Part II Section 5 in the *Tobacco Act 1927* (ACT); *Tobacco Products Control Act 2006* (WA) (as made), Exhibit AUS-350, Section 7; *Public Health (Tobacco) Act 2008* (NSW), Exhibit AUS-267, Section 23; *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Section 43(2).

¹¹⁰⁴ See *Tobacco Products (Prevention of Supply to Children) Act 1998* (Qld) (as made) Section, Exhibit AUS-353, Section 40; *Public Health Amendment (Juvenile Smoking) Act 2002* (NSW), Exhibit AUS-358, Schedule 1 item 1, inserting Section 58 into the *Public Health Act 1991* (NSW); *Tobacco Products Regulation (Miscellaneous Offences) Amendment Act 2007* (SA), Exhibit AUS-359, Section 15, inserting new Section 70A into the *Tobacco Products Regulation Act 1997* (SA); *Public Health Act 1997* (Tas) (as made), Exhibit AUS-360, Section 66; *Tobacco Products Control Act 2006* (WA) (as made), Exhibit AUS-350, Section 99. The ACT, Northern Territory and Victoria do not have seizure laws in place as at 4 March 2013.

¹¹⁰⁵ *Tobacco Products Control Act 2006* (WA) (as made), Exhibit AUS-350, Section 21.

(b) Prohibiting certain flavoured cigarettes

- 18 April 2008 - Australian and New Zealand Health Ministers agreed in principle to implement a ban on the sale of fruit and confectionery-flavoured cigarettes in their respective jurisdictions. The Ministerial Council on Drug Strategy endorsed the proposal on 23 May 2008.¹¹⁰⁶
- 2006 to 2012 – A number of states introduced prohibitions on flavoured cigarettes, with South Australia introducing prohibitions on flavoured cigarettes in 2006.¹¹⁰⁷ As of October 2012, each of NSW, Victoria, the ACT, South Australia and Tasmania had enacted legislation prohibiting, or allowing ministers to prohibit, the sale of cigarettes with a fruit or confectionery-like character.¹¹⁰⁸ Queensland banned the sale of fruit and confectionery flavoured cigarettes with effect from November 2012.¹¹⁰⁹ Western Australia prohibits the display of any package that contains tobacco with fruit or confectionery flavours.¹¹¹⁰

(c) Prohibiting chewing tobacco and oral snuff (smokeless tobacco)

- 1987 to 2006 – Prohibitions on smokeless tobacco products were introduced by a number of states and territories. Victoria prohibited smokeless tobacco products such as chewing tobacco in 1987, South Australia prohibited "sucking tobacco" in 1986 (but not chewing tobacco), and the ACT prohibited the manufacture or sale

¹¹⁰⁶ Minister's Second Reading Speech to the Public Health Amendment Bill 2008, Tasmania, *Parliamentary Debates*, House of Assembly, 12 November 2008, Exhibit AUS-361, p. 48 (Ms Giddings).

¹¹⁰⁷ See the *Tobacco Products Regulation (Prohibited Tobacco Products) Notice 2006* (SA), Exhibit AUS-362, made under Section 34A of the *Tobacco Products Regulation Act 1997* (SA), which commenced on 31 October 2006.

¹¹⁰⁸ See *Public Health (Tobacco) Act 2008* (NSW), Exhibit AUS-267, Section 29; *Tobacco Act 1987* (Vic), Exhibit AUS-363, Sections 15N and 15O; *Tobacco Act 1927* (ACT), Exhibit AUS-347, Section 21; *Tobacco Products Regulation Act 1997* (SA), Exhibit AUS-348, Section 34A; *Public Health Act 1997* (Tas), Exhibit AUS-456, Section 68A.

¹¹⁰⁹ *Health Legislation Amendment Act 2011* (Qld), Exhibit AUS-364, Section 72, inserting new Section 26ZT into the *Tobacco and Other Smoking Products Act 1998* (Qld), banning the sale of confectionery-flavoured or fruit-flavoured cigarettes.

¹¹¹⁰ *Tobacco Products Control Regulations 2006* (WA), Exhibit AUS-365, Regulation 33.

of smokeless tobacco from 1 March 1991.¹¹¹¹ New South Wales introduced a similar ban in December 1991.¹¹¹² Queensland banned smokeless tobacco products in 2006.¹¹¹³

- 4 June 1991 - The Commonwealth Government imposed a permanent ban on the supply, sale and exchange of oral snuff and chewing tobacco within Australia, as well as on the export of such goods from Australia.¹¹¹⁴

4. How tobacco can be sold

(a) Regulation of tobacco vending machines

- 1980s - States and territories started regulating the availability, location of, and access to, tobacco product vending machines.¹¹¹⁵
- 1991 - NSW legislation came into effect that prohibited tobacco vending machines except at licensed premises (such as bars, pubs and clubs) or at a part of premises which is set aside by an employer such as a staff amenity area.¹¹¹⁶ Other

¹¹¹¹ *Tobacco Act 1987* (Vic) (as made), Section 15, Exhibit AUS-462; *Tobacco Products Control Act 1986* (SA) (as made), Exhibit AUS-366, Section 9; *Tobacco (Amendment) Act 1990* (ACT), Exhibit AUS-351, Section 5 amending Section 7 of the *Tobacco Act 1927* (ACT). In 1990 Western Australia banned the sale of smokeless tobacco products, unless the sale complied with requirements in the Regulations: *Tobacco Control Act 1990* (WA) (as made), Exhibit AUS-367, Section 13. The Regulations provided that this section did not apply to the manufacture or sale of a tobacco product prepared, packed and labelled solely for nasal use as snuff: *Tobacco Control (Smokeless Tobacco) Regulations 1991* (WA) (as made), Exhibit AUS-368, Regulation 3. South Australia prohibited sucking tobacco in 1986, although a person could be made exempt through Regulation: *Tobacco Products Control Act 1986* (SA) (as made), Exhibit AUS-366, Section 9. Tasmania added smokeless tobacco products (excluding nasal snuff) to Schedule 4 of its Poisons List, banning their advertising and promotion to the general public and making them available only on medical prescription: *Statutory Rules 1986 No 270* (Tas) (as made), Exhibit AUS-369, made under the *Poisons Act 1971* (Tas), Exhibit AUS-370, Section 15; also see M Scollo and M Winstanley, *Tobacco in Australia: Facts and Issues* (Cancer Council Victoria, 2nd ed, 1995), Exhibit AUS-371, chapter 9.4.

¹¹¹² *Tobacco Advertising Prohibition Act 1991* (NSW) (as made), Exhibit AUS-372, Section 11.

¹¹¹³ *Health Legislation Amendment Act 2006* (Qld), Exhibit AUS-373, Section 297, adding Section 26ZR to the *Tobacco and Other Smoking Products Act 1998* (Qld).

¹¹¹⁴ *Consumer Protection Notice No 10 of 1991* (as made), Exhibit AUS-55, made under the *Trade Practices Act 1974* (Cth).

¹¹¹⁵ See, e.g., *Tobacco Products Control Act 1986* (SA) (as made), Exhibit AUS-366, Section 11(2); and *Tobacco Act 1987* (Vic) (as made), Exhibit AUS-462, Section 13.

¹¹¹⁶ *Tobacco Advertising Prohibition Act 1991* (NSW) (as made), Exhibit AUS-372, Section 9.

states introduced similar legislation during the 1990s and early 2000s¹¹¹⁷ and on 1 September 2006, the ACT banned tobacco vending machines completely.¹¹¹⁸

(b) Prohibiting indirect (including online) sales of tobacco products

- 2006 - Western Australia regulated "indirect sale" of tobacco products. "Indirect sale" includes sales by internet, telephone, or facsimile: anyone selling tobacco products via these platforms must hold an indirect seller's licence.¹¹¹⁹
- 2008 - South Australia also prohibited the retail sale of tobacco products by mail, telephone, facsimile transmission, internet or other electronic communication.¹¹²⁰

C. BANS ON SMOKING IN WORKPLACES AND PUBLIC PLACES

1. Commonwealth smoking bans

- 1987 to 1990 - The Commonwealth Government progressively extended bans to smoking in work places and public places to include public transport. On 1 December 1987, smoking was banned on all domestic flights.¹¹²¹ Smoking was also banned on certain international flights in Australian airspace in 1990.¹¹²²

¹¹¹⁷ See *Tobacco (Amendment) Act 1990* (ACT), Exhibit AUS-351, Section 5 amending Parts I and II of the *Tobacco Act 1927* (Cth); *Tobacco Products (Prevention Of Supply To Children) Act 1998* (Qld) (as made), Exhibit AUS-353, Section 15; *Tobacco Products Control (Miscellaneous) Amendment Act 1993* (SA), Exhibit AUS-354, Section 8, inserting new Section 10a into the *Tobacco Products Control Act 1986* (SA); *Public Health Amendment Act 1996* (Tas), Exhibit AUS-356, Section 4, inserting new Part VIIIA (especially Section 121D) in the *Public Health Act 1962* (Tas). In 2002 the Northern Territory introduced legislation prohibiting vending machines except within areas of licensed premises where children were not permitted: *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Section 26. Western Australia restricted tobacco vending machines to licensed premises or mines amenities in 2006: *Tobacco Products Control Act 2006* (WA) (as made), Exhibit AUS-350, Section 27.

¹¹¹⁸ *Tobacco (Vending Machine Ban) Amendment Act 2004* (ACT), Exhibit AUS-375, Sections 2(2), 9, amending Section 16 of the *Tobacco Act 1927* (ACT).

¹¹¹⁹ *Tobacco Products Control Act 2006* (WA) (as made and as amended), Exhibit AUS-350 and Exhibit AUS-376, Section 18 and Glossary.

¹¹²⁰ *Tobacco Products Regulation (Miscellaneous) Amendment Act 2007* (SA), Exhibit AUS-377, section 4 inserting new Section 30(5) into the *Tobacco Products Regulation Act 1997* (SA).

¹¹²¹ *Air Navigation Regulations (Amendments) 1987* (No. 278) (Cth), Exhibit AUS-378, Regulation 2 amending Regulation 246 of the *Air Navigation Regulations* (Cth).

¹¹²² *Air Navigation Regulations (Amendment) 1990* (No. 299) (Cth), Exhibit AUS-379, Regulation 3 substituting new Regulation 246(10) in the *Air Navigation Regulations 1947* (Cth); Explanatory Statement, *Air Navigation Regulations (Amendment) 1990* (Cth), Exhibit AUS-380.

- 1988 - Smoke-free policy adopted for all Commonwealth health department workplaces, and then for all Commonwealth departments.¹¹²³

2. State and territory smoking bans

- 1994 - The ACT became the first jurisdiction to enact legislation banning smoking in restaurants and other enclosed public spaces, phased in over 1994-1998, providing "explicit protection" to the public who would otherwise be harmed by second-hand smoke.¹¹²⁴
- 2002 - The Northern Territory enacted legislation banning smoking in outdoor public venues with fixed seating (although owners could designate 50% of those venues as exempt from the smoking ban).¹¹²⁵
- 2003 - Legislation banning smoking in restaurants and other enclosed public places was enacted in most states and territories. This legislation typically banned smoking in areas such as restaurants, cafés, shopping and community centres,

¹¹²³ National Public Health Partnership, Legislation Reform Working Group, *National Response to passive smoking in enclosed public places and workplaces: A Background Paper* (November 2000), Exhibit AUS-381, p. 21. See also K Barnsley and B Freeman, "Smokefree environments" in M. Scollo and M. H. Winstanley, *Tobacco in Australia: Facts and issues*, 4th ed. (Cancer Council Victoria, 2012), Exhibit AUS-382, Section 15.4.2.

¹¹²⁴ *Smoke-free Areas (Enclosed Public Places) Act 1994* (ACT) (as made), Exhibit AUS-383, Section 5; Explanatory Memorandum, *Smoke-free Areas (Enclosed Public Places) Act 1994* (ACT), Exhibit AUS-384, p. 1.

¹¹²⁵ *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Sections 7(c), 11, and *Tobacco Control Regulations 2002* (NT) (as made), Exhibit AUS-385, Regulation 11.

workplaces, and public transport,¹¹²⁶ and in some jurisdictions inspectors were empowered to direct persons to cease smoking in such places.¹¹²⁷

- 2004 - State and territory governments further expanded smoking bans in outdoor public areas, such as outdoor eating areas, beaches, outdoor swimming areas and

¹¹²⁶ See *Smoke-Free Environment Act 2000* (NSW) (as made), Exhibit AUS-386, Sections 6, 7(1), Schedule 1; *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Sections 7, 11; *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 26, adding Section 26R to the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998* (Qld); *Tobacco Products Regulation Act 1997* (SA) (as made), Exhibit AUS-388, Section 47; *Public Health Amendment (Smoke-free areas) Act 2001* (Tas), Exhibit AUS-389, Section 5 adding Sections 67B-67E to the *Public Health Act 1997* (Tas); *Tobacco (Amendment) Act 2000* (Vic), Exhibit AUS-390, Section 7, inserting Sections 5A-5D into the *Tobacco Act 1987* (Vic); *Occupational Safety and Health Amendment Regulations (No 2) 1997* (WA), Exhibit AUS-391, Regulation 6, inserting Regulation 3.44B(1) into the *Occupational Safety and Health Regulations 1996* (WA); and *Health (Smoking in Enclosed Public Places) Regulations 1999* (WA) (as made), Exhibit AUS-392, Regulation 4.

¹¹²⁷ See *Smoke-free Areas (Enclosed Public Places) Act 1994* (ACT) (as made), Exhibit AUS-383, Section 13(2); *Smoke-Free Environment Act 2000* (NSW) (as made), Exhibit AUS-386, Sections 17, 18; *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 37 adding Section 40A to the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998* (Qld); *Public Health Amendment (Smoke-free areas) Act 2001* (Tas), Exhibit AUS-389, Section 5 inserting Section 67C(3) into the *Public Health Act 1997* (Tas); *Tobacco (Amendment) Act 2000* (Vic), Exhibit AUS-390, Section 7, inserting new Section 5A(2) into the *Tobacco Act 1987* (Vic); *Occupational Safety and Health Amendment Regulations (No 2) 1997* (WA), Exhibit AUS-391, regulation 6 inserting Regulation 3.44F and *Health (Smoking in Enclosed Public Places) Regulations 1999* (WA).

around playground equipment.¹¹²⁸ In 2005, Victoria moved to ban smoking by adults at underage music and dance events.¹¹²⁹

- 2006 - Legislation with the effect of banning smoking in the workplace had commenced in all Australian states and territories.¹¹³⁰
- 2007 - South Australia became the first state to enact a ban on smoking in vehicles where children under the age of 16 were present.¹¹³¹ All states had enacted similar legislation by 2010,¹¹³² and the ACT did so in 2012.¹¹³³

¹¹²⁸ See *Smoking (Prohibition in Enclosed Public Places) Amendment Act 2009* (ACT), Exhibit AUS-393, Section 11, adding Sections 9B-9E to the *Smoking (Prohibition in Enclosed Public Places) Act 2003* (ACT); *Tobacco Legislation Amendment Act 2012* (NSW), Exhibit AUS-394, Schedule 1 item 8, inserting Section 6A(1) into the *Smoke-free Environment Act 2000* (NSW); *Tobacco Control Legislation Amendment Act 2010* (NT), Exhibit AUS-395, Section 16-18, adding Sections 5B and 5C, and amending Sections 7 and 11 of the *Tobacco Control Act 2002* (NT); *Tobacco and Other Smoking Products Amendment Act 2004* (Qld), Exhibit AUS-396, Section 40 inserting Sections 26ZD-26ZK in the *Tobacco and Other Smoking Products Act 1998* (Qld); *Tobacco Products Regulation (Further Restrictions) Amendment Act 2012* (SA), Exhibit AUS-397, Section 4, inserting Sections 49-50 into the *Tobacco Products Regulation Act 1997* (SA); *Public Health Amendment Act 2004* (Tas), Exhibit AUS-398, Section 6, amending Section 67B of the *Public Health Act 1997* (Tas) and *Public Health Amendment Act 2011* (Tas) Section 12, amending Section 67B of the *Public Health Act 1997* (Tas); *Tobacco (Amendment) Act 2005* (Vic), Exhibit AUS-399, Section 24, inserting new Sections 5C-D into the *Tobacco Act 1987* (Vic), see also *Tobacco (Amendment) Act 2005* (Vic) Section 27, inserting Section 222A into the *Transport Act 1983* (Vic) (banning smoking in certain carriages and covered train platforms, trams or bus stops); and *Tobacco Products Control Amendment Act 2009* (WA), Exhibit AUS-400, Section 9, adding Sections 107A-107C to the *Tobacco Products Control Act 2006* (WA).

¹¹²⁹ *Tobacco (Amendment) Act 2005* (Vic), Exhibit AUS-399, Section 18, inserting new Part 2 Division 3 into the *Tobacco Act 1987* (Vic). See also, *Smoking (Prohibition in Enclosed Public Places) Amendment Act 2009* (ACT), Exhibit AUS-393, Section 11, adding Sections 9K-9N to the *Smoking (Prohibition in Enclosed Public Places) Act 2003* (ACT).

¹¹³⁰ See *Smoking (Prohibition in Enclosed Public Places) Act 2003* (ACT) (as made), Exhibit AUS-401, Section 6; *Smoke-free Environment Act 2000* (NSW) (as made), Exhibit AUS-386, Sections 6, 7(1); *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Sections 5, 7, 9; *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 26 inserting Part 2B in the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998* (Qld); *Tobacco Products Regulation (Further Restrictions) Amendment Act 2004* (SA), Exhibit AUS-402, Section 17 substituting Section 46(1) of the *Tobacco Products Regulation Act 1997* (SA); *Public Health Amendment (Smoke-free Areas) Act 2001* (Tas), Exhibit AUS-389, Section 5 inserting new Sections 67B-C, 67H into the *Public Health Act 1997* (Tas); *Tobacco (Amendment) Act 2005* (Vic), Exhibit AUS-399, Section 5 substituting new Section 5A into the *Tobacco Act 1987* (Vic); and *Health (Smoking in Enclosed Public Places) Regulations 1999* (WA) (as made), Exhibit AUS-392, Regulations 4-10.

¹¹³¹ *Tobacco Products Regulation (Smoking in Cars) Amendment Act 2007* (SA), Exhibit AUS-403, Section 4 inserting Section 48 into the *Tobacco Products Regulation Act 1997* (SA).

¹¹³² See *Public Health (Tobacco) Act 2008* (NSW) (as made), Exhibit AUS-404, Section 30; *Public Health Amendment Act 2007* (Tas), Exhibit AUS-405, Section 4, substituting Section 67H of the

(continued)

- 2010 to 2012 - NSW, Victoria, Queensland, South Australia and Tasmania extended smoking bans in more outdoor places including spectator areas at outdoor public sporting and cultural events, outdoor public swimming areas, beaches, platforms of passenger railways, wharves, bus stops and taxi ranks, and in areas near pedestrian access to buildings.¹¹³⁴

D. INCREASING PRICES OF TOBACCO PRODUCTS THROUGH EXCISE MEASURES AND CUSTOMS DUTIES

1. Excise measures

- 1983 - As part of the Commonwealth Budget, the Commonwealth Government decided to align increases in excise and customs duty to correspond automatically with the consumer price index¹¹³⁵ in order to "counteract the eroding effects of inflation on real rates of excise".¹¹³⁶

Public Health Act 1997 (Tas); *Tobacco Amendment (Protection of Children) Act 2009* (Vic), Exhibit AUS-406, Section 19, inserting new Division 1A in Part 2 of the *Tobacco Act 1987* (Vic); *Tobacco Products Control Amendment Act 2009* (WA), Exhibit AUS-400, Section 9, adding Section 107D to the *Tobacco Products Control Act 2006* (WA); and *Health and Other Legislation Amendment Act 2009* (Qld), Exhibit AUS-407, Section 180, inserting new Part 2BA into the *Tobacco and Other Smoking Products Act 1998* (Qld).

¹¹³³ *Smoking in Cars with Children (Prohibition) Act 2011* (ACT) (as made), Exhibit AUS-408, Section 7.

¹¹³⁴ *Health and Other Legislation Amendment Act 2009* (Qld), Exhibit AUS-407, Section 181, adding Part 2C Division 4 to the *Tobacco and Other Smoking Products Act 1998* (Qld) and *Tobacco and Other Smoking Products Regulation 2010* (Qld) (as made), Exhibit AUS-409, Regulations 14-15, Schedules 1-2; *Public Health Amendment Act 2011* (Tas), Exhibit AUS-410, Section 12 amending Section 67B of the *Public Health Act 1997* (Tas); *Tobacco Legislation Amendment Act 2012* (NSW), Exhibit AUS-394, Schedule 1 item 8 amending Sections 6, 6A of the *Smoke-Free Environment Act 2000* (NSW); *Tobacco Products Regulation (Further Restrictions) Amendment Act 2012* (SA), Exhibit AUS-397, Section 4, inserting Section 49 in the *Tobacco Products Regulation Act 1997* (SA) and *Tobacco Products (Smoking Bans in Public Areas - Longer Term) Regulations 2012* (SA) (as made) AUS-411, Regulation 4; *Tobacco Amendment (Smoking at Patrolled Beaches) Act 2012* (Vic), Exhibit AUS-412, Section 3 inserting Section 5RA(1) into the *Tobacco Act 1987* (Vic).

¹¹³⁵ A general measure of price inflation for the household sector compiled and published by the Australian Bureau of Statistics. From 1 March 2014 bi-annual indexation will be based on Average Weekly Ordinary Time Earnings.

¹¹³⁶ Minister's Second Reading Speech to the Excise Tariff Amendment Bill (No 2) 1983, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 November 1983, Exhibit AUS-413, p. 2466 (Mr Brown).

- 19 August 1992 - The Commonwealth Government increased the price of tobacco products for public health reasons, in light of concerns about the social costs of smoking.¹¹³⁷
- 1995 - The Treasurer announced a 10% increase in the rate of excise duty payable on manufactured tobacco and tobacco products including cigarettes, cigars and snuff.¹¹³⁸ Corresponding increases were also made to customs duty.¹¹³⁹
- 1999 - The Commonwealth Government introduced a new system that calculated tobacco duty on a "per stick" basis.¹¹⁴⁰ The net effect of the "per stick" system was to increase the price of cigarettes.
- 29 April 2010 - The Commonwealth Government announced an increase in tobacco excise of 25%.¹¹⁴¹ The excise increase raised the tax on a pack of 30 cigarettes by approximately \$2.16.¹¹⁴²
- 14 May 2013 – The Commonwealth Government announced that it would index the rate of excise bi-annually on the basis of Average Weekly Ordinary Time Earnings to keep in line with rising incomes.¹¹⁴³

¹¹³⁷ *Excise Tariff Amendment Act 1993* (Cth), Exhibit AUS-414, Section 6, Minister's Second Reading Speech to the Excise Tariff Amendment Bill 1993, Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1993, Exhibit AUS-415, p. 122 (Mr Lindsay).

¹¹³⁸ *Excise Tariff Amendment Act (No. 2) 1995* (Cth), Exhibit AUS-416, Section 4 and Schedule 2. Note that although this Act did not receive royal assent until 16 December 1995, Section 2 of the Act provided that Section 4, which increased the rate of excise on tobacco products, was taken to have commenced on 10 May 1995.

¹¹³⁹ Tobacco is an excise equivalent good and therefore subject an equivalent customs duty to ensure it is treated consistently with goods manufactured or produced in Australia.

¹¹⁴⁰ *Excise Tariff Amendment Act (No 1) 2000* (Cth), AUS-417, Section 2(1) and Schedule 1.

¹¹⁴¹ Prime Minister Rudd and Health Minister Roxon, "Anti-Smoking Action", Media Release (29 April 2010), Exhibit AUS-115.

¹¹⁴² *Excise Tariff Amendment (Tobacco) Act 2010* (Cth), Exhibit AUS-418; *Customs Tariff Amendment (Tobacco) Act 2010* (Cth), Exhibit AUS-419. The figure of \$2.16 comes from the Minister's Second Reading Speech to the Excise Tariff Amendment (Tobacco) Bill 2010, Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2010, Exhibit AUS-420, p. 3197 (Ms Roxon).

¹¹⁴³ Effective 1 March 2014. Prior to this the Consumer Price Index was used as the relevant index. Commonwealth of Australia, "Budget Measures: Budget Paper No. 2", (2013-2014), Exhibit AUS-266, p 25.

- 1 August 2013 - The Commonwealth Government announced a decision to implement a substantial staged increase in excise on tobacco products.¹¹⁴⁴ The increases included four staged 12.5% increases in tobacco excise over 4 years and commenced on 1 December 2013.¹¹⁴⁵ The first two 12.5% increases occurred on 1 December 2013 and 1 September 2014 respectively, with the remaining increases coming into effect on 1 September 2015 and 1 September 2016.

2. Restrictions on duty free tobacco

- 1982 - The *Customs Act 1901* (Cth) was amended to include provision for the sale of duty free goods to travellers on outbound international flights from "duty free shops".¹¹⁴⁶
- 1985 - The *Customs Act 1901* (Cth) was further amended to include provision for the sale of "duty free" goods from "inwards duty free shops".¹¹⁴⁷ The quantity allowed was prescribed in the Customs by-laws to be 250 grams of tobacco.¹¹⁴⁸
- 1 September 2012 - The Commonwealth Government reduced the duty free allowance for inbound travellers from 250 to 50 cigarettes, or 250g to 50g of tobacco products.¹¹⁴⁹

¹¹⁴⁴ The increase will be a 12.5% increase in tobacco excise of the next 4 years: Treasurer Bowen and Health Minister Plibersek, "Government to increase tobacco excise" (Media Release, 1 August 2013), Exhibit AUS-421.

¹¹⁴⁵ Treasurer Bowen and Health Minister Plibersek, "Government to increase tobacco excise" (Media Release, 1 August 2013), Exhibit AUS-421. See also Commonwealth of Australia, *Economic Statement*, Statement by the Honourable Chris Bowen MP and Senator the Honourable Penny Wong, August 2013, Exhibit AUS-265, p. 33.

¹¹⁴⁶ *Customs and Excise Amendment Act 1982* (Cth), Exhibit AUS-422, Section 22, adding Section 96A to the *Customs Act 1901* (Cth).

¹¹⁴⁷ *Customs and Excise Legislation Amendment Act (No. 2) 1985* (Cth), Exhibit AUS-423, Section 7, adding Section 96B to the *Customs Act 1901* (Cth).

¹¹⁴⁸ *Customs By-Law No 4-119* (Cth) (as made), Exhibit AUS-424, items 5, 6(5), Table Part II item 2, contained in Commonwealth Gazette, No. S 6 (7 January 1985), Part 1 of Schedule 4.

¹¹⁴⁹ *Customs By-law No. 1228133* (Cth) (as made), Exhibit AUS-425, Section 2, Table items 6, 7.

E. TACKLING THE ILLICIT TOBACCO TRADE IN TOBACCO: PREVENTING SMUGGLING AND COUNTERFEITING

- 2000 - The Commonwealth Government introduced amendments to the *Excise Act 1901* (Cth) designed to address the illicit tobacco trade.¹¹⁵⁰ Specific offences were introduced for unlicensed persons manufacturing, producing, possessing, dealing with or moving tobacco seed, tobacco plant or tobacco leaf and severe penalties were imposed for breaches of the Act.¹¹⁵¹
- 2012 - The Commonwealth Government introduced legislation that created criminal offences under the Customs Act specifically in relation to the smuggling of tobacco products.¹¹⁵²

F. INVESTMENT IN ANTI-SMOKING INITIATIVES

1. Education campaigns

- 1960s - Public and school-based education programs have been used to complement legislative and regulatory activity.
- 1972 - A coordinated national approach to school-based education campaigns was implemented through a range of policy initiatives.¹¹⁵³

2. The first mass media anti-smoking campaigns

- 1970s - The first mass media campaigns were developed by the Cancer Council Victoria.¹¹⁵⁴ Early state and territory-based smoking control activity was often

¹¹⁵⁰ *Excise Amendment (Compliance Improvement) Act 2000* (Cth) (as made), Exhibit AUS-426; see also Minister's Second Reading Speech to the Excise Amendment (Compliance Improvement) Bill 2000, Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2000, Exhibit AUS-427, p. 17803 (Mr Slipper).

¹¹⁵¹ *Excise Act 1901* (Cth) (as at 2000), Exhibit AUS-428, Sections 25, 28, 33, 117C-117H.

¹¹⁵² *Customs Act 1901* (Cth), Exhibit AUS-429, Section 233BABAD.

¹¹⁵³ Minister's Second Reading Speech to the Cigarettes (Labelling) Bill 1972, New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 1972, Exhibit AUS-430, pp. 856-858, 863.

undertaken by state Cancer Councils and the Heart Foundation, typically focusing on a "Quit week" of activities and including other activity throughout the year.¹¹⁵⁵

- 1980s to 1990s - State campaigns including advertising (on television, billboards and newspapers), anti-smoking skits by major personalities on radio, distribution of a training videotape about smoking to physicians, and school-based educational programs alongside sponsored theatre performances, rock concerts, and sports activities with non-smoking themes continued,¹¹⁵⁶ with a focus on sharing and adaptation of campaign materials.¹¹⁵⁷
- 1990s - Various education programs were used to accompany new regulatory action on tobacco. For example, the *Tobacco Products Control Act 1986* (SA) was supported by a range of non-legislative measures, including resource manuals for secondary school teachers and mobile classrooms for primary school teachers.¹¹⁵⁸

3. The National Tobacco Campaigns

- June 1997 - The first *National Tobacco Campaign*, a national mass media education campaign encouraging smoking cessation was launched.¹¹⁵⁹

¹¹⁵⁴ See generally Quit Victoria and Cancer Council Victoria, *Celebrating 20 years of better health: 1985–2005* (Cancer Council Victoria, 2005), Exhibit AUS-431, p. 34.

¹¹⁵⁵ T Carroll, "Social marketing and public education campaigns", in M. Scollo and M. H. Winstanley, *Tobacco in Australia: Facts and issues*, 4th ed. (Cancer Council Victoria, 2012), Exhibit AUS-282, Section 14.3.2.1.

¹¹⁵⁶ J Pierce, P Macaskill, D Hill, "Long-Term Effectiveness of Mass Media Led Antismoking Campaigns in Australia" (1990) 80(5) *American Journal of Public Health* 565, Exhibit AUS-432, pp. 565-566.

¹¹⁵⁷ J Pierce, P Macaskill, D Hill, "Long-Term Effectiveness of Mass Media Led Antismoking Campaigns in Australia" (1990) 80(5) *American Journal of Public Health* 565, Exhibit AUS-432, pp. 565-566. See also Purcell and Schultz, *Review of the National Tobacco Strategy 2004-2009* (September 2010), Exhibit AUS-433, pp. 60-61.

¹¹⁵⁸ See Minister's Second Reading Speech to the Tobacco Products Control Bill 1986, South Australia, *Parliamentary Debates*, 29 October 1986, Exhibit AUS-434, p. 1618 (Mr Keneally).

¹¹⁵⁹ Ministerial Council on Drug Strategy, *Background Paper: A Companion Document to the National Tobacco Strategy 1999 to 2002-03* (June 1999), Exhibit AUS-435, para. 4.7.

- 1997 to 2005 - The *National Tobacco Campaign 1997-2005* focused on television advertisements explicitly detailing the harm caused by tobacco to arteries, lungs and eyes, with the message "Every cigarette is doing you damage".¹¹⁶⁰
- 2005 to 2006 and 2008 to 2009 - The anti-smoking campaigns complemented health warnings and targeted youth (12-24 years) and comprised the first truly national collaborative anti-smoking campaign.¹¹⁶¹
- 2003 - The Commonwealth Government, through its "Smoke Free Fashion" initiative, supported a range of activities encouraging the fashion industry to de-glamorise smoking, providing information about smoking to persons involved in the fashion industry, appointing prominent fashion personalities as smoke-free ambassadors, a national publicity program and declaring Mercedes Australian Fashion Week a smoke free event.¹¹⁶²
- December 2005 - The ACCC launched a \$9 million education campaign addressing the risks associated with cigarettes advertised as "light" and "mild". Funding came from the tobacco industry as part of court enforceable undertakings, which required Philip Morris Limited, British American Tobacco Australia Limited and Imperial Tobacco Australia Limited to remove the words such as "light" and "mild" from their packaging, and to cease making certain representations about "light" and "mild" cigarettes.¹¹⁶³

¹¹⁶⁰ Australian Department of Health and Ageing, "Australia's National Tobacco Campaign: Evaluation Report Volume Three" (2004), Exhibit AUS-436, pp. vii, 4.

¹¹⁶¹ See, e.g., The Social Research Centre, "National Tobacco Youth Campaign Evaluation" (June 2007), Exhibit AUS-437, pp. i, 1-2; Commonwealth, Ministerial Council on Drug Strategy, *Background paper: A companion document to the National Tobacco Strategy 1999 to 2002-03* (June 1999), Exhibit AUS-435, para. 4.7.

¹¹⁶² Mercedes-Benz Australian Fashion Week, "Smoke Free Fashion Extends Campaign" (Media Release, 14 April 2003), Exhibit AUS-438.

¹¹⁶³ ACCC, "Low yield cigarettes 'not a healthier option': \$9 million campaign" (Media Release, 19 December 2005), Exhibit AUS-439.

- 2000 - The Commonwealth Government also launched a program with the Australian women's soccer team, the Matildas, promoting smoke-free lifestyles through a range of promotional activities in Australia.¹¹⁶⁴

4. Current campaigns and the future

- 2009 to 2016 - The Commonwealth Government has committed to investing over \$135 million from 2009-10 to 2015-16 in anti-smoking social marketing campaigns.¹¹⁶⁵ Targeted campaigns comprise media advertising, community toolkits, partnership programs, cross-coordination initiatives, direct mail campaigns and online resources.¹¹⁶⁶ Currently the "More Targeted Approach" campaign continues, featuring television, in-venue, radio, print, outdoor and online advertising, aimed at reducing smoking rates amongst pregnant women, culturally and linguistically diverse groups, prisoners, people with mental illness and socially disadvantaged groups.¹¹⁶⁷

5. Subsidies for nicotine replacement therapies and other cessation services: helping Australians quit and avoid relapse

- 1980s - Nicotine replacement therapies (NRTs) were introduced in Australia
- 1986 - Nicotine gum for use as an aid in withdrawal from tobacco smoking was available only on prescription from a medical practitioner.¹¹⁶⁸

¹¹⁶⁴ Dr M Wooldridge, "Australian women's soccer team joins the US in the war on smoking" (Media Release, 17 September 2000), Exhibit AUS-440.

¹¹⁶⁵ Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018 — A Strategy to Improve the Health of all Australians by Reducing the Prevalence of Smoking and its Associated Health, Social and Economic Costs, and the Inequalities it Causes* (2012), Exhibit AUS-129, p. 17.

¹¹⁶⁶ Australian Government National Preventative Health Taskforce, *Taking preventative action - A response to Australia: the healthiest country by 2020* (15 May 2010), Exhibit AUS-116, p. 65.

¹¹⁶⁷ Commonwealth Quitnow, "More Targeted Approach" (Under heading: "Culturally and linguistically diverse advertisements") (15 July 2013), Exhibit AUS-441.

¹¹⁶⁸ *Standard for the Uniform Scheduling of Drugs and Poisons (No. 1)* (1986), Exhibit AUS-442, p. 75.

- 2002 - Access to these technologies has increased both through the expanding range of available NRTs, and also their availability: NRT products were made available in pharmacies and then supermarkets from 2002.
- February 2001 - The Commonwealth Government began subsidising the cost of antidepressants used as a smoking cessation aide.¹¹⁶⁹
- December 2010 - The Commonwealth Government announced that nicotine transdermal patches (21mg over 24 hours and 15 mg over 16 hours) would be listed on the Pharmaceutical Benefits Scheme, and would be extended to patients in the general community who have a prescription and who hold a concession card. These aids were previously only subsidised for Aboriginal and Torres Strait Islander people.¹¹⁷⁰
- 1 January 2012 - Lower strength nicotine patches (14mg and 7mg over 24 hours) were also listed on the Pharmaceutical Benefits Scheme.¹¹⁷¹

6. Support for Aboriginal and Torres Strait Islander communities to reduce smoking rates

- 31 May 2002 - The Commonwealth Minister for Health and Ageing announced a package of measures worth \$1 million over three years designed to address tobacco use in Aboriginal and Torres Strait Islander communities. This announcement coincided with the release of the National Aboriginal Community Controlled Health Organisation (NACCHO) report entitled *Tobacco: Time for Action*.¹¹⁷²

¹¹⁶⁹ Australian Government National Preventative Health Taskforce, *Technical Report 2: Tobacco Control in Australia: Making smoking history* (July 2009), Exhibit AUS-52, Section. 3.3.2.

¹¹⁷⁰ Australian Government National Preventative Health Taskforce, *Technical Report 2: Tobacco Control in Australia: Making smoking history* (July 2009), Exhibit AUS-52, Section. 3.3.2.

¹¹⁷¹ Australian Department of Health and Ageing, Pharmaceutical Benefits Scheme, "New Listings and Changes 1 January 2012", Exhibit AUS-443.

¹¹⁷² Health and Ageing Minister Patterson, "Launch of the Final Report - NACCHO Tobacco Control Project – Report of the National Aboriginal Community Controlled Health Organization" (31 May 2002), Exhibit AUS-444.

- 2006 to 2007 - The Commonwealth Government began implementing a Pregnancy Lifescripts Kit program.¹¹⁷³ The program helped fund and develop kits that were delivered to general practitioners, nurses and Aboriginal and Torres Strait Islander health workers, which gave them further skills and resources to assist women to adopt healthier behaviours during pregnancy, such as quitting smoking.
- 2005 to 2006 - The Commonwealth Budget allocated \$4.3 million over 3 years to help women, in particular Aboriginal and Torres Strait Islander women, to stop smoking during and after pregnancy.¹¹⁷⁴
- 2 October 2008 - Council of Australian Governments agreed to six targets in the *National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes*. One of the priority areas of this agreement was to tackle smoking through social marketing campaigns, Aboriginal and Torres Strait Islander-specific smoking cessation and support services, and strategies to improve the delivery of smoking cessation services, including nicotine replacement therapy.¹¹⁷⁵
- 2008 to 2012 - The Commonwealth Government allocated \$14.5m to Aboriginal and Torres Strait Islander tobacco control initiatives. The initiatives covered:
 - supporting research to build evidence around what works in helping Aboriginal and Torres Strait Islander people to quit smoking;
 - trialling community interventions; and

¹¹⁷³ Health and Ageing Minister Pyne, "Health and lifestyle support for pregnant women" (Media Release, 7 August 2006), Exhibit AUS-445.

¹¹⁷⁴ Commonwealth Treasury, *2005-2006 Budget Paper No 2, Budget Measures 2005-06* (10 May 2005), Exhibit AUS-446, p. 212.

¹¹⁷⁵ Council of Australian Governments, *National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes* (December 2008), Exhibit AUS-447, p. 8.

- offering smoking cessation training to staff working in indigenous health.¹¹⁷⁶
- 22 February 2011 - The Commonwealth Government allocated \$4 million for the development, production and implementation of a National Indigenous Anti-Smoking Television Commercial. The Aboriginal and Torres Strait Islander anti-smoking social marketing activity was launched by the Government on 28 March 2011.¹¹⁷⁷
- November 2008 - The Commonwealth Government announced \$806 million over four years as its contribution to the Council of Australian Governments' A\$1.6 billion *National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes*.¹¹⁷⁸

¹¹⁷⁶ Australian Government National Preventative Health Taskforce, *Technical Report 2: Tobacco Control in Australia - Making Smoking History* (July 2009), Exhibit AUS-52, p. 39.

¹¹⁷⁷ Health and Ageing Minister Roxon and Indigenous Health Minister Snowdon, "Break the Chain: Indigenous Anti Tobacco Campaign Kicks Off" (Media Release, 28 March 2011), Exhibit AUS-448.

¹¹⁷⁸ Council of Australian Governments Meeting, 29 November 2008, Communique, Exhibit AUS-449, p. 17.

ANNEXURE C: DETAILS OF RESTRICTIONS ON THE ADVERTISING AND PROMOTION OF TOBACCO PRODUCTS IN AUSTRALIA

1. This annexure outlines the broad range of advertising and promotion restrictions, other than tobacco plain packaging, which apply to tobacco products in Australia. These restrictions include: broadcast advertising bans; broader advertising bans; prohibitions on sponsorship; point of sale advertising bans; and retail display bans

A. HISTORY OF TOBACCO ADVERTISING AND PROMOTION RESTRICTIONS

1. 1966 – 1976: Early restrictions on tobacco advertising

2. Advertising of tobacco products in Australia has been progressively restricted since the 1960s. Prior to the implementation of any binding regulation, from 1966 cigarette advertising was governed by the Voluntary Code for Advertising of Cigarettes on Radio and Television (The Code).

3. The first bans on cigarette advertising for radio and television in Australia were phased in from 1973 to 1976.¹¹⁷⁹ These bans originally applied to cigarette and cigarette tobacco only, but were extended in 1988 to cover all types of tobacco products.¹¹⁸⁰

4. In 1972, the *Broadcasting and Television Act 1942* (Cth) was amended to require each advertisement broadcast or televised for cigarettes or cigarette tobacco to

¹¹⁷⁹ *Broadcasting and Television Amendment Act 1976* (Cth) (as made) (extract), Exhibit AUS-59, Section 5 inserting Section 100(5A) in the *Broadcasting and Television Act 1942* (Cth) (as made); Minister Robinson, "Minister's Second Reading Speech to the Broadcasting and Television Amendment Bill 1976", Commonwealth, *Parliamentary Debates*, House of Representatives, 20 May 1976, Exhibit AUS-60, p. 2299.

¹¹⁸⁰ *Broadcasting Legislation Amendment Act 1988* (Cth), Exhibit AUS-61, Section 41 amending Section 100(5A) of the *Broadcasting Act 1942* (Cth).

be followed immediately by the statement "Medical authorities warn that smoking is a health hazard."¹¹⁸¹

2. 1986 onwards: toys or products resembling tobacco banned

5. In 1986, South Australia became the first state to ban confectionery designed to resemble tobacco products.¹¹⁸² The ACT followed in 1991, Tasmania in 1996, Queensland in 1998, New South Wales in 1999, Northern Territory in 2002, Western Australia in 2006 and Victoria in 2010.¹¹⁸³ All states and territories now prohibit retailers from selling food, toys or other products that are designed to resemble tobacco products.¹¹⁸⁴ Some states and territories also prohibit food or toys that might encourage young people to smoke, or that promote, through the product or packaging, smoking products, their trademarks or the interests of the manufacturers or distributors.¹¹⁸⁵

¹¹⁸¹ *Broadcasting and Television Act 1972* (Cth), Exhibit AUS-309, (extract) Section 3 inserting Section 100A(1) in the *Broadcasting and Television Act 1942* (Cth).

¹¹⁸² *Tobacco Products Control Act 1986* (SA) (as made), Exhibit AUS-366, Section 10.

¹¹⁸³ *Tobacco (Amendment) Act 1990* (ACT), Exhibit AUS-351, Section 5 amending Section 10 of the *Tobacco Act 1927* (ACT); *Public Health Amendment (Tobacco Advertising) Act 1997* (NSW) (extract), Exhibit AUS-450, Schedule 1 item 10, inserting Section 61G in the *Public Health Act 1991* (NSW); *Tobacco Control Act 2002* (NT) (as made) Section 46, Exhibit AUS-374; *Tobacco Products (Prevention Of Supply To Children) Act 1998* (Qld) (extract), AUS-451, Section 24; *Public Health Amendment Act 1996* (Tas), Exhibit AUS-356, Section 4, inserting Section 121G in the *Public Health Act 1962* (Tas); *Tobacco Amendment (Protection of Children) Act 2009* (Vic), Exhibit AUS-452, Section 38, adding Sections 15N-15S to the *Tobacco Act 1987* (Vic); *Tobacco Products Control Act 2006* (WA) (as made), Exhibit AUS-350.

¹¹⁸⁴ *Tobacco Products Control Act 2006* (WA), Exhibit AUS-350, Section 106; *Tobacco Act 1927* (ACT), Exhibit AUS-453, Section 18; *Tobacco Control Act 2002* (NT), (as made), Exhibit AUS-374, Section 46; *Tobacco and Other Smoking Products Act 1998* (Qld) (extract), Exhibit AUS-454, Section 26ZS; *Tobacco Act 1987* (Vic), Exhibit AUS-455, (extract) Sections 15N, 15O(2)(a); *Public Health (Tobacco) Act 2008* (NSW) (extract), Exhibit AUS-404, Section 21; *Public Health Act 1997* (Tas) (extract), Exhibit AUS-456, section 68A; *Tobacco Products Control Act 1986* (SA) (as made), Exhibit AUS-366, Section 10.

¹¹⁸⁵ *Tobacco Act 1927* (ACT), Exhibit AUS-453, Section 18; *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Section 46, (products that encourage children to smoke); *Tobacco Act 1987* (Vic), Exhibit AUS-455, Sections 15N, 15O (2)(a) (might encourage young people to smoke); *Tobacco Products Regulation Act 1997* (SA), Exhibit AUS-457, Section 34A(2)(b) (might encourage young people to smoke).

3. 1987 – 1993: Broader bans on tobacco advertising and sponsorship

6. In the late 1980s and early 1990s, Commonwealth, state and territory governments introduced broader bans on advertising. From 1987, some states and territories enacted legislation banning advertisements for tobacco products from display in certain public places, or from where they could be seen or heard from a public place, as well as in theatres, and on films or video tapes.¹¹⁸⁶ The Commonwealth Government prohibited advertising of all tobacco products in newspapers and magazines published in Australia in 1990, complementing the ban on radio and television advertising.¹¹⁸⁷ From 1990, states and territories also prohibited various means of promotion of tobacco products, such as through competitions, coupons, prizes, vouchers and free samples.¹¹⁸⁸ However, states and territories

¹¹⁸⁶ *Tobacco Act 1987* (Vic) (as made), Exhibit AUS-462, Section 6; *Tobacco (Amendment) Act 1990* (ACT), Exhibit AUS-351, Section 5 amending s 10 of the *Tobacco Act 1927* (ACT); *Tobacco Advertising Prohibition Act 1991* (NSW) (as made) (extract), Exhibit AUS-372, Section 5(1); *Tobacco Products Control Act Amendment Act 1988* (SA) (extract), Exhibit AUS-458, Section 12, inserting Section 11a of the *Tobacco Products Control Act 1986* (SA); and *Tobacco Control Act 1990* (WA) (as made), Exhibit AUS-367, Section 5. See also Minister's Second Reading Speech to the Tobacco Bill 1990, Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, Exhibit AUS-459, pp. 1916-1917 (Mr Wilson). Note that the Northern Territory, Queensland and Tasmania did not have their own advertising bans in place at this time other than the applicable Commonwealth legislation: see e.g. the discussion in Northern Territory, *Parliamentary Debates*, Legislative Assembly, 19 November 1991, Exhibit AUS-460, pp. 3486-3487 (Mr Manzie). Tasmania's advertising bans came into effect between 1998 and 2000 under the *Public Health Act 1997* (Tas) (as made), Exhibit AUS-360, Sections 70-72 and the *Public Health Amendment (Tobacco) Act 2000* (Tas), Exhibit AUS-461, Section 12 inserting Section 72A into the *Public Health Act 1997* (Tas). Queensland introduced similar provisions on 31 May 2002 under the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 26, adding Sections 26A, 26B to the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998* (Qld). The Northern Territory's ban on similar advertising came into effect on 31 May 2003 under the *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Section 15.

¹¹⁸⁷ *Smoking and Tobacco Products Advertisements (Prohibition) Act 1989* (Cth) (as made), Exhibit AUS-62, Section 5(1).

¹¹⁸⁸ See *Tobacco Advertising Prohibition Act 1991* (NSW) (as made), Exhibit AUS-372, Sections 6(1), 7; *Tobacco Products Control Act Amendment Act 1988* (SA), Exhibit AUS-458, Section 12, inserting Sections 11d, 11e of the *Tobacco Products Control Act 1986* (SA); *Tobacco Act 1987* (Vic) (as made), Exhibit AUS-462, Sections 7-8; and *Tobacco Control Act 1990* (WA) (as made), Exhibit AUS-367, Sections 6, 7. Note that Tasmania enacted similar provisions with effect from 1 February 1998 in the *Public Health Act 1997* (Tas) (as made), Exhibit AUS-360, Section 69. From 10 November 1999, similar provisions were in place in the ACT: see *Tobacco (Amendment) Act 1999* (ACT), Exhibit AUS-463, Section 17, inserting Sections 11A-11C into *Tobacco Act 1927* (ACT).

continued, at this point, to permit the advertising of tobacco products within retail premises, including displays at the point of sale.¹¹⁸⁹

7. The Commonwealth Government continued to introduce broader restrictions on the broadcasting and publishing of tobacco advertisements,¹¹⁹⁰ which were consolidated in 1992 under the *Tobacco Advertising Prohibition Act 1992* (the TAP Act).¹¹⁹¹ The prohibitions on tobacco advertising¹¹⁹² included print media advertising, advertisements in film, videos, television or radio; advertising on tickets; the sale or supply or offer or hire of any item containing a tobacco advertisement to the public; displays that could be seen or heard from a public place, or from public transport or workplaces; and advertising of sponsorship.¹¹⁹³ Existing sponsorship contracts for Australian events were allowed to run their course, but no new sponsorships were permitted. This brought tobacco company sponsorships of high-profile Australian sporting events to an end, including the Australian Rugby League's "Winfield Cup" in 1995, and Benson & Hedges sponsorship of the World Series Cup cricket competition in 1996.

¹¹⁸⁹ See, e.g. *Tobacco (Amendment) Act 1990* (ACT), Exhibit AUS-351, Section 5 inserting Section 10(2)(c) in the *Tobacco Act 1927* (ACT); *Tobacco Advertising Prohibition Act 1991* (NSW) (as made), Exhibit AUS-372, Section 5(4)(e); *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 26 inserting new Sections 26A, 26B(1)(a) into the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998* (Qld); *Public Health Act 1997* (Tas) (as made), Exhibit AUS-360, Section 70.

¹¹⁹⁰ See e.g. the *Broadcasting Services Act 1992* (Cth) (as made), Exhibit AUS-63, Section 42(1) and Schedule 2 items 7(1)(a), 8(1)(a), 9(1)(a), 10(1)(a), 11(1)(a), which prohibited broadcasting licensees from broadcasting an advertisement, or sponsorship announcement, for cigarettes, cigarette tobacco or any other tobacco product and the *Smoking and Tobacco Products Advertisements (Prohibition) Act 1989* (Cth) (as made), Exhibit AUS-62, Section 5(1), which prohibited advertising of tobacco products in newspapers and magazines printed in Australia for Australian consumers as of December 1990.

¹¹⁹¹ *Tobacco Advertising Prohibition Act 1992* (Cth) (as made), Exhibit AUS-464, Sections 13, 15.

¹¹⁹² "Tobacco advertisement" was defined as any writing, still or moving picture, sign, symbol or other visual image or any audible message, or combination of two or more of those things, that gives publicity to, otherwise promotes or is intended to promote smoking, the purchase or use of a tobacco product or range of tobacco products, the whole or part of a trade mark or design that includes a tobacco product, the whole or part of a name of a person who is a manufacturer of tobacco products and whose name appears on the packaging of some or all of those products, or any other words or designs closely associated with a tobacco product or range of tobacco products (*Tobacco Advertising Prohibition Act 1992* (Cth) (as made and current), Exhibit AUS-64, Section 9).

¹¹⁹³ *Tobacco Advertising Prohibition Act 1992* (Cth) (as made), Exhibit AUS-464, Sections 9(1), 10(1), 15.

8. There were some exceptions to the TAP Act ban. Tobacco advertising was permitted:

- in publications distributed solely to persons in the tobacco trade;
- at the point of sale at retail premises (only if permitted by state and territory law);
- on a tobacco product itself, or on the package of a tobacco product; and
- at major international sporting or cultural events held in Australia (if granted an exemption by the Minister).¹¹⁹⁴

9. Within a year, TAP Act regulations had limited the point of sale exception to advertising that was only visible from within retail premises.¹¹⁹⁵

10. In 2000, the Commonwealth Government introduced legislation designed to "end all association of tobacco sponsorship and sport in [Australia]" by removing the Minister's discretion to grant an exemption from the general ban on tobacco advertising at international sporting or cultural events held in Australia.¹¹⁹⁶ As of October 2000, no new international events held in Australia were granted an exemption and those events that had already been granted an exemption¹¹⁹⁷ were required to end tobacco sponsorship by October 2006.

¹¹⁹⁴ *Tobacco Advertising Prohibition Act 1992* (Cth) (as made), Exhibit AUS-464, Sections 9(2)-9(4), 10(3), 16, 18. The TAP Act continues to maintain some exceptions to allow advertising under certain limited circumstances, including accidental or incidental broadcasts and publications: *Tobacco Advertising Prohibition Act 1992* (Cth), Exhibit AUS-64, Sections 9, 14, 19.

¹¹⁹⁵ *Tobacco Advertising Prohibition Regulations 1993* (Cth), Exhibit AUS-465, Regulations 7, 8.

¹¹⁹⁶ *Tobacco Advertising Prohibition Amendment Act 2000* (Cth), Exhibit AUS-65, Schedule 1 item 1, repealing and substituting Section 18(2) of the TAP Act; Minister's Second Reading Speech to the Tobacco Advertising Prohibition Amendment Bill 2000, Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2000, Exhibit AUS-66, p. 16625 (Dr Wooldridge).

¹¹⁹⁷ At that stage the events that continued to carry tobacco sponsorship were: Ladies Masters (golf); Indy 300; Rally Australia; Australian Motorcycle Grand Prix; and Formula 1 Australian Grand Prix.

4. 1998 – 2005: Advertising banned at point of sale and tobacco display restricted

11. In the context of implementing the goals of the *National Tobacco Strategy 1999 to 2003*, between 1998 and 2007 the states and territories enacted legislation prohibiting tobacco advertising at the point of sale and restricting the display of tobacco products within retail premises.¹¹⁹⁸

12. The changes to tobacco advertising legislation during this period occurred in all states and territories. One example is Queensland, where from 31 May 2002, advertising of tobacco products at retail premises was prohibited, and restrictions were introduced on the display of tobacco products which required that tobacco products only be displayed at the point of sale at retail premises (either on the seller's side at the counter or otherwise so that customers could not access tobacco products without the assistance of an employee) or anywhere within a duty free shop. In

¹¹⁹⁸ See, with respect to restrictions on the display of tobacco products: *Tobacco (Amendment) Act 1999* (ACT), Exhibit AUS-463, Sections 4-5, 12 and 13, amending Section 3, inserting new Sections 3F-3K and 9A-9B of the *Tobacco Act 1927* (ACT); *Public Health (Tobacco) Regulation 1999* (NSW) (as made), Exhibit AUS-466, Regulations 8, 9 and 11; *Tobacco Control Regulations 2002* (NT) (as made), Exhibit AUS-385, Regulation 21; *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 26, adding Sections 26A-26F to the *Tobacco and Other Smoking Products Act 1998* (Qld); *Tobacco Products Variation Regulations 2006 (No 273)* (SA), Exhibit AUS-467, Regulation 4(3), inserting Regulations 6(2a) and 6(2c) into the *Tobacco Products Regulations 2004* (SA); *Public Health Act 1997* (Tas) (as made), Exhibit AUS-360, Sections 70-72; *Tobacco (Amendment) Act 2000* (Vic), Exhibit AUS-390, Section 9, adding Section 6A to the *Tobacco Act 1987* (Vic); and *Tobacco Products Control Act 2006* (WA) (as made), Exhibit AUS-350, Sections 22-23. See, with respect to prohibitions on advertising at the point of sale: *Tobacco (Amendment) Act 1999* (ACT), Exhibit AUS-463, Section 5 inserting Part 1A in the *Tobacco Act 1927* (ACT); *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 26 inserting new Part 2A, Division 1 in the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998* (Qld); *Public Health Amendment (Tobacco Advertising) Act 1997* (NSW), Exhibit AUS-450, Schedule 1, item 10 inserting Section 61B in the *Public Health Act 1991* (NSW) and repealing the *Tobacco Advertising Prohibition Act 1991* (NSW) especially Section 5(4)(e); *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Section 15; *Tobacco Products Regulation (Further Restrictions) Amendment Act 2004* (SA), Exhibit AUS-402, Section 15 amending Section 40 of the *Tobacco Products Regulation Act 1997* (SA); *Public Health Act 1997* (Tas) (as made), Exhibit AUS-360, Section 70; *Tobacco (Amendment) Act 2000* (Vic), Exhibit AUS-390, Sections 8, 9, amending Section 6 and inserting Section 6A into the *Tobacco Act 1987* (Vic); *Tobacco Products Control Act 2006* (WA) (as made), Exhibit AUS-350, Sections 31-32.

addition, the displays were limited to one packet for each product line of cigarettes, or 13 individual cigars for each product line of cigars.¹¹⁹⁹

5. 2006 onwards: Fruit and confectionery flavoured cigarettes banned

13. South Australia was the first state to ban certain cigarettes on the basis that they were fruit or confectionery flavoured and hence appealing to children.¹²⁰⁰ All remaining states and territories have since banned, or given the Minister power to ban, tobacco products with a fruit, confectionery or sweet flavour or that are otherwise attractive to children.¹²⁰¹

6. 2009: New South Wales banned certain on-pack advertising

14. In 2009, New South Wales banned tobacco packaging that: contained any statement alluding to sporting, sexual or business success; depicted wholly or in part people or cartoon characters; depicted scenes or activities, words, representations or illustrations that have appeal to children or young persons; or displayed any hologram.¹²⁰²

¹¹⁹⁹ *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-387, Section 26, adding Sections 26A-26F to the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998* (Qld). "Product line" was defined to mean a smoking product distinguishable from other kinds of smoking product by one or more of the following: trade mark, brand name, nicotine or tar content, flavour, or number of items in the immediate package sold: see *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), Exhibit AUS-487, Section 49(2) inserting the definition of "product line" in the Schedule (Dictionary). Cigar displays were permitted to be located other than at a point of sale if they were in a humidified container or room, with additional access and supervision restrictions.

¹²⁰⁰ *Tobacco Products Regulation (Prohibited Tobacco Products) Amendment Act 2006* (SA), Exhibit AUS-468, Section 4, inserting Section 34A in the *Tobacco Products Regulation Act 1997* (SA).

¹²⁰¹ Products banned in the ACT, Queensland and Tasmania: *Tobacco Act 1927* (ACT), Exhibit AUS-347, Section 21; *Tobacco and Other Smoking Products Act 1998* (Qld), Exhibit AUS-269, Section 26ZT; and *Public Health Act 1997* (Tas), Exhibit AUS-456, Section 68A. Minister has power to ban in New South Wales, Victoria and South Australia: *Public Health (Tobacco) Act 2008* (NSW), Exhibit AUS-267, Section 29; *Tobacco Act 1987* (Vic), Exhibit AUS-455, Sections 15N, 15O(2)(a); *Tobacco Products Regulation Act 1997* (SA), Exhibit AUS-357, Section 34A(2).

¹²⁰² *Public Health (Tobacco) Regulations 2009* (NSW), Exhibit AUS-469, Regulation 5.

7. 2010 – 2012: Complete ban on retail display of tobacco products

15. In 2009, the NPHT¹²⁰³ recommended that legislation be amended to ensure that tobacco was out of sight in retail outlets in all jurisdictions.¹²⁰⁴ On 1 January 2010, the ACT became the first jurisdiction to implement a *complete* ban on the *display* of tobacco products at *all* retail premises.¹²⁰⁵ All remaining states and territories commenced similar legislation between 2010 and 2012¹²⁰⁶ with some exceptions.

16. The following table sets out key dates on which the states and territories introduced bans on tobacco advertising at points of sale and bans on the display of tobacco products at retail locations. The table also includes information on exemptions to the bans:

<i>State/Territory</i>	<i>Point of sale advertising ban</i>	<i>Display ban (standard retailers)</i>	<i>Display ban (specialist tobacconists)</i>	<i>Exemptions</i>
Tasmania	1 February 1998 ¹²⁰⁷	1 February 2011	1 March 2012	None

¹²⁰³ The National Preventative Health Taskforce is a body established by the Federal Government in April 2008 to provide advice on national health policy and to develop a National Preventative Health Strategy. In September 2009 the NPHT released its National Preventative Health Strategy entitled *Australia: the healthiest country by 2020*, with a focus on preventing or minimising harms caused by tobacco, excess alcohol consumption and obesity: Australian Government National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020 - National Preventative Health Strategy – the roadmap for action* (30 June 2009), Exhibit AUS-67, p. 7.

¹²⁰⁴ Australian Government National Preventative Health Taskforce, *Australia: the healthiest country by 2020, National Preventative Health Strategy, The Roadmap for Action*, (30 June 2009), Exhibit AUS-67, p. 181.

¹²⁰⁵ *Tobacco Amendment Act 2008* (ACT), Exhibit AUS-470, Section 8, replacing Section 10 of the *Tobacco Act 1927* (ACT).

¹²⁰⁶ See for example (not exhaustive) *Hospital and Health Boards Act 2011* (Qld) (previously *Health and Hospitals Network Act 2011* (Qld)), Exhibit AUS-471, Section 326 replacing *Tobacco and Other Smoking Products Act 1998* (Qld) Sections 26A and 26C; *Public Health (Tobacco) Act 2008* (NSW) (as made), Exhibit AUS-404, Section 9, Schedule 1 item 5(2)(b); *Tobacco Control Legislation Amendment Act 2010* (NT), Exhibit AUS-395, Section 20, amending *Tobacco Control Act 2002* (NT) Section 20.

¹²⁰⁷ *Public Health Act 1997* (Tas) (as made), Exhibit AUS-360, Section 70; later amended by the *Public Health Amendment Act 2000* (Tas), Exhibit AUS-472, Section 15.

<i>State/Territory</i>	<i>Point of sale advertising ban</i>	<i>Display ban (standard retailers)</i>	<i>Display ban (specialist tobacconists)</i>	<i>Exemptions</i>
Victoria	1 January 2002 ¹²⁰⁸	1 January 2011	1 January 2011	Specialist tobacconists and duty free stores may display tobacco "product line".
New South Wales	31 August 1999 ¹²⁰⁹	1 July 2010	1 July 2013	None
Queensland	31 May 2002 ¹²¹⁰	18 November 2011	18 November 2011	None
South Australia	31 March 2005 ¹²¹¹	1 January 2012	31 December 2014	None after 31 December 2014
Western Australia	31 July 2006 ¹²¹²	22 September 2010	22 September 2010	Specialist tobacconists may display in an area not greater than 1 square metre
Northern Territory	31 May 2003 ¹²¹³	2 January 2011	2 January 2011	None
Australian Capital Territory	10 May 2000 ¹²¹⁴	1 Jan 2010	1 January 2011	None

¹²⁰⁸ *Tobacco Act 1987* (Vic), Exhibit AUS-462, Section 6(2), as amended by *Tobacco (Amendment) Act 2000* (Vic) Sections 8 and 9.

¹²⁰⁹ *Public Health Act 1991* (NSW) Section 61B, as amended by the *Public Health Amendment (Tobacco Advertising) Act 1997* (NSW), Exhibit AUS-450, Schedule 1, clause 10.

¹²¹⁰ *Tobacco and Other Smoking Products Act 1998* (Qld) Exhibit AUS-269, Section 26A; restrictions clarified 31 December 2005 by *Tobacco and Other Smoking Products Amendment Act 2004* (Qld) Exhibit AUS-396, Section 19.

¹²¹¹ *Tobacco Products Regulation Act 1997* (SA) Section 40, as amended by *Tobacco Products Regulation (Further Restrictions) Amendment Act 2004* (SA), Exhibit AUS-402, Section 15.

¹²¹² *Tobacco Products Control Act 2006* (WA), Exhibit AUS-350, Section 31 (prohibiting advertisement that could be seen or heard from a public place).

¹²¹³ *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374, Section 15.

¹²¹⁴ *Tobacco Act 1927* (ACT) Sections 10 and 20, as amended by the *Tobacco Amendment Act 2008* (ACT), Exhibit AUS-470, Sections 8 and 10. Earlier partial restrictions had commenced on 10 May 2000: *Tobacco Act 1927* (ACT) Sections 3F to 3L, as inserted by *Tobacco (Amendment) Act 1999* (ACT), Exhibit AUS-463, Section 5.

8. 2012: Internet advertising restricted

17. From 6 September 2012, amendments to the TAP Act made by the Commonwealth Government extended existing restrictions on tobacco advertising to the internet and other electronic media in Australia (for example, mobile phones).¹²¹⁵ A key exemption to the prohibition on electronic advertising allows point of sale advertising for online sales of tobacco products, but even here the exception applies only where it complies with state and territory laws or Commonwealth regulations.¹²¹⁶

18. In September 2012, the Commonwealth Government also regulated online point of sale tobacco advertising in relation to content, format and location of such advertisements, as well as health warnings. The *Tobacco Advertising Prohibition Amendment Regulation 2012* required that online advertisements be presented in a plain, text-only format, without product images, and accompanied by health warnings and age warnings.¹²¹⁷ Currently, no state or territory has yet passed legislation expressly dealing with online point of sale tobacco advertising¹²¹⁸. Accordingly, Commonwealth regulations apply in all jurisdictions.

B. RESTRICTIONS AT THE POINT OF SALE

1. Point of sale display bans

19. Bans on the display of tobacco products at retail locations in Australia require tobacco products to be kept out of sight from customers. A customer entering a shop to buy tobacco products is not meant to be exposed to any trademarks and only very

¹²¹⁵ *Tobacco Advertising Prohibition Amendment Act 2012* (Cth), Exhibit AUS-473, Schedule 1, items 5 and 13, inserting Sections 10(1)(da) and 15A respectively into the *TAP Act*.

¹²¹⁶ *Tobacco Advertising Prohibition Act 1992* (Cth), Exhibit AUS-64, Sections 16A, 16B. See also Minister's Second Reading Speech to the Tobacco Advertising Prohibition Amendment Bill 2010, Commonwealth, *Parliamentary Debates* House of Representatives, 17 November 2010, Exhibit AUS-474, p. 2692 (Ms Roxon).

¹²¹⁷ *Tobacco Advertising Prohibition Amendment Regulation 2012 (No. 1)* (Cth), Exhibit AUS-68, Schedule 1 item 4, adding Regulation 8A into the *Tobacco Advertising Prohibition Regulation 1993* (Cth).

¹²¹⁸ South Australia bans the sale of tobacco products over the internet: *Tobacco Products Regulation (Miscellaneous) Amendment Act 2007* (SA), Exhibit AUS-377, Section 4 inserting new Section 30(5) into the *Tobacco Products Regulation Act 1997* (SA).

limited brand information. For example in Victoria, retailers may display one price board listing brand name; flavour (e.g. menthol); pack size; and price (including any discount). The price board and the lettering on it is also regulated.

20. Audible promotion of products is prohibited and retailers are advised that if a customer does not request a specific brand the retailer is only allowed to ask general questions such as "What brand do you want?" or "What flavour are they?" but may not mention a specific brand themselves.

21. The specific requirements for storing tobacco products vary between states and territories although generally tobacco may be stored behind closed cupboard doors or opaque curtains, in drawers or under the counter.¹²¹⁹ Some states and territories also require the storage unit to be located in a certain place or position, or at a certain distance from customers, public entrances, or confectionery or products marketed to children.

22. Customers may see tobacco products incidentally during a transaction, such as when a customer requests a product and the retailer opens a tobacco storage unit. More than incidental display (such as leaving the doors open for extended periods) may place retailers at risk of prosecution. The New South Wales (NSW) Guidelines for Tobacco Retailers, for instance, advises retailers that they will be at a higher risk of prosecution in using public-facing cupboards with large opening doors because of the likelihood of substantial and repeated display of products throughout business hours and potentially for longer periods of time through error or oversight in failing to close the doors.¹²²⁰ In Victoria, such temporary displays can only be in response to a

¹²¹⁹ See, e.g. NSW Department of Health, "Tobacco storage images", available at: http://www.health.nsw.gov.au/tobacco/Pages/information_for_tobacco_retailers_and_consumers.aspx (last accessed 7 March 2015), Exhibit AUS-475.

¹²²⁰ NSW Department of Health, "Guidelines for Tobacco Retailers in NSW" (available at: <http://www.health.nsw.gov.au/tobacco/Factsheets/guidelines-for-tobacco-retailers-in-nsw.pdf> (last accessed 7 March 2015), Exhibit AUS-476.

request by a customer asking to purchase a specified tobacco product, i.e. asking for the product by brand name.¹²²¹

2. Strict requirements apply to the display of tobacco brand names and prices (price boards)

23. In all states and territories other than Queensland and the ACT consumers may see limited information about available tobacco brands (such as brand name, pack size and price) on a price board. Most states also allow price tickets. Each state and territory has specific requirements for how retailers may display information about available tobacco products and prices on price boards, price tickets or price lists. The requirements cover the size, font, and colour of the price boards or price tickets and in some instances the lighting and location of the price board or tickets. Key requirements for states and territories are summarised below. Victoria is the only state that specifically allows retailers to advertise price discounts on a price board.¹²²²

24. Details of price board regulations are as follows:

<i>State/Territory</i>	<i>Price board or price tickets</i>
Tasmania ¹²²³	<p>Retailers may display one price board. Price boards must be no larger than 100 x 75 cm. They must display text on one side only, limited to tobacco brand name (mentioned once), packet and carton, prices and quantities, and headings relating to this information. The text must be black, with no bold, italics, or underline in Arial font of 80 point size (2cm) or less on a white background. The price board cannot use any colours.</p> <p>In addition, retailers may display one square metre of price tickets 'during the fleeting incidental display of tobacco products'. Retailers may display one price ticket per tobacco product line positioned immediately adjacent to the tobacco</p>

¹²²¹ *Tobacco Act 1987* (Vic), Exhibit AUS-462, Section 6(3)(ba); see also VIC Department of Health, "Tobacco Retailer Guide" available at: [http://docs.health.vic.gov.au/docs/doc/184C77E1237E1D92CA2578CB00771C3F/\\$FILE/1302009_tobacco_retailer_guide_feb13_WEB.pdf](http://docs.health.vic.gov.au/docs/doc/184C77E1237E1D92CA2578CB00771C3F/$FILE/1302009_tobacco_retailer_guide_feb13_WEB.pdf) (last accessed 7 March 2015), Exhibit AUS-279.

¹²²² See for example (non-exhaustive) Northern Territory, Queensland, Tasmania, and Western Australia do not allow price discounting advertising on price boards: see for example *Tobacco Control Act 2002* (NT) (as made), Exhibit AUS-374.

¹²²³ See Tasmanian Department of Health and Human Services, *Tobacco Retailers Guide* and *Guidelines for the Sale of Tobacco products*, Exhibit AUS-477.

<i>State/Territory</i>	Price board or price tickets
	product to which it relates. Price tickets must be limited to tobacco brand name (mentioned once), a barcode, symbol identifying country of origin, packet and carton prices and quantities and headings relating to this information. Coloured text and background is permitted when consistent with all price ticketing in store (two colours only and colouring must not correspond to tobacco packaging). Text must be black (no bold, italics or underline) on a white background with a maximum size of two centimetres high (80 point size) for sales units and five millimetres (20 point size) for vending machines.
Victoria ¹²²⁴	Retailers may display one price board listing: ¹²²⁵ brand name; flavour (e.g. menthol); pack size; and price (including any discount). Price board must be no bigger than 1.5 m by 1.5 m (150 cm x 150 cm), with lettering no bigger than 2.1 cm high x 1.5 cm wide, printed on one side only in either black and white or in up to four (4) colours, none of which is fluorescent. It may not be lit or displayed in a way that makes the price board more noticeable than other signs or price tickets in the shop. The price board must contain one of the prescribed graphic health warnings on or immediately next to the price board.
New South Wales ¹²²⁶	Tobacco retailers may use a single price board OR price tickets (but not both). If tobacco retailers choose to use, price tickets they must ensure that they: only use two colours - one for the ticket and one for the price; are not coloured in fluorescent colours or in a more distinctive manner than price tickets used for other merchandise in the retail outlet; are not highlighted by any lighting; are no larger than 35 square centimetres in area; contain lettering not more than two centimetres in height and not more than 1.5 centimetres in width; do not contain information other than the name of the product line, a bar code or other identifying codes, the price and a symbol indicating the country of origin;

¹²²⁴ Department of Health (Vic), "Tobacco Retailers fact sheet" (October 2010) available at: [http://docs.health.vic.gov.au/docs/doc/77404BA8E1832995CA2578D700742FD2/\\$FILE/retailers_fact_sheet.pdf](http://docs.health.vic.gov.au/docs/doc/77404BA8E1832995CA2578D700742FD2/$FILE/retailers_fact_sheet.pdf) (last accessed 7 March 2015), Exhibit AUS-478 and VIC Department of Health, "Tobacco Retailer Guide" available at: [http://docs.health.vic.gov.au/docs/doc/184C77E1237E1D92CA2578CB00771C3F/\\$FILE/1302009_tobacco_retailer_guide_feb13_WEB.pdf](http://docs.health.vic.gov.au/docs/doc/184C77E1237E1D92CA2578CB00771C3F/$FILE/1302009_tobacco_retailer_guide_feb13_WEB.pdf) (last accessed 7 March 2015), AUS-279.

¹²²⁵ VIC Department of Health, "Tobacco Retailer Guide" available at: [http://docs.health.vic.gov.au/docs/doc/184C77E1237E1D92CA2578CB00771C3F/\\$FILE/1302009_tobacco_retailer_guide_feb13_WEB.pdf](http://docs.health.vic.gov.au/docs/doc/184C77E1237E1D92CA2578CB00771C3F/$FILE/1302009_tobacco_retailer_guide_feb13_WEB.pdf) (last accessed 7 March 2015), AUS-279.

¹²²⁶ Department of Health (NSW), Retailer Factsheet 5, "Ban on Display of tobacco and smoking products in retail outlets from 1 July 2013" available at: <http://www.health.nsw.gov.au/tobacco/Factsheets/ban-on-the-display-of-tobacco.pdf> (last accessed 7 March 2015), Exhibit AUS-479.

<i>State/Territory</i>	Price board or price tickets
Queensland ¹²²⁷	<p>display the price and product name only once for each product line carried by the retailer; have no other article or thing attached to them; and are not arranged with other price tickets so as to create an image or visual effect from the arrangement that would be incomplete if any one ticket were removed.</p> <p>If tobacco retailers choose to use a price board, they must ensure that they only use one and it must: not contain information other than the names of the product lines and prices; be no larger than 2,000 square centimetres in area; have a black background with white lettering or a white background with black lettering (but not both); contain lettering that is not more than two centimetres in height and not more than 1.5 centimetres in width; display the price and product name only once for each product line carried by the retailer; have no other article or thing attached to it; and not be highlighted by any lighting.</p> <p>Price tickets for smoking products must not be larger than 80mm x 40mm.</p> <p>Price tickets may only display information stating the name of the product line, packet size, price, country of origin, or bar code or similar identification code. The words on the price ticket must be the same font style, size and type (e.g. Arial, Times New Roman) as all other smoking product price tickets, with white text on a black background, or black text on a white background. A single colour with a different coloured background (e.g. black text on a yellow background), can be used if this dual colour scheme is used elsewhere in the retail outlet. No other information (e.g. 'special' or 'discount') is allowed on the price tickets. The tickets must be fixed to the relevant point of sale. Booklets of price tickets or other selection aids with information about smoking products are not allowed.</p> <p>Price boards are not permitted.</p>
South Australia ¹²²⁸	<p>Price tickets: Price tickets are permitted but must be compliant with the regulations. These regulations cover the size, colour and information that can be displayed on the tickets. Advertising of discounted tobacco products using 'Special' price tickets or other</p>

¹²²⁷ Queensland Government, "Requirements for retailers" available at: http://www.health.qld.gov.au/tobaccolaws/documents/reqs_retailers.pdf (last accessed 4 March 2015), Exhibit AUS-480.

¹²²⁸ SA Health, "Point of sale restrictions for tobacco retailers" available at: <http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/protecting+public+health/tobacco+laws+and+businesses/requirements+for+licensed+tobacco+premises/point+of+sale+display+restrictions+for+tobacco+retailers#Regulations> regarding displaying tobacco products (last accessed 4 March 2015), Exhibit AUS-481.

<i>State/Territory</i>	Price board or price tickets
Western Australia ¹²²⁹	<p>means is prohibited.</p> <p>Price boards: One prescribed price board is permitted. The total surface area of the board (including, in the case of a sandwich board, the combined surface area of both sides) must not be larger than 0.5m², or 1m² in specialist tobacconists. It must have black text in a standard font not exceeding 20mm in height on a white background. The information allowed on the price board is the same as for price tickets.</p> <p>Price lists: Price lists such as loose sheets of paper that can be handed to customers are not permitted.</p> <hr/> <p>Information about the availability or price of tobacco products may be provided on price tickets and price boards (information sign). Information may also be displayed in the form of a price list.</p> <p>It may be provided in a price list provided that it: is available only on the request of a customer; is not available to be taken away by a customer; does not exceed A4 size; if more than one page, the pages are bound or fixed together so that they cannot be separated easily; at the top of each page is a Quitline logo that is at least 1 cm high; a facsimile of a package not greater than 50% of the actual size of the front face of the package is permitted.</p> <p>Price tickets must: not exceed 35 cm² in area; and must have — a white background with black lettering, or a black background with white lettering, or the same colour lettering and the same colour background as the other price tickets displayed in the premises, unless the price ticket is in electronic form on a vending machine; not contain a fluorescent colour unless the price ticket is in electronic form on a vending machine; not contain lettering or numbers for the product line information exceeding 8 mm in height; and not contain lettering or numbers for the product line information of a height exceeding that of the lettering or numbers for the price.</p> <p>Information signs must not contain information relating to the availability or price of tobacco products or smoking implements other than describing the product lines available, if the product line is packed in more than one type of package, the types of package available, the country of origin of the available tobacco products or smoking implements, and the price or prices of the</p>

¹²²⁹ WA Department of Health, "Tobacco Products Control Act 2006 Guideline: Price Tickets" available at: http://www.tobaccocontrol.health.wa.gov.au/licensing/docs/Price_Ticket_Guidelines.pdf (last accessed 4 March 2015), Exhibit AUS-482 and WA Department of Health, "Retailer Fact Sheet No 2" available at: <http://www.tobaccocontrol.health.wa.gov.au/legislation/docs/retailer-fact-sheet-2.pdf> (last accessed 4 March 2015), Exhibit AUS-483.

<i>State/Territory</i>	Price board or price tickets
	available tobacco products or smoking implements; must display the Quitline logo that is at least 2 cm in height; and must contain only the words 'Tobacco products sold here' or 'Tobacco products and smoking implements sold here', as the case requires. A health warning sign must be displayed adjacent to the sign.
	A price board cannot exceed one square metre in size, and must not be located within one metre of any product designed or marketed for consumption by children (including confectionery products). Price boards should not be used where they face the window or shop front of a tobacco retail outlet if they are less than 2 metres from the entrance. In addition to the use of price boards, it is also open to tobacco retailers to keep a price list behind the counter that can be produced at the request of a customer.
Northern Territory ¹²³⁰	The use of small product labels on storage units will be permitted to enable retailers to quickly identify and select products that are located inside the enclosed units. Retailers should ensure that if product labels are used, the labels must: display the product name only once; not be easily legible to any member of the public inside or outside the retail outlet; not be intended to or otherwise attract attention, promote a particular tobacco product, or the sale of tobacco products generally; not include any reference to price; and adopt a standardized text size, font and colour. Product labels may include a barcode or product reference number where necessary.
Australian Capital Territory ¹²³¹	Price tickets may be displayed for product lines which are available, or usually available, for sale. These must not exceed 15cm ² in size and must contain only text printed in 12 point, Times New Roman type (a bar code or similar identifying code may be included). A price ticket must be located at least 1 metre from any part of the customer service area. Price tickets may be displayed below or next to the blocked-out smoking products. Price tickets may also be arranged sequentially if it is not possible to place the price ticket below or adjacent to smoking products.

¹²³⁰ NT Government, "Displays and Point of Sale: banning tobacco retail displays, Frequently Asked Questions" available at: http://www.health.nt.gov.au/library/scripts/objectifyMedia.aspx?file=pdf/52/95.pdf&siteID=1&str_title=Fact%20Sheet%20-%20Displays%20and%20Point%20of%20Sale.pdf (last accessed 4 March 2015), Exhibit AUS-484.

¹²³¹ Department of Health (ACT), "Guide to the Sale of Smoking Products in the ACT" available at: <http://health.act.gov.au/health-services/population-health/health-protection-service/tobacco-and-smoke-free/tobacco#> (last accessed 4 March 2015), Exhibit AUS-485.

<i>State/Territory</i>	Price board or price tickets
	A document indicating the price of smoking products cannot be given to a customer to read. If needed, a barcode sheet may be provided to staff to assist the scanning of prices. To ensure it is not a price ticket within the meaning of the Act, only the barcode and product names should be on this sheet. The sheet should be kept under the counter.

3. Retailers are limited in what they can say to customers

25. Legislation prohibiting tobacco advertising may include retailer advertising or over-the-counter word of mouth promotion. In all states and territories other than Queensland, the relevant legislation specifically applies to audible advertising. In *Robinson v Eureka Operations Pty Ltd*,¹²³² the New South Wales Supreme Court found that the action of a salesperson in telling a customer who asked for a single pack of cigarettes that the customer could buy a second pack of cigarettes at a reduced price contravened the relevant prohibitions against display of tobacco advertisements, including "audible messages".

26. Some states and territories provide guidelines about what a retailer can say to a customer. For instance, the Guide to the Sale of Tobacco Products in the ACT provides that an ACT retailer may tell customers what products are available, their price and answer any questions but may not say anything that would constitute the promotion of particular products or of smoking generally. The Victorian Tobacco Retailer Guide provides that if a customer does not request a specific brand the retailer may ask general questions such as "What brand do you want?" or "What flavour are they?" but may not mention a specific brand themselves.

4. Cigar restrictions

27. Some states and territories have different requirements for the storage or display of cigars. In Queensland, customers may view cigars in a humidified room, accompanied by the tobacco retailer. In Victoria, cigars may be displayed in a

¹²³² *Robinson v Eureka Operations* (2008)192 A Crim R 234, Exhibit AUS-486.

humidor. In Western Australia, certain tobacco retailers may keep cigars in cigar cabinets.

28. New South Wales and Western Australia specifically provide for tobacco retailers to open cigar packages to sell single cigars.¹²³³ Western Australia also specifically allows for additional signage to provide information about the availability and price of cigars in a cigar cabinet.¹²³⁴

¹²³³ *Public Health (Tobacco) Act 2008* (NSW), Exhibit AUS-267, Section 6(3); *Tobacco Products Control Regulations 2006* (WA), Exhibit AUS-365, Regulation 36(2).

¹²³⁴ *Tobacco Products Control Regulations 2006* (WA), Exhibit AUS-365, Regulation 42.

ANNEXURE D: PROTECTION OF TRADEMARKS AND GEOGRAPHICAL INDICATIONS IN AUSTRALIA

1. There are a range of mechanisms for the protection of trademarks (including well-known trademarks) and geographical indications under Australian law. These protections include: statutory protections under the *Trade Marks Act 1995* (Cth) (Trade Marks Act); other statutory protections against unfair competition; and common law actions such as passing off that protect the reputation associated with trademarks.

2. Through these mechanisms, Australia complies with its TRIPS Agreement and Paris Convention obligations with respect to trademarks and geographical indications.

A. TRADE MARKS ACT

1. Registration

3. The Trade Marks Act establishes the legal requirements for the registration of trademarks in Australia and the rights accorded to owners and authorised users of registered trademarks.

4. Under the Trade Marks Act, a person can apply to have certain signs registered as a trademark in respect of particular goods and services. Section 17 of the Trade Marks Act defines a trademark as: "[a] sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by another person."¹²³⁵ The Registrar must register the trademark unless: the application for registration was not made in accordance with the Trade Marks Act;¹²³⁶ there are grounds for rejection of the application; or the application for registration has been successfully opposed.¹²³⁷

¹²³⁵ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 17. Section 6 defines a "sign" as: "includes the following or any combination of the following, namely, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent."

¹²³⁶ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 27(1) provides:

(continued)

5. An application for registration must be rejected if the trademark, *inter alia*, consists of or includes a sign prohibited under the Regulations (section 39); is not capable of distinguishing between goods and services of the applicant and those of other persons (section 41); contains or consists of scandalous matter or its use would be contrary to law (section 42); is likely to deceive or cause confusion (section 43); or is substantially identical or deceptively similar to a prior registered trademark (section 44). The registration of a trademark can be opposed on these same grounds¹²³⁸ as well as additional grounds, including: if the applicant is not the owner of the trademark (section 58); the applicant does not intend to use the trademark (section 59); where another trademark had acquired a reputation in Australia and the use of the trademark being registered would be likely to deceive or cause confusion (section 60); and where the trademark contains or consists of a false geographical indication (section 61).

6. A registered trademark may remain on the register, provided it is renewed every ten years.¹²³⁹ The registration of a trademark may be cancelled¹²⁴⁰, revoked¹²⁴¹, amended¹²⁴² and the Register may be rectified¹²⁴³ under specific circumstances.

"A person may apply for the registration of a trade mark in respect of goods and/or services if: (a) the person claims to be the owner of the trade mark; and (b) one of the following applies: (i) the person is using or intends to use the trade mark in relation to the goods and/or services; (ii) the person has authorised or intends to authorise another person to use the trade mark in relation to the goods and/or services; (iii) the person intends to assign the trade mark to a body corporate that is about to be constituted with a view to the use by the body corporate of the trade mark in relation to the goods and/or services."

¹²³⁷ See *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 33 (the obligation to accept applications for registration); and *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 68 (the obligation to register a trademark). *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 38 authorises the Registrar to revoke acceptance of an application for the registration of a trademark in specified circumstances. *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 84A provides that the registration of a trademark may subsequently be revoked by the Registrar in specified circumstances.

¹²³⁸ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 57 provides: "The registration of a trade mark may be opposed on any of the grounds on which an application for the registration of a trade mark may be rejected under this Act, except the ground that the trade mark cannot be represented graphically."

¹²³⁹ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Sections 72(3), 77-78.

¹²⁴⁰ The owner of a registered trade mark may seek cancellation of the registration by written notice: *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 84.

¹²⁴¹ The Registrar may revoke the registration of a trade mark if the trade mark should not have been registered, and it is reasonable to revoke the registration, taking account of all the circumstances: *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 84A(1).

7. A registered trademark (other than a certification trademark) may be removed from the Register for non-use where, at the time of registration, the trademark was never intended to be used in Australia; or where it has not been used in Australia for a continuous period of three years or more.¹²⁴⁴ However, the Trade Marks Act provides that a trademark owner can oppose an application for removal for non-use in "circumstances (whether affecting traders generally or only the registered owner of the trade mark) that were an obstacle to use of the trade mark during that period".¹²⁴⁵

(a) Registration of certification trademarks

8. Under the Trade Marks Act, signs that constitute a geographical indication¹²⁴⁶ may be eligible for registration as a trademark in Australia. Signs that constitute geographical indications are generally registered as certification trademarks.

9. A certification trademark is defined as:

a sign used, or intended to be used, to distinguish goods or services:

(a) dealt with or provided in the course of trade; and

¹²⁴² *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Sections 81-83A.

¹²⁴³ A prescribed court may, on the application of an aggrieved person, order that the Register be rectified to add omitted details or to correct an error: *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 85.

¹²⁴⁴ See *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Part 9.

¹²⁴⁵ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 100(3)(c). In implementing this provision, the "obstacles" contemplated under this provision include regulations that restrict the ability to use a trademark. In particular, use of a trademark *in relation to tobacco products* was specifically contemplated as falling within the scope of this provision. In its report of July 1992 to the Minister for Science and Technology, the Working Party to review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* (1992), Exhibit AUS-488, recommended under the heading "Defence against an application for removal":

33A. A registration may be protected against a claim for non-use by: ... circumstances which constitute an obstacle to the use of the registered trade mark, whether applicable to traders generally, or specific to the proprietor of the mark. For example, regulatory delay for pharmaceuticals, *regulatory prohibition of use (e.g. tobacco products)*, import restrictions or circumstances of war could constitute special circumstances affecting a specific trader rather than all traders in a particular field. (emphasis added)

¹²⁴⁶ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 6, defines a geographical indication as: "in relation to goods, means a sign that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin".

(b) certified by a person (owner of the certification trade mark) in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture,

from other goods or services dealt with or provided in the course of trade but not so certified.¹²⁴⁷

10. To be registered, a certification trademark must have a set of rules governing the certification trademark, including the requirements that the goods must meet for the certification trademark to be applied to them and the process for determining whether the goods or services meet those certification requirements.¹²⁴⁸

11. The Registrar may only reject an application for registration of a certification trademark on certain grounds. These grounds are the same for other trademark registration applications, except that (a) the application cannot be rejected on the ground that the trademark is not capable of distinguishing the designated goods or services from the goods or services of other persons (rather, the relevant ground is that the trademark "is not capable of distinguishing goods or services certified by the applicant ... from goods or services not so certified"¹²⁴⁹); and (b) an applicant for registration of a certification trademark need not itself intend to use the trademark.¹²⁵⁰

12. As with other registered trademarks, once registered, a certification trademark remains on the register, provided it is renewed every ten years.¹²⁵¹ It is also subject to cancellation, revocation, or rectification of the Register if any relevant ground is made out.¹²⁵² However, a certification trademark is not liable to be removed from the register for non-use, because the owner of the certification trademark itself need not actually use the trademark.¹²⁵³

¹²⁴⁷ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 169.

¹²⁴⁸ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 173.

¹²⁴⁹ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Sections 170, 177.

¹²⁵⁰ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 170.

¹²⁵¹ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Sections 72(3), 77, 78, 170.

¹²⁵² *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Sections 84 (cancellation), 84A(1) (revocation), 81-83A (amendment), 85 (rectification).

¹²⁵³ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 170.

(b) Registration of collective trademarks

13. An association may apply to register a collective trademark under the Trade Marks Act.¹²⁵⁴ A collective trademark is "a sign used, or intended to be used, in relation to goods or services dealt with or provided in the course of trade by members of an association to distinguish those goods or services from goods or services so dealt with or provided by persons who are not members of the association."¹²⁵⁵ Most of the provisions of the Trade Marks Act concerning trademarks, including registration and grounds of opposition, apply to collective trademarks.¹²⁵⁶ In addition to certification trademarks, collective trademarks may also provide protection for signs that are geographical indications in Australia.

2. Rights accorded to the owner of a registered trademark

14. Section 20 of the Trade Marks Act articulates the rights accorded to owners of registered trademarks:

20. Rights given by registration of trade mark

(1) If a trade mark is registered, the registered owner of the trade mark has, subject to this Part, the exclusive rights:

(a) to use the trade mark; and

(b) to authorise other persons to use the trade mark;

in relation to the goods and/or services in respect of which the trade mark is registered.

...

(2) The registered owner of a trade mark has also the right to obtain relief under this Act if the trade mark has been infringed.¹²⁵⁷

¹²⁵⁴ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Part 15.

¹²⁵⁵ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 162.

¹²⁵⁶ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 163. There are some exceptions and variations, for example, the use of a registered collective trademark by a member of the association that is the registered owner of the collective trademark is taken to be a use of the collective trade mark by the registered owner: *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 163(2)(b).

¹²⁵⁷ The owner of a registered trademark may also assign or transfer its trademark: *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 106.

15. Section 20 of the Trade Marks Act grants owners of registered trademarks exclusivity of use which is enforced through the right of a registered trademark owner to pursue enforcement action against infringement. As explained at Part D of this Annex, the rights granted by section 20 of the Trade Marks Act are wholly negative in nature and do not grant positive rights to use registered trademarks. Under the Trade Marks Act, a person infringes a registered trademark if the person uses as a trade mark a sign that is substantially identical with, or deceptively similar to, the trade mark in relation to goods or services (or closely related goods or services) in respect of which the trade mark is registered.¹²⁵⁸

(a) Rights accorded to the owner of a registered well-known trademark

16. In addition to the rights accorded to registered trademarks under the Trade Marks Act, owners of trademarks that are "well known in Australia" are able to pursue infringement action against unauthorised use of a sign by third parties if certain conditions are met.¹²⁵⁹

17. Section 120(4) of the Trade Marks Act provides that in deciding whether a trademark is "well known in Australia", "one must take account of the extent to which the trade mark is known within the relevant sector of the public, whether as a result of the promotion of the trade mark or for any other reason."¹²⁶⁰

¹²⁵⁸ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Sections 120(1) and (2).

¹²⁵⁹ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 120(3) provides: "a trademark is infringed if: (a) the trade mark is well known in Australia; and (b) the person uses as a trade mark a sign that is substantially identical with, or deceptively similar to, the trade mark in relation to: (i) goods (unrelated goods) that are not of the same description as that of the goods in respect of which the trade mark is registered (registered goods) or are not closely related to services in respect of which the trade mark is registered (registered services); or (ii) services (unrelated services) that are not of the same description as that of the registered services or are not closely related to registered goods; (c) because the trade mark is well known, the sign would be likely to be taken as indicating a connection between the unrelated goods or services and the registered owner of the trade mark; and (d) for that reason, the interests of the registered owner are likely to be adversely affected."

¹²⁶⁰ It is possible that a trademark may be "well known in Australia" under the *Trade Marks Act 1995* (Cth) without it having been used in Australia. For example, it may be well known in Australia on the basis of use overseas. See *ConAgra Inc v McCain Foods (Australia) Pty Ltd* (1992) 23 IPR 19, Exhibit AUS-489.

(b) Rights accorded to the owner of a registered certification or a collective trademark

18. In the same way as other registered trademarks, an owner of a registered certification trademark or a registered collective trademark is able to pursue infringement action against unauthorised use of a sign by third parties.¹²⁶¹ However, with respect to certification trademarks, the registered owner must exercise his or her exclusive rights "only in accordance with the rules governing the use of the certification trade mark."¹²⁶² With respect to collective trademarks, a member of an association in whose name a collective trademark is registered does not have the right to prevent another member of the association from using the collective trademark in accordance with the rules of the association.¹²⁶³

B. OTHER STATUTORY MECHANISMS

19. In addition to the protections afforded under the Trade Marks Act, Australia provides a range of other statutory mechanisms to prevent or obtain redress for acts of unfair competition in respect of both registered and unregistered trademarks, including well known trademarks, and geographical indications. These protections include the *Competition and Consumer Act 2010* (Cth); the *Australian Grape and Wine Authority Act 2013* (Cth);¹²⁶⁴ the *Commerce Trade Descriptions Act 1905* (Cth); and the *Australia New Zealand Food Standards Code*.¹²⁶⁵

20. The *Competition and Consumer Act 2010* (Cth) establishes a general ban on misleading or deceptive conduct in trade or commerce. Relevantly, section 18 of

¹²⁶¹ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Sections 163, 170.

¹²⁶² *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 171.

¹²⁶³ *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 165.

¹²⁶⁴ *Australian Grape and Wine Authority Act 2013* (Cth), Exhibit AUS-490, Part VIB creates a system for the registration of geographical indications in relation to wine products. Given that tobacco products are outside the scope of the register it will not be considered further.

¹²⁶⁵ Australia requires packaged foods and unpackaged pork, fish, fruit and vegetables to be labelled with country of origin information (*Australia New Zealand Food Standards Code, Standard 1.2.11 Country of Origin Labelling (Australia Only)* (Cth)). Given that tobacco products are outside the scope of the *Australia New Zealand Food Standards Code, Standard 1.2.11 Country of Origin Labelling (Australia Only)* (Cth), it will not be considered further.

Schedule 2 to the Act provides that "[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."¹²⁶⁶ Similarly, section 29(1) prohibits the making of a range of false or misleading representations in connection with the supply, possible supply or promotion of goods or services, including statements concerning the place of origin of goods.¹²⁶⁷ Practices in contravention of the *Competition and Consumer Act 2010* (Cth) may give rise to both criminal and civil liabilities, including damages, injunction and rescission of contract.

21. Under the *Commerce Trade Descriptions Act 1905* (Cth) Australia prohibits the importation of any good bearing a false trade description.¹²⁶⁸ A false trade description is defined as "a trade description which, by reason of anything contained therein or omitted therefrom, is false or likely to mislead in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description whether by way of addition, effacement, or otherwise, which makes the description false or likely to mislead in a material respect"¹²⁶⁹ and a "trade description" includes any description, statement, indication, or suggestion, direct or indirect, as to the country or place in or at which the goods were made or produced.¹²⁷⁰

C. COMMON LAW

22. The reputation of a business may be protected in Australia through the common law tort of passing off. As indicia of that reputation, trademarks or

¹²⁶⁶ *Competition and Consumer Act 2010* (Cth), Schedule 2 Australian Consumer Law, Exhibit AUS-127, Section 18.

¹²⁶⁷ *Competition and Consumer Act 2010* (Cth), Schedule 2 Australian Consumer Law, Exhibit AUS-127, Section 29(1).

¹²⁶⁸ *Commerce Trade Descriptions Act 1905* (Cth), Exhibit AUS-248, Section 9.

¹²⁶⁹ *Commerce Trade Descriptions Act 1905* (Cth), Exhibit AUS-248, Section 3.

¹²⁷⁰ *Commerce Trade Descriptions Act 1905* (Cth), Exhibit AUS-248, Section 3.

geographical indications may therefore also be protected through passing off actions (although they are not protected *per se*).¹²⁷¹

23. The elements of the tort of passing off are: (a) a misrepresentation (b) by a trader in the course of trade to prospective customers of the trader (c) calculated to injure the business reputation of another trader, and (d) resulting in damage or the probability of damage to that other trader's business reputation.¹²⁷²

24. Remedies that may be granted as a result of a successful passing off action include an injunction.¹²⁷³

D. THE NATURE OF THE RIGHTS GRANTED WITH RESPECT TO TRADEMARKS

25. The rights granted to owners of registered trademarks in Australia are negative rights of exclusion—a registered trademark owner is *not* granted a positive right to use its trademark.¹²⁷⁴

26. The negative rights granted under the Trade Marks Act have their origins in the common law under which trademark owners also have negative rights to restrain the conduct of third parties such as through actions for passing off. These negative rights to restrain infringement are reflected in the first and every subsequent piece of Australian legislation that provides for the registration of trademarks.¹²⁷⁵ Even as

¹²⁷¹ M. Davison, T. Berger and A. Freeman, *Shanahans's Australian Law of Trade Marks and Passing Off*, 4th ed., (Lawbook co., 2008), Exhibit AUS-102, pp. 687-699. See also *Spalding v Gammage* (1915) 32 RPC 273, Exhibit AUS-253; *Campomar Sociedad, Limitada v Nike International Limited* [2000] HCA 12, Exhibit AUS-254, para. 108.

¹²⁷² M. Davison, T. Berger and A. Freeman, *Shanahans's Australian Law of Trade Marks and Passing Off*, 4th ed., (Lawbook co., 2008), Exhibit AUS-102, pp. 688.

¹²⁷³ M. Davison, T. Berger and A. Freeman, *Shanahans's Australian Law of Trade Marks and Passing Off*, 4th ed., (Lawbook co., 2008), Exhibit AUS-102, pp. 727-728.

¹²⁷⁴ The complainants have referred to footnote 563 in the panel report of *EC-Geographical Indications* in support of their assertion that there is a positive right to use a trademark granted under Section 20(1)(a) of the *Trade Marks Act 1995* (Cth). The scope of the rights granted under Australia's Trade Marks Act was not in issue in that dispute. The suggestion that the Section 20(1)(a) of the *Trade Marks Act 1995* (Cth) grants a positive right to use a trademark is not correct.

¹²⁷⁵ See *Trade Marks Registration Act 1875* (UK), Exhibit AUS-491, Section 3; *Trade Marks Act 1905* (UK), Exhibit AUS-492, Section 39; *Trade Marks Act 1938* (UK), Exhibit AUS-493,

(continued)

Australia has amended its trademarks legislation, as it did in 1995 to implement its obligations under the TRIPS Agreement, the negative nature of the rights granted to registered trademark owners has not changed.

27. In *JTI v Commonwealth*¹²⁷⁶ the High Court of Australia affirmed that the nature of the rights granted in Australia to owners of trademarks (under both common law and statute) are *negative* rights of exclusion. This High Court decision was with respect to the same tobacco plain packaging measure being challenged by the complainants. In a 6:1 decision upholding the constitutionality of the tobacco plain packaging measure, each of the six justices in the majority concluded that there was no "acquisition" for the purpose of section 51(xxxi) of the Australian Constitution, which relevantly prohibits the Commonwealth from making laws with respect to the acquisition of property otherwise than on just terms.¹²⁷⁷ In reaching this conclusion, of the five justices who specifically addressed the nature of trademark rights, a majority of four justices (French CJ, Gummow J, Crennan J and Kiefel J) characterised the rights granted to trademark owners as negative rights. For example, Chief Justice French stated:

It is a common feature of the statutory rights asserted in these proceedings that they are negative in character. As Laddie, Prescott and Vitoria observed[68]: "Intellectual property is ... a purely negative right, and this concept is very important. Thus, if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has the positive right to show it himself." In *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation*, Windeyer J spoke of the essential nature of a copyright: "It is not a right in an existing physical thing. It is a negative right, as it has been called, a power

Sections 4-5; *Trade Marks Registration Act 1876* (Vic), Exhibit AUS-494, Section 5; *Designs and Trade Marks Act 1884* (WA), Exhibit AUS-495, Section 33; *Trade Marks Act 1905* (Cth), Exhibit AUS-496, Section 50; *Trade Marks Act 1955* (Cth), Exhibit AUS-497, Section 58; and *Trade Marks Act 1994* (Cth), Exhibit AUS-498, Section 19. See also *Trade Marks Act 1994* (UK), Exhibit AUS-499.

¹²⁷⁶ *JT International SA v Commonwealth of Australia*; *British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* (2012) 291 ALR 669, Exhibit AUS-500.

¹²⁷⁷ Australia notes that contrary to Ukraine's submission at para 239 (Ukraine's first written submission, para. 239), no finding of a "taking" of intellectual property was made in *JTI v Commonwealth*. As noted, the question at issue was whether the tobacco plain packaging measure constituted an "acquisition" of property on just terms under the *Commonwealth Constitution*, Section 51(xxxi). The majority concluded that there was no "acquisition" for the purpose of section 51(xxxi) and the High Court upheld the constitutionality of the measure.

to prevent the making of a physical thing by copying." To similar effect, in relation to patents, was the observation of Lord Herschell LC in *Steers v Rogers*, quoted with approval by the plurality in *The Grain Pool of Western Australia v The Commonwealth*: "The truth is that letters patent do not give the patentee any right to use the invention — they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention." ... "The get-up rights asserted by JTI and BAT and the other non-statutory rights are, like their statutory equivalents, exclusive rights which are negative in character and support protective actions against the invasion of goodwill."¹²⁷⁸

28. Gummow J accepted the following threshold propositions:

(i) absent some prohibitions elsewhere in the common law or in statute, there was at common law a freedom to use any word or device in association with the provision of goods or services, (ii) that common law freedom was not proprietary in nature, (iii) it was this common law freedom of traders, whether the plaintiffs or others, which the [TPP Act] restricted, (iv) the "exclusive" rights of a registered owner identified in s 20(1) of the [Trade Marks Act], to use and to authorise use, were directed to the imposition in favour of the registered owner of a duty or obligation upon others, thereby restricting what otherwise was their freedom of use, (v) it was this right to exclude which constituted the personal property in a registered trade mark spoken of in s 21 of the [Trade Marks Act], (vi) the [TPP Act] in no way impinged upon the rights of exclusion of others conferred by the [Trade Marks Act] upon registered owners.¹²⁷⁹

29. Justice Kiefel stated: "[s]trictly speaking, the right subsisting in the owners of a trade mark is a negative and not a positive right. It is to be understood as a right to exclude others from using the mark"¹²⁸⁰

¹²⁷⁸ *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* (2012) 291 ALR 669, Exhibit AUS-500, pp. 682-683, para. 36. See also, para. 40 (French CJ).

¹²⁷⁹ *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* (2012) 291 ALR 669, Exhibit AUS-500, p. 691, paras. 76-77 (Gummow J).

¹²⁸⁰ *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* (2012) 291 ALR 669, Exhibit AUS-500, p. 756, para. 348 (Kiefel J).

30. Finally, Justice Crennan succinctly stated: "[t]he exclusive right to use the mark is a negative right to exclude others from using it."¹²⁸¹

¹²⁸¹ *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* (2012) 291 ALR 669, Exhibit AUS-500, pp. 728-729, para. 248 (Crennan J).

ANNEXURE E: FLAWS IN THE COMPLAINANTS' EVIDENCE

A. INTRODUCTION

1. As discussed in the body of Australia's submissions, the complainants have sought by various means to establish that the evidence base underlying the tobacco plain packaging measure is unreliable, and that the proper conclusion from the data that is available post-implementation of the tobacco plain packaging measure is that the measure has failed or backfired. Australia rejects those claims.

2. This annexure addresses in more detail the evidence on which the complainants' submissions are based. In particular this annexure considers in more detail the various reports which describe the literature reviews undertaken by the complainants' experts and the reports which rely on various datasets to reach conclusions about smoking prevalence and consumption in Australia.

B. THE LITERATURE REVIEWS RELIED ON BY THE COMPLAINANTS ARE METHODOLOGICALLY FLAWED

1. The complainants have failed to establish that the evidence supporting tobacco plain packaging should be rejected

3. Despite the wealth of evidence supporting the effectiveness of the tobacco plain packaging measure, each of the complainants asserts that the literature "is neither reliable nor probative,"¹²⁸² suffers from "significant limitations",¹²⁸³ has been "cherry-picked,"¹²⁸⁴ is "repetitive and reproduces the same flawed enquiry",¹²⁸⁵ and is "speculative in nature."¹²⁸⁶ In support of these arguments, the complainants rely on

¹²⁸² Dominican Republic's first written submission, para. 57.

¹²⁸³ Cuba's first written submission, para. 170.

¹²⁸⁴ Indonesia's first written submission, para. 304.

¹²⁸⁵ Honduras' first written submission, para. 462.

¹²⁸⁶ Ukraine's first written submission, para. 610.

three literature reviews by Professor Inman et al; Kleijnen Systematic Reviews; and Professor Klick (hereafter "the complainants' literature experts").

4. Drawing on their extensive expertise in public health and epidemiology; psychology and consumer behaviour; and knowledge of peer review processes for public health research; Australia asked Professor Fong and Professor Samet to consider the criticisms levelled at the body of tobacco plain packaging literature by the complainants' literature experts. Although each expert evaluated the reports independently, Professor Fong and Professor Samet each drew the same conclusion: the body of evidence supporting tobacco plain packaging is sound, and the complainants' expert literature reviews are fundamentally flawed and contain basic errors.

5. Professor Samet served as Senior Scientific Editor of several United States Surgeon General's Reports, including the 1990, 2004, 2006, and 2014 reports.¹²⁸⁷ The 2004 report revisited and reaffirmed the criteria of causality proposed in the 1964 Surgeon General's Report, proposing a four-level scheme for classifying the strength of evidence for causation.¹²⁸⁸ Professor Samet has reviewed the critiques put forward by the complainants' literature experts, and concludes:

...[t]he methods used by Inman, Kleijnen and Klick document their sharply contrasting approaches to the accepted norms of evidence-based review. Their intent and strategies are shared and obvious; to carry out highly granular critiques that will find each study to be so flawed that its findings should be dismissed.¹²⁸⁹

2. The complainants' criticisms of the literature are not persuasive

6. Professor Fong has specialised in public health for the past 30 years and has published in excess of 230 journal articles. In his expert report for Australia, Professor Fong outlines common themes of the critiques of the tobacco plain packaging literature by the complainants' literature experts, and why each of these critiques is

¹²⁸⁷ Expert Report of J. Samet, (5 March 2015), Exhibit AUS-7, para. 10.

¹²⁸⁸ Expert Report of J. Samet, (5 March 2015), Exhibit AUS-7, para. 19.

¹²⁸⁹ Expert Report of J. Samet, (5 March 2015), Exhibit AUS-7, para. 152.

unjustified, irrelevant, and misrepresentative of the body of literature supporting the tobacco plain packaging measure.¹²⁹⁰ These themes, and their fundamental flaws, include

- ***Illusion of rigour and demanding the "perfect" study:***¹²⁹¹ Professor Fong states that the complainants' literature experts "present an illusion of scientific rigour in their critiques" but notes that "their methods are inappropriate, overly restrictive, or at odds with established methods for informing policy through evidence."¹²⁹² "[P]erfect" studies are impossible in practice, and the best evidence must be applied through a variety of sources, and using a variety of methods, as with the tobacco plain packaging literature. No one study makes an evidence base, but a significant number of studies reaching the same conclusions, regardless of individual limitations or flaws, provide a strong evidentiary base for developing public policy.
- ***Exclusive focus on prevalence as the only outcome of the tobacco plain packaging measure:***¹²⁹³ In focussing on the impact on smoking prevalence as a measure by which to assess the effectiveness of tobacco plain packaging,¹²⁹⁴ the complainants' literature experts ignore the three specific mechanisms by which tobacco plain packaging contributes to the measure's public health objectives: reducing the appeal of tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead. In Professor Fong's view, this is "fatal"¹²⁹⁵ to the experts' consideration of whether

¹²⁹⁰ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 446-493.

¹²⁹¹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 446-450.

¹²⁹² Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 446.

¹²⁹³ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 451-457.

¹²⁹⁴ See, e.g. Honduras' first written submission, para. 116; Indonesia's first written submission, para. 89; Cuba's first written submission, para. 86; Dominican Republic's first written submission, para. 195; and Ukraine's first written submission, para. 75.

¹²⁹⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para.453.

the tobacco plain packaging measure contributes to achieving the full range of outcomes set out in the TPP Act.

- ***Insisting on outcome measures of real-world behaviour:***¹²⁹⁶ The complainants' literature experts argue that the literature lacks any evidence of the effect of tobacco plain packaging on actual smoking behaviour. The claim that tobacco plain packaging has not affected behaviour is wrong at a factual level. There have been observable changes in consumer behaviour following the introduction of tobacco plain packaging in Australia, as predicted by a number of studies. Moreover, there is a significant body of evidence showing that tobacco plain packaging impacts on non-behavioural outcomes of both smokers and non-smokers; and that attitudes and intentions lead to behavioural changes both generally and in the context of tobacco use.
- ***Disregarding all non-experimental research:***¹²⁹⁷ The complainants' literature experts largely dismiss qualitative research and focus group studies, claiming that these types of studies lack scientific control and rigour. This narrow focus disregards the importance of qualitative studies in providing information about attitudes and beliefs and is contrary to the Cochrane Handbook, which states that "evidence from qualitative studies can play an important role in adding value to systematic reviews for policy, practice and consumer decision-making."¹²⁹⁸
- ***Misleading or inaccurate reporting of evidence:***¹²⁹⁹ In dismissing individual studies, the complainants' literature experts often rely on a minor flaw or limitation of a study to reject the entire study –

¹²⁹⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras.458-462.

¹²⁹⁷ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para.463.

¹²⁹⁸ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para.463.

¹²⁹⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras.464-467.

regardless of the relevance of the flaw or limitation at issue. Ulucanlar et al found this technique to be heavily used in tobacco industry submissions on tobacco plain packaging in the United Kingdom, which "involved inaccurate reporting of objectives, methods, findings, or conclusions of studies; presenting a minor point as a main conclusion; and [using] the 'tweezers method' of partially quoting the original source and omitting qualifying information."¹³⁰⁰ The effect of this technique "was to distort or even contradict the meanings in the original source with the result of the evidence supportive of [tobacco plain packaging] was transformed into evidence against [tobacco plain packaging]."¹³⁰¹

- ***Overemphasis on social desirability bias:***¹³⁰² Professor Fong notes that the complainants' literature experts focus heavily on "socially desirable responding", claiming that the respondents in the tobacco plain packaging studies are simply giving the response they believe is consistent with social norms and expectations (rather than with their real beliefs).¹³⁰³ However, the complainants' literature experts provide no evidence or "even a description of the exact nature of the social desirability bias that they claim is present to address either the magnitude or the direction of the bias, and how it would influence results."¹³⁰⁴

¹³⁰⁰ S. Ulucanlar, G. Fooks, J. Hatchard, and A. Gilmore, 'Representation and Misrepresentation of scientific evidence in contemporary tobacco regulation: a review of tobacco industry submissions to the UK Government consultation on standardised packaging' *PLoS Medicine* Vol. 11 (2014), Exhibit AUS-501, p.4. See also A. Lavery, P. Diethelm, N. Hopkinson, H. Watt, and M. McKee, 'Use and abuse of statistics in tobacco industry-funded research on standardised packaging' *Tobacco Control* (2014) pp.1-3, Exhibit AUS-502.

¹³⁰¹ S. Ulucanlar, G. Fooks, J. Hatchard, and A. Gilmore, 'Representation and Misrepresentation of scientific evidence in contemporary tobacco regulation: a review of tobacco industry submissions to the UK Government consultation on standardised packaging' *PLoS Medicine* Vol. 11 (2014), Exhibit AUS-501, p. 4.

¹³⁰² Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 476-479.

¹³⁰³ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para.476.

¹³⁰⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para.476.

- ***Overemphasis on demand effects:***¹³⁰⁵ Similarly, the complainants' literature experts claim that participants in the tobacco plain packaging studies "may have inferred the researcher's hypothesis and responded as they thought the researcher wanted them to respond rather than in accordance with their own true attitudes."¹³⁰⁶ Professor Fong notes that Professor Inman appears to rely on this argument repeatedly, yet "does not provide factual evidence or even explain how the study designs may have specifically led to respondents guessing the hypothesis."¹³⁰⁷
- ***Failing to address how "flaws" could in fact account for the results:***¹³⁰⁸ The "flaws" identified by the complainants' literature experts do not necessarily equate to any impact on the findings of the study. Professor Fong states that "[I]f the experts had considered these 'flaws' more carefully, they may have found that it is actually more difficult for researchers to find significant results with potential biases present, so that any significant results are found *despite* these 'problems', not *because* of them."
- ***Exaggerating the impact of limitations and ignoring study strengths:***¹³⁰⁹ The complainants' literature experts frequently overemphasise the limitations acknowledged by study authors, criticising them for drawing conclusions despite such limitations. However, because there is no such thing as a perfect study it is standard practice for journal articles to include a section on the particular limitations of the study and, as Professor Fong notes, it is "entirely reasonable and appropriate for conclusions to be drawn if there is no evidence that these limitations may have impacted the

¹³⁰⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 480-484.

¹³⁰⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para.480.

¹³⁰⁷ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para.481.

¹³⁰⁸ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 485-488.

¹³⁰⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 489.

pattern of results."¹³¹⁰ The acknowledgement of "limitations" in the studies forming part of the tobacco plain packaging literature is no indication of the strength of the study or its conclusions, but rather is consistent with best practice.

- ***Claiming a small set of authors of a majority of papers is bias:***¹³¹¹
The complainants' literature experts cite the fact that a relatively small set of authors have undertaken studies on tobacco plain packaging, and criticise the results of the studies as demonstrating bias generated and repeated by the same authors. Professor Fong notes that the complainants' literature experts "fail to recognise the fact that good evidence synthesis requires the collaboration of scientists or researchers working in the same field, who all have the relevant experience to publish within this field."¹³¹² However, as acknowledged by the complainants,¹³¹³ there has been an increase in researchers and academics publishing in this area. Not only do the complainants' literature experts underestimate the number of researchers publishing in this area, but they also fail to point to *any* impact of this so-called "bias".

7. Each of the above strategies has led the complainants' literature experts to discredit individual studies on the effects of tobacco plain packaging; and to conclude that no study provides a sufficient basis to support the implementation of the tobacco plain packaging measure. However, by examining each study separately, the conclusions of the complainants' literature experts ignore the convergent effect of the tobacco plain packaging literature. Professor Fong observes the complainants' literature experts

¹³¹⁰ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 489.

¹³¹¹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 490-491.

¹³¹² Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 491.

¹³¹³ Honduras' first written submission, para. 461.

do not synthesise the evidence and consider the literature as a whole, which demonstrates that despite minor flaws within each study, across studies with different methods and potential flaws, the pattern of findings is consistent and therefore the evidence as a whole overwhelmingly supports plain packaging.¹³¹⁴

8. In contrast to the complainants' literature reviews, independent reviews of the literature, including the Stirling Reviews,¹³¹⁵ and the 2012 United States Surgeon General's Report,¹³¹⁶ have found that the weight of the evidence supports the effectiveness of tobacco plain packaging. Moodie et al, for example, found:

remarkable consistency in study findings regarding the potential impact of plain packaging. Across studies using different designs, conducted in a range of countries, with young and older populations, males and females and with smokers and non-smokers, the key findings are similar.¹³¹⁷

9. This finding is confirmed by Sir Cyril Chantler, who was commissioned to review tobacco plain packaging for the United Kingdom Government in 2014, and who concluded that:

Together, the body of published, peer reviewed studies span research in ten different countries and deploy a wide range of research methods, and overall show a high level of consistency in findings.¹³¹⁸

10. The criticisms by the complainants' literature experts of the literature supporting tobacco plain packaging are therefore unfounded. Not only is there a far greater body of tobacco plain packaging literature available than that critiqued by the

¹³¹⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 446-493.

¹³¹⁵ C. Moodie, K. Angus, M. Stead and L. Bauld, "Plain tobacco packaging research: an update" *Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling* (2013), Exhibit AUS-216; C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angusa, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140; C. Moodie, G. Hastings and A. Ford, "A brief review of plain packaging research for tobacco products", *Institute for Social Marketing* (2009), Exhibit AUS-141.

¹³¹⁶ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General* (2012), Exhibit AUS-76

¹³¹⁷ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angusa, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140, p.90.

¹³¹⁸ C. Chantler, *Standardised packaging of tobacco: A Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 4.10.

complainants, but the claims made by the complainants' literature experts with respect to the studies they did review are misconceived and unsound. The weight of the evidence is significant, and points to a consistent conclusion: tobacco plain packaging is effective and will contribute to the ultimate goal of improving public health by altering smoking behaviour through reducing the appeal of tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead consumers as to the harms of tobacco use.

C. THE EMPIRICAL ANALYSES RELIED ON BY THE COMPLAINANTS ARE CONCEPTUALLY FLAWED

11. Australia has presented evidence consistent with the tobacco plain packaging measure already having its intended effect (see Part II.I).

12. However, Australia's view has always been that the impact of tobacco plain packaging on smoking rates will be most pronounced in the long-term.¹³¹⁹ This follows from the addictive power of nicotine, and the consequential need for multiple quit attempts before success.¹³²⁰ This also follows from the likely impact of the measure on youth initiation.¹³²¹ First, as Dr Chipty observes, any reductions in youth initiation are not likely to be picked up in national prevalence and consumption data for some time given youth initiation makes up a small fraction of total smoking. Second, as Dr Biglan observes, the important role that tobacco marketing plays in influencing youth initiation is partly a function of its ability to create positive social and peer attitudes to smoking.¹³²² Accordingly, it will take time before the impact of the tobacco plain packaging measure on the behaviour of a generation of children who have never been exposed to promotion through tobacco packaging is reflected in national surveys.

¹³¹⁹ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p.1.

¹³²⁰ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, paras. 48-52 and Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 35.

¹³²¹ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p.1. It takes time for the cohort of children, who have never been exposed to branded tobacco packaging, to reach adolescence and be included in national health surveys.

¹³²² Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 36.

13. For the foregoing reasons, it is unreasonable for the complainants to draw definitive conclusions on the success of tobacco plain packaging solely on the basis of rates of smoking prevalence so soon after the measure's implementation.

14. The complainants' conclusions regarding the effectiveness of the measure are based on an analysis of prevalence and consumption data. Such data is likely to mask the contribution of the tobacco plain packaging measure to its broader objectives of improving public health by discouraging uptake, encouraging quitting, discouraging relapse, and reducing exposure to smoke.¹³²³ As Dr Chipty explains in her report, large changes in these behaviours stemming from a policy change (such as tobacco plain packaging) will be masked in measures like prevalence and consumption because of the stock of current smokers whose behaviours may not be as affected by the policy.¹³²⁴

15. To illustrate her point, Dr Chipty uses data from the National Drug Strategy Household Survey, and shows that even if a new policy were to reduce the youth initiation rate by 20%, and increase the youth quit rate by 20% (a significant policy achievement by any measure), the decline in overall smoking prevalence would only be 0.1 percentage point.¹³²⁵ Dr Chipty observes that this masking would be even more severe if the policy-related reduction occurred over a longer time period.¹³²⁶ This demonstrates that the complainants' examination of overall smoking prevalence (and tobacco consumption) is unlikely to pick up the contribution of the tobacco plain packaging measure to its broader objectives of improving public health by discouraging uptake, encouraging quitting, discouraging relapse, and reducing exposure to smoke.

16. The danger in drawing a conclusion too quickly regarding the effectiveness of a measure, by reference to its impact on prevalence, is also evident in the example of

¹³²³ These behavioural changes represent the broader objectives of the tobacco plain packaging measure through which the measure will reduce tobacco use (TPP Act, Exhibit AUS-1, Section 3(1)).

¹³²⁴ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 8(b), 32-39.

¹³²⁵ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 38.

¹³²⁶ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 39.

Canadian graphic health warnings. As explained by Professor Chaloupka, Canada was the first country to introduce graphic health warnings (in December 2000 to June 2001).¹³²⁷ Although early studies were able to detect an effect of the warnings on the intermediate pathways through which the graphic health warnings eventually affected prevalence, a statistically significant impact on prevalence using econometric studies was not able to be detected until many years later. It was certainly not detected within the 18 months following the implementation of the measure.¹³²⁸ On the complainants' case, such a measure should have been declared a failure and abandoned in 2003.

17. Putting to one side the significant methodological flaws in the complainants' experts' empirical analyses discussed below, Australia considers that, in any event, it is inappropriate to seek to judge the efficacy of a measure such as tobacco plain packaging on the basis of limited datasets in short timeframes.

D. THE EMPIRICAL ANALYSES RELIED ON BY THE COMPLAINANTS ARE METHODOLOGICALLY UNSOUND AND FATALLY FLAWED

18. Leaving aside the issues identified above, the empirical analyses of smoking prevalence and tobacco consumption relied on by the complainants are fundamentally flawed. In particular, the respective analyses of smoking prevalence by IPE and Professor Klick (upon which the complainants rely heavily), suffer from serious flaws that render their conclusions wholly unreliable.

1. IPE's analysis of smoking prevalence data is fundamentally flawed

19. The IPE report purports to undertake a comprehensive review of empirical data from the Australian market to assess whether tobacco plain packaging has reduced smoking prevalence rates.¹³²⁹ The authors of the IPE report employ two standard analyses for this purpose: (i) a "statistical trend" analysis, and (ii) a "micro-

¹³²⁷ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 89.

¹³²⁸ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 89-96.

¹³²⁹ Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, para. 1.

econometric" analysis.¹³³⁰ In both analyses IPE investigate a single data set, the Roy Morgan Single Source survey data.

20. According to the IPE report, the results for both these analyses are the same: they find no empirical evidence for the conclusion that the implementation of tobacco plain packaging has caused a lasting reduction in smoking prevalence.¹³³¹

21. However, as explained in more detail below, the analyses undertaken by IPE are fundamentally flawed.

- For one, because of a lack of what statisticians refer to as "power", IPE's statistical trend analysis was not capable of detecting meaningful reductions in smoking prevalence in the period following the implementation of tobacco plain packaging. The "no evidence" result was effectively preordained. The analysis was simply not capable of finding the very thing it claims it set out to find which renders the results of the analysis meaningless.
- Secondly, the micro-econometric analysis undertaken by IPE appears to have only investigated the impact of tobacco plain packaging on a nonsensical subset of the population that is so absurd that one has to assume that the authors of the IPE report misunderstood their own analysis. According to expert evidence obtained by Australia, IPE's micro-econometric analysis, as constructed, "provides no useful information."¹³³²

22. These are not the only issues with the analyses of smoking prevalence undertaken by the authors of the IPE report.¹³³³ However, they are the most

¹³³⁰ See generally, Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, Chapter 3.

¹³³¹ Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, Chapter 3.

¹³³² Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 85.

¹³³³ For example, IPE provides no economic explanation for the use of time trends in their statistical models. According to Dr Chipty, IPE's approach makes is "less likely, and sometimes

(continued)

significant, and in Australia's view they are of such a fundamental nature that they alone render the conclusions of the IPE report wholly unreliable and meaningless.

(a) IPE's statistical trend analysis lacked "power" to detect meaningful changes in smoking prevalence

23. As noted above, as part of their assessment of the impact of tobacco plain packaging on smoking prevalence, the authors of the IPE report undertook a statistical trend analysis using the Roy Morgan Single Source survey data.

24. In its simplest terms, this analysis involves comparing observed trends in smoking prevalence following the introduction of tobacco plain packaging to *estimated* trends in smoking prevalence that might have occurred had tobacco plain packaging not been introduced (sometimes referred to as the "counterfactual").¹³³⁴

25. For the overall population, IPE only found a statistically significant effect on smoking prevalence in a single month, being December 2012. Based on this, IPE concluded that it found no evidence of a statistically significant, lasting effect of tobacco plain packaging on smoking prevalence.¹³³⁵

26. Australia asked Professor Scharfstein, an expert biostatistician and a professor in the Department of Biostatistics at the John Hopkins Bloomberg School of Public Health, to evaluate IPE's statistical trend analysis of smoking prevalence.¹³³⁶ In Professor Scharfstein's opinion, the methodology employed by IPE to evaluate the effects of tobacco plain packaging are inadequate to detect important declines in smoking prevalence following the introduction of the tobacco plain packaging

impossible" to find an effect from the tobacco plain packaging measure: Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 8(c), 40-43.

¹³³⁴ Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, para. 46; Dominican Republic's first written submission, para. 435.

¹³³⁵ Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, p. 25.

¹³³⁶ Expert report of D. Scharfstein (9 March 2015), Exhibit AUS-20.

measure.¹³³⁷ In particular, Professor Scharfstein found that the IPE analyses have low statistical power.

27. To understand this fundamental flaw in IPE's analysis, it is important to understand what is meant by "statistical power". At its most basic, power is strongly influenced by two things: the size of the effect the researcher is looking for, and the sample size of the study.¹³³⁸ For example, if you are trying to determine whether tobacco plain packaging caused 50% of smokers to quit, a small survey might be adequately powered to identify that effect. If, however, you are trying to measure a much smaller (but still meaningful) effect, a significantly larger sample size would be required.

28. The smaller the effect you are looking for, and the smaller the dataset you are using the more prone the study is to reaching an incorrect conclusion about what is happening in the actual population. There are two types of statistical error. A "Type I" error, also known as a false positive, occurs where the analysis incorrectly finds an effect when in fact there is no effect.¹³³⁹ A "Type II" error, or false negative, occurs where the analysis fails to detect an effect when in fact there was an effect. For example, a Type II error arises where a researcher studying the effect of a policy intervention on smoking prevalence wrongly concludes from a dataset that there was no effect from that policy when in fact, if a survey of the entire population had been conducted, it would have been established that the policy reduced smoking prevalence.

¹³³⁷ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 11, 51-64.

¹³³⁸ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 31, 32.

¹³³⁹ Professor Scharfstein provides an example of a Type I error in his report using the example of a researcher trying to detect the effect of a policy intervention on HIV prevalence in a particular country. Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 26: "For example, suppose that a particular policy intervention has no impact on HIV prevalence in the population... The researcher does not know this, of course, and she can only rely on what she infers from her sample. A correct decision in this circumstance (i.e., a true negative) would be to fail to reject the null hypothesis of no impact. If the researcher, after analyzing her sample, did the opposite – i.e., rejected the null hypothesis of no impact and declared that the policy appeared to reduce HIV prevalence – the result would be a false positive, and she would be committing a Type I error."

29. Obviously, researchers are concerned with minimising the chances of both types of errors. As Professor Scharfstein explains, it is common statistical practice to design studies in a way which limit the chance of a Type I error to 5%. Similarly, it is common statistical practice to design studies to limit the chance of a Type II error to no more than 20%.¹³⁴⁰

30. To put this in the present context, for a specified reduction in smoking prevalence that is attributable to the tobacco plain packaging measure (say 0.5 percentage points), if the chance of a Type II error is 20%, then as designed, there is an 80% chance that the survey would detect the prevalence decline (and conversely, a 20% chance that the survey would fail to detect the decline and suggest the incorrect conclusion that the measure has not had an impact on prevalence). So even with a study designed with 80% power, there is still a one in five chance of coming to the wrong conclusion when no effect is found.¹³⁴¹

31. The "statistical power" of a survey is 100% minus the chance of a Type II error. In the example immediately above, the "power" of the hypothetical analysis would be 80%. As the chance of a Type II error increases, power decreases.

32. Power is of critical importance to analyses of the type that IPE have undertaken. If there is no chance of detecting a particular result, it is meaningless to declare that one has not been found. As Professor Scharfstein observes, an implication of power is that failure to find a statistically significant result does not imply that the measure being studied (i.e. tobacco plain packaging) has not had an effect.¹³⁴² It could be that the analysis was not adequately powered to detect the true population effect.

¹³⁴⁰ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 28-29.

¹³⁴¹ As explained below, the power of the IPE analyses to detect meaningful changes in smoking prevalence is significantly lower than 80%. However, even if the IPE study was adequately powered (at, say, 80%), there is still a question as to whether, in the present context, a 1 in 5 chance of failing to detect a relevant effect in the actual population is too high given the weight of evidence in support of the tobacco plain packaging measure, and the serious health consequences associated with tobacco use.

¹³⁴² Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 35.

33. Indeed, this is precisely the problem with IPE's analysis. As Professor Scharfstein explains:

The essential problem with IPE's trend analysis (and their associated conclusions) is that it has low power to detect important declines in smoking prevalence following the introduction of plain packaging.¹³⁴³

34. To demonstrate this point, Professor Scharfstein conducted a simulation study, which is a common tool used by statisticians to evaluate the power of analyses like that undertaken by IPE.¹³⁴⁴ As part of his simulation study, Professor Scharfstein sought to identify the magnitude of the effect of the tobacco plain packaging measure on smoking prevalence that would be required for power to be 80% (i.e. where the IPE analysis had a 4 in 5 chance of detecting an effect that was actually there, so the Type II error equals 20%), and where power is 90% (i.e. where the IPE analysis had a 9 in 10 chance of detecting an effect that was actually there, so the Type II error equals 10%). In other words, Professor Scharfstein sought to identify the percentage point change in smoking prevalence that the IPE analysis is capable of detecting at the generally accepted thresholds for a Type II error.

35. The results of Professor Scharfstein's simulation study are presented below.¹³⁴⁵

¹³⁴³ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 51.

¹³⁴⁴ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 56.

¹³⁴⁵ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 60-61, Figure 7.

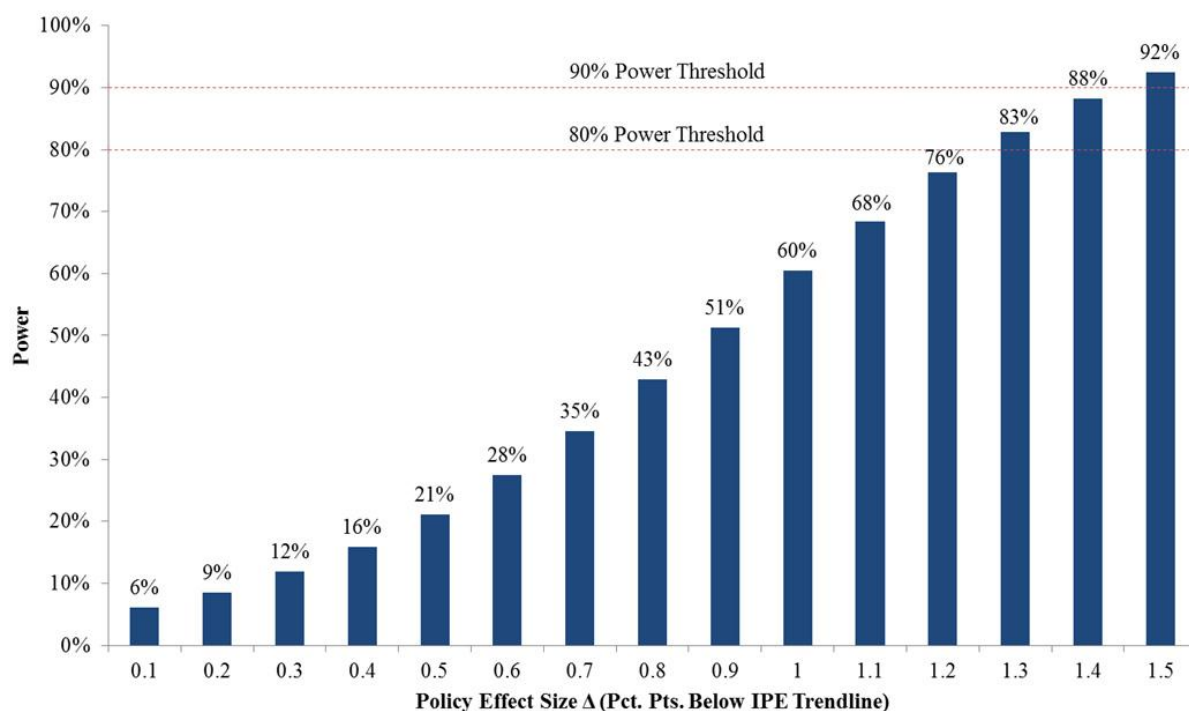


Figure 1: Power of the IPE Trend Methodology

36. As can be seen from Figure 1 above, at the 80% power threshold, Professor Scharfstein finds that the IPE methodology is only capable of detecting decreases in smoking prevalence *greater than 1.2 percentage points below trend*.¹³⁴⁶ At the 90% power threshold the IPE methodology is only capable of detecting decreases in smoking prevalence greater than 1.4 percentage points below trend.¹³⁴⁷

37. To provide some context for declines in smoking prevalence of this magnitude, consider that IPE estimated that prevalence was declining in Australia by 0.6 percentage points per year on average between 2006 and 2012. IPE also predicted that prevalence would have continued to decline at this rate absent tobacco plain packaging. It is important to point out that IPE provides no persuasive reason for expecting a linear trend to continue without additional tobacco control policies being

¹³⁴⁶ The actual figure for 80% power is 1.26 percentage points: Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 61.

¹³⁴⁷ The actual figure for 90% power is 1.44 percentage points: Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 61.

implemented or refreshed, which is a further problem with the analysis.¹³⁴⁸ Therefore, requiring *at least* a 1.2 percentage point decline before attributing an effect to the tobacco plain packaging measure is equivalent to two years of pre-existing decline in smoking prevalence happening *instantly*.¹³⁴⁹ In other words, only if the tobacco plain packaging measure *tripled* the historical annual rate of smoking decline immediately after its introduction would the IPE methodology have an 80% chance of detecting the effect.

38. To take another example, assume that the true impact of tobacco plain packaging in the population were to reduce smoking prevalence by 0.6 percentage points (i.e. the same level IPE estimated for historical *annual* decline). As Professor Scharfstein explains, IPE's statistical procedure would have only a 28% chance of detecting an effect of this magnitude (i.e. there would be a 72% chance of "missing" such an impact).¹³⁵⁰

39. Another way to benchmark the lack of power in the IPE analysis is to consider the underlying mechanisms that lead to declining prevalence. As discussed above, in her expert report Dr Chipty explains how a measure like tobacco plain packaging may have large impacts on rates of youth smoking initiation and quitting, but that these large impacts may only translate into small declines in overall prevalence.¹³⁵¹ Dr Chipty provides a hypothetical example in which the tobacco plain packaging measure reduces the youth initiation rate by 20% and increases the youth quit rate by 20% (an unquestionably excellent result). These effects, however, would only lead to a decline in prevalence of 0.1 percentage points a year after the policy was introduced.¹³⁵² The IPE methodology has only 6% power to detect a change of this magnitude.¹³⁵³ In other words, in this scenario, there is a 94% chance that IPE would

¹³⁴⁸ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 8(c), 40-43.

¹³⁴⁹ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 62.

¹³⁵⁰ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 60.

¹³⁵¹ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 32-39.

¹³⁵² Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 38.

¹³⁵³ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, Figure 7.

(incorrectly) conclude that there was no effect of the tobacco plain packaging measure.

40. A further way to demonstrate empirically the fundamental flaw in IPE's approach is to apply IPE's methodology to the 25% excise increase that Australia introduced in April 2010. Each of the complainants acknowledge that tax policy is an effective tobacco control policy for reducing smoking prevalence.¹³⁵⁴ It follows then that if IPE were being fair to tobacco plain packaging and seeking to devise a statistical analysis that shed genuine light on the impact of tobacco plain packaging, IPE would devise a method which was at least capable of detecting the predicted effect on smoking prevalence following the excise increase.

41. Professor Scharfstein applied the IPE's "statistical trend" methodology to assess changes in smoking prevalence following the 2010 excise increase. As a result, he detected only one month where the impact of the excise increase was statistically significant.¹³⁵⁵ As Professor Scharfstein explains:

[F]ollowing IPE's logic in assessing plain packaging, IPE would have to conclude that there was no lasting effect, or no effect at all, of the 2010 increase in the excise tax.¹³⁵⁶

42. This result, as well as the examples discussed above, demonstrate the fundamentally inadequate and potentially disingenuous nature of IPE's analysis in terms of assessing the effects of the tobacco plain packaging measure on smoking prevalence.

43. It is also important to note that the discussion above is based on IPE's (flawed) attempt to analyse the entire Australian population. IPE also attempts to analyse separately the measure's effects on minors and young adults. As Professor Scharfstein explains:

¹³⁵⁴ Honduras' first written submission, para. 589; Ukraine's first written submission, para. 700; Dominican Republic's first written submission, para. 753; Cuba's first written submission, paras. 276-277; Indonesia's first written submission, para. 430.

¹³⁵⁵ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 54.

¹³⁵⁶ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 54.

Because these subpopulations are subsets of the overall Roy Morgan data, the sample sizes associated with them are smaller. As a result, IPE's analyses of the impact of plain packaging on these groups *will have less power*.¹³⁵⁷ (emphasis added)

44. The implication of Professor Scharfstein's evaluation of the IPE analysis is simple: the IPE analysis design means that regardless of whether the tobacco plain packaging measure is making a meaningful contribution to reducing smoking prevalence, the quality of the data and the design parameters mean that, even before the work was done, IPE would almost certainly find no effect. Given this, IPE's failure to find a statistically significant effect of tobacco plain packaging is, in Australia's submission, meaningless.

45. In Professor Scharfstein's opinion, the better way of understanding what one can learn from the Roy Morgan data about the effect of tobacco plain packaging is simply to ask (and answer) what post-policy trends in smoking prevalence are consistent with the observed data.¹³⁵⁸ Professor Scharfstein presents the results of this exercise in his report.¹³⁵⁹ He finds that there are many possible trends in smoking prevalence, some of which reflect small increases in prevalence, and many others that reflect decreases in prevalence. Importantly, in Professor Scharfstein's opinion, the monthly data from Roy Morgan "cannot reasonably rule out important declines in smoking prevalence in the post-policy period".¹³⁶⁰

(b) IPE's micro-econometric analysis only considered the impact of the tobacco plain packaging measure on an absurd and nonsensical subset of the population

46. Australia also asked Professor Scharfstein to evaluate IPE's "micro-econometric" analysis of smoking prevalence. Professor Scharfstein found that the IPE's micro-econometric analysis, which purports to isolate the effect of tobacco plain

¹³⁵⁷ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 54.

¹³⁵⁸ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 65.

¹³⁵⁹ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 66-68.

¹³⁶⁰ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 68.

packaging above and beyond changing population demographics and socio-economic characteristics (such as age, gender, education, income position, and social class), is fundamentally flawed.¹³⁶¹

47. According to Professor Scharfstein, the fundamental flaw in IPE's methodology is that the authors of the IPE report appear to have completely misinterpreted their own analysis.¹³⁶² They do not, as they claim in their report, form "a time series of the estimated aggregate likelihood of smoking, adjusted for individual effects".¹³⁶³ Rather, each of IPE's models appears only to have investigated the probability of smoking for a nonsensical subgroup of individuals.¹³⁶⁴ In a majority of IPE's models, this subgroup is limited to males, age zero, with zero years of education, and positioned at the very top of the income distribution.¹³⁶⁵ In the remaining model, the subgroup is further restricted to individuals with a social class AB. In lay terms, this means that IPE have confirmed that there is no evidence the tobacco plain packaging measure has had an effect on very wealthy, uneducated, new born male babies.¹³⁶⁶ This is not a surprising result.

48. Therefore, very far from finding no effect of tobacco plain packaging on the entire population, the authors of the IPE report have only determined that there is no effect of tobacco plain packaging on the absurd subgroup of individuals they have identified.

49. In light of the absurdity of IPE's approach, Professor Scharfstein re-ran IPE's analysis but standardised it to a subgroup of the population who may actually have

¹³⁶¹ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 14.

¹³⁶² Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 73.

¹³⁶³ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 74; citing the Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, p. 159.

¹³⁶⁴ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 74-76.

¹³⁶⁵ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 75.

¹³⁶⁶ Professor Scharfstein observes in his report that this subgroup of "rich, uneducated newborn males" does not exist in the Roy Morgan data. If it did, IPE's models would predict them to have a miniscule likelihood of smoking. For example, IPE's Model 1 for December 2012 predicts that the likelihood of smoking for this subgroup would have been less than 1 in 180 billion. See Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, fn 29.

been affected by the policy, being females, aged 23, with 18 years of education and whose income position is at the 20% level. Professor Scharfstein compared IPE's original estimates of the effect of tobacco plain packaging for their nonsensical demographic subgroup with the estimates of the effect of tobacco plain packaging for his alternative subgroup. He found that:

In contrast to IPE's findings, I find a *negative* and *statistically significant* effect of plain packaging for all of their model specifications – the exact opposite of IPE's conclusion. In other words, had IPE focused their analysis on this much more sensible demographic subgroup, they would have had to declare that plain packaging reduced smoking prevalence.¹³⁶⁷

50. To illustrate that he is not "cherry picking" a subset of the population, Professor Scharfstein repeated this analysis using the 4,713 individuals in the July 2006 Roy Morgan dataset.¹³⁶⁸ Among this group, there were 3,505 unique combinations of the four demographic characteristics used by IPE (age, gender, education, income position). Professor Scharfstein re-ran the analysis for each of these unique combinations. He found that for 82% of the combinations, tobacco plain packaging appeared to reduce the likelihood of smoking, with results being statistically significant for 41% of the combinations.¹³⁶⁹

51. Professor Scharfstein's analysis demonstrates that if IPE had competently performed their own analysis, they could not have claimed that their analysis showed that there was no evidence that tobacco plain packaging was having an effect.

¹³⁶⁷ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 80.

¹³⁶⁸ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 81.

¹³⁶⁹ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 82.

2. Professor Klick's analysis comparing Australia and New Zealand is fatally flawed

52. The complainants also rely on an analysis undertaken by Professor Klick in support of their claims that the tobacco plain packaging measure has not had any effect on smoking in Australia.¹³⁷⁰

53. In his report, Professor Klick attempts to identify the effect of the tobacco plain packaging measure on smoking status among current smokers and recent quitters. He does so by comparing smoking status in Australia pre and post-plain packaging to smoking status in New Zealand (a country without tobacco plain packaging) over the same period of time.¹³⁷¹ To the extent that there are observed differences in smoking between Australia (the treatment group) and New Zealand (the control group) it may be possible to draw conclusions about the impact of tobacco plain packaging on smoking.

54. Australia requested that Dr Chipty evaluate the validity of Professor Klick's analysis and his conclusions. In Dr Chipty's expert opinion, Professor Klick's analysis of the data is "fatally flawed", and provides no basis for his conclusion that there is no evidence that the tobacco plain packaging measure reduces actual smoking.¹³⁷²

55. According to Dr Chipty, the validity of Professor Klick's analysis rests on two key design elements.

- First, he requires a valid "pre-period".¹³⁷³ That is, he requires information on the outcome of interest (here, smoking status) for both Australia and New Zealand at a point in time before the relevant policy (tobacco plain packaging) was implemented. Plainly enough, without a

¹³⁷⁰ Honduras' first written submission, paras. 380-393; Ukraine's first written submission, paras. 527-540; Dominican Republic's first written submission, para. 433; Cuba's first written submission, para. 100; Indonesia's first written submission, paras. 341-346.

¹³⁷¹ See generally, Expert Report of J. Klick (Survey/Market Report), Exhibit UKR-5.

¹³⁷² Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 11-24.

¹³⁷³ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 17.

relevant pre-period, there is no meaningful way to evaluate a change pre and post-policy.

- Second, Professor Klick requires a control group (here, New Zealand) that resembles the treatment group (Australia) in important dimensions *except* the relevant policy implementation (i.e. tobacco plain packaging).¹³⁷⁴ Only when this condition is satisfied does the control group provide information on what would have happened in the treatment group, *but-for* the policy intervention being studied.

56. The evidence of Dr Chipty is that Professor Klick's analysis does not satisfy *either* of these two fundamental design elements.¹³⁷⁵

- *No pre-period:* The first wave of Professor Klick's survey, which he calls his "pre" wave, was carried out in Australia between 2 and 26 November 2012. As part of the roll-out of the tobacco plain packaging measure, manufacturers were required to manufacture plain packaged tobacco products from 1 October 2012 (with retailers being required to stock only plain-packaged products from 1 December 2012). Survey data from Australia at the time of implementation reveals that anywhere from 60 to 80% of smokers were smoking from plain packs in each week of Professor Klick's supposed "pre" wave.¹³⁷⁶ As Professor Klick's survey does not contain a relevant "pre period", there is no meaningful way for him to evaluate a change pre and post-policy.¹³⁷⁷
- *No appropriate control group:* On 1 January 2013 (i.e. between Waves 1 and 2 of Professor Klick's survey), New Zealand increased its

¹³⁷⁴ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 17.

¹³⁷⁵ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 17.

¹³⁷⁶ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 19-21.

¹³⁷⁷ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 24.

tobacco excise by 10%.¹³⁷⁸ As a result, one cannot study smoking status in New Zealand or compare Australia to New Zealand without accounting for this policy intervention.¹³⁷⁹ Indeed, as Dr Chipty observes, there was a significant change in smoker behaviour in New Zealand between Waves 1 and 2 which is consistent with the tobacco excise increase having its intended effect.¹³⁸⁰ Professor Klick's analysis does not account for this effect and is, therefore, meaningless.

57. The implications of the above for Professor Klick's analysis are significant. As Dr Chipty explains:

One cannot reliably implement a difference-in-difference estimation strategy, as attempted by Professor Klick, without the requisite pre-period data or a control group that resembles the treatment group in important dimensions other than the treatment... As such, Professor Klick's study cannot and does not provide a reliable estimate of the effect of Plain Packaging in Australia.¹³⁸¹ (emphasis added)

58. Indeed, far from suggesting that the tobacco plain packaging measure has not reduced smoking, a more appropriate behavioural analysis of Professor Klick's survey data is consistent with the tobacco plain packaging measure having its intended effect on smoking behaviour.

3. Mr Gibson's analysis is conceptually flawed and wrong

59. The Dominican Republic and Ukraine also rely on analysis undertaken by Stephen Gibson of data from the NSW Cancer Institute Tobacco Tracking Survey (CITTS).¹³⁸² Mr Gibson's analysis, which was prepared at the request of British American Tobacco UK and submitted to a UK Government consultation process on the introduction of tobacco plain packaging, suggests that the proportion of smokers

¹³⁷⁸ New Zealand Customs Services, *New excise duty rates for tobacco and tobacco products from 1 January 2013* (23 November 2012), Exhibit AUS-503.

¹³⁷⁹ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 22-24.

¹³⁸⁰ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 23.

¹³⁸¹ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 24.

¹³⁸² Ukraine's first written submission, paras. 516-522; Dominican Republic's first written submission, para. 525.

surveyed who smoked on a daily basis increased from 70% in 2012 to 77% in 2013.¹³⁸³ The complainants cite this as evidence of the lack of effect of the tobacco plain packaging measure on smoking behaviour.¹³⁸⁴

60. Mr Gibson's analysis is, however, fundamentally flawed. The CITTS is a weekly survey of smokers and recent quitters (who quit in the past 12 months). The figures reported in Mr Gibson's report, and relied upon by the Dominican Republic and Ukraine, are incorrectly labelled by Mr Gibson as representing the "proportion of smokers" who were smoking on a daily basis.¹³⁸⁵ In fact they represent the proportion of the *entire sample* (including both smokers *and* recent quitters) who are, or – in the case of recent quitters – were, daily smokers.¹³⁸⁶

61. The implication of the CITTS being a survey of smokers and recent quitters, and not a population survey, is that it is not designed to measure (and indeed is not capable of measuring) changes in smoking prevalence in the entire population. A more reliable measure of smoking prevalence for New South Wales is the NSW Population Health Survey. Figures from that survey show smoking prevalence in New South Wales *decreased* from 17.1% to 16.4% in the year following the introduction of the tobacco plain packaging measure.¹³⁸⁷

4. The Klick and IPE analyses of tobacco sales data are flawed and misleading

62. Professor Klick and IPE both undertake various analyses of retail and wholesale sales data from the Australian tobacco market. Based on their analyses,

¹³⁸³ See, e.g. Ukraine's first written submission, para. 518.

¹³⁸⁴ See, e.g. Ukraine's first written submission, para. 522.

¹³⁸⁵ Cancer Institute NSW, "Cancer Institute NSW's Rebuttal of British American Tobacco's analysis of Cancer Institute NSW Tobacco Tracking Survey (CITTS) data" (30 September 2014), Exhibit AUS-504.

¹³⁸⁶ Cancer Institute NSW, "Cancer Institute NSW's Rebuttal of British American Tobacco's analysis of Cancer Institute NSW Tobacco Tracking Survey (CITTS) data" (30 September 2014), Exhibit AUS-504.

¹³⁸⁷ Centre for Epidemiology and Evidence, *Health Statistics New South Wales: Current Smoking in Adults*, Ministry of Health, available at: www.healthstats.nsw.gov.au, (accessed 2 March 2015), Exhibit AUS-505.

Professor Klick and IPE find no evidence that the tobacco plain packaging measure reduced tobacco consumption in Australia.¹³⁸⁸ Indeed, both raise the possibility that tobacco consumption actually *increased* following the introduction of the tobacco plain packaging measure.¹³⁸⁹

63. Australia asked Dr Chipty to evaluate the validity of the empirical analyses of tobacco consumption put forward by Professor Klick and IPE. Based on her review of their empirical work, Dr Chipty concludes that Professor Klick and IPE's tobacco consumption analyses are inaccurate and uninformative.¹³⁹⁰

64. Starting with Professor Klick's analysis of the Nielsen retail sales data, Dr Chipty finds that there are serious problems with Professor Klick's analysis and associated conclusions. As Dr Chipty explains: "[t]hese problems range from fundamental design errors to a key transcription error".¹³⁹¹

65. Dr Chipty sets out these errors in detail in her report.¹³⁹² For example, Dr Chipty found:

[T] here is no evidence of a statistically significant increase in sales in either of Professor Klick's two specifications controlling for price, though he reports that there is. A closer look at his discussion and backup material shows that Professor Klick has made a transcription error and has **erroneously reported a statistically significant increase**. This effect was in fact *not* statistically significant.¹³⁹³

66. Given the issues identified with Professor Klick's Nielsen analyses comparing sales in Australia to New Zealand, Dr Chipty considers that the results are "entirely

¹³⁸⁸ Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, p. 63; Expert Report of J. Klick (Survey/Market Report), Exhibit UKR-5, p. 2.

¹³⁸⁹ Expert Report of the Institute for Policy Evaluation, Exhibit DR-100, pp. 65-67; Expert Report of J. Klick (Survey/Market Report), Exhibit UKR-5, pp. 15-18. While the experts themselves appear not to place emphasis on these results in their overall conclusions, the complainants highlight these results in their written submissions: see, e.g. Honduras' first written submission, para. 346; Ukraine's first written submission, para. 514; Dominican Republic's first written submission, para. 485; Cuba's first written submission, para. 142.

¹³⁹⁰ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 44-66.

¹³⁹¹ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 46.

¹³⁹² Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 45-54.

¹³⁹³ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 53.

uninformative" and provide no information about the impact of tobacco plain packaging.¹³⁹⁴ Professor Klick's analyses do not, therefore, provide any support for the complainants' claims that the tobacco plain packaging measure has "backfired".

67. Dr Chipty also considered Professor Klick and IPE's respective analyses of the IMS wholesale data.¹³⁹⁵

68. Professor Klick and IPE both present "graphical evidence" of annual sales trends in the IMS wholesale data, and both report that sales actually *increased* in the year following the introduction of the tobacco plain packaging measure. The complainants rely on this evidence in support of their assertions that tobacco plain packaging has "backfired".¹³⁹⁶

69. However, as Dr Chipty explains in her expert report, this is misleading:

A closer look at the [IMS] data reveals that this graphical analysis is misleading and fails to account for strategic inventory management that likely took place on the eve of the December 2013 tax increase...¹³⁹⁷

70. In January 2013, Australia announced a series of increases in the tobacco excise rate, commencing with a 12.5% increase on 1 December 2013.¹³⁹⁸ Australian tobacco manufacturers have subsequently acknowledged that the anticipated 12.5% excise increase in December 2013 resulted in a boost to wholesale shipments in late 2013 as retailers stocked inventory prior to the increase.¹³⁹⁹ This is clearly demonstrated in the graph of seasonally adjusted IMS sales below. As one can see,

¹³⁹⁴ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 54.

¹³⁹⁵ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 62-66.

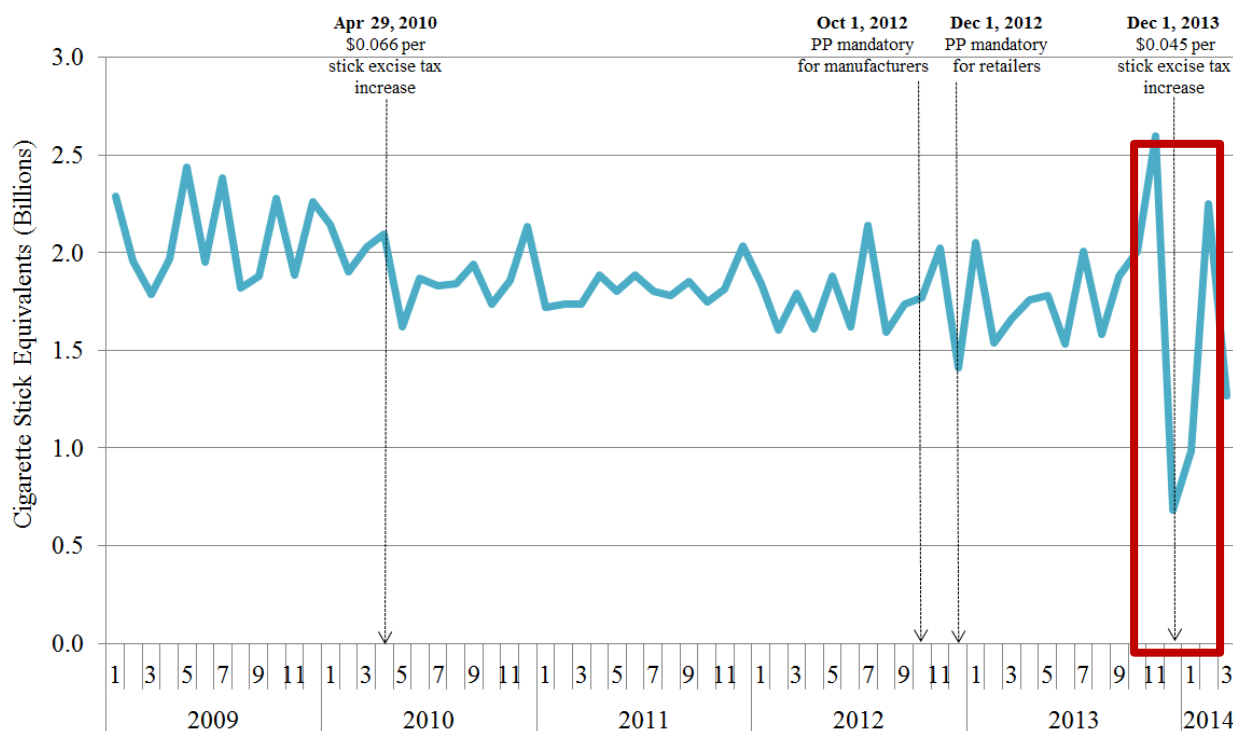
¹³⁹⁶ See, e.g. Honduras' first written submission, para. 346; Ukraine's first written submission, para. 514; Dominican Republic's first written submission, para. 485; Cuba's first written submission, para. 142.

¹³⁹⁷ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 62.

¹³⁹⁸ The Hon Chris Bowen MP and The Hon Tanya Plibersek MP, "Government to Increase Tobacco Excise", *Media Release* (1 August 2013), Exhibit AUS-421.

¹³⁹⁹ Transcript of meeting between Sir Cyril Chantler and British American Tobacco Australia and Imperial Tobacco Australia (12 March 2014), Exhibit AUS-506, p. 9.

there is a noticeable spike in sales volumes in the two months preceding the December 2013 excise increase, followed by a noticeable decline.¹⁴⁰⁰



Note: The original series is seasonally adjusted using a standard approach that allows for the form of seasonality in IPE's regression models. Using data from January 2000 to December 2013, this adjustment is implemented by subtracting from actual monthly sales a seasonal component, which is the difference between overall average sales and average sales in that month.

Source: IMS data from IPE Report backup production.

Figure 2: Monthly IMS Cigarette Sales Volume, Seasonally Adjusted (CSE in Billions)

71. According to Dr Chipty, the presence of this anticipated tax response, coupled with the fact the tobacco plain packaging measure actually went into effect in October 2012 (as explained above), suggests that a comparison of sales volumes between calendar years 2012 and 2013 (such as those undertaken by the complainants' experts) is not meaningful.¹⁴⁰¹

¹⁴⁰⁰ Expert of T. Chipty Report (9 March 2015), Exhibit AUS-17, para. 64.

¹⁴⁰¹ Expert of T. Chipty Report (9 March 2015), Exhibit AUS-17, para. 65.

72. In Dr Chipty's opinion, a more analytically sound approach is to compare sales volumes in the 12 months leading up to October 2012 to sales volumes in the 12 months following the introduction of the tobacco plain packaging measure.¹⁴⁰² A comparison of this nature demonstrates that wholesale volumes *declined* in the 12 months following the introduction of tobacco plain packaging. Indeed, as the table below demonstrates, a comparison of years beginning in October before and after the introduction of the tobacco plain packaging measure shows a reduction in sales volumes across all data sources relied on by the complainants' experts.¹⁴⁰³

	Oct 11 – Sept 12 Before PP	Oct 12 – Sept 13 After PP	% Change
IMS	21.41	20.99	-1.96%
Nielsen	20.69	20.48	-1.01%
Aztec	13.73	13.65	-0.56%

Sources: IMS and Aztec data from IPE Report backup production. Nielsen data from Klick Pre/Post Report backup production.

Figure 3: Year-Over-Year Change, for Year Beginning October, in Cigarette Sales Volume (CSE in Billions)

73. Moreover, according to Dr Chipty, a proper analysis of the IMS data, which takes into account the unusually high cigarette sales volumes in October and November 2013 ahead of the December 2013 excise increase, actually *reverses* the conclusions from IPE's statistical analysis of tobacco consumption.¹⁴⁰⁴ That is, modifying IPE's own analysis to account for the strategic stock-up prior to December 2013, Dr Chipty finds a *statistically significant reduction* in cigarette sales volumes following the introduction of the tobacco plain packaging measure.¹⁴⁰⁵

74. While Australia does not suggest that Dr Chipty's re-analysis of the complainants' data proves that tobacco plain packaging has already reduced

¹⁴⁰² Expert of T. Chipty Report (9 March 2015), Exhibit AUS-17, para. 65.

¹⁴⁰³ Expert of T. Chipty Report (9 March 2015), Exhibit AUS-17, para. 66.

¹⁴⁰⁴ Expert of T. Chipty Report (9 March 2015), Exhibit AUS-17, paras. 67-69.

¹⁴⁰⁵ Expert of T. Chipty Report (9 March 2015), Exhibit AUS-17, para. 67.

prevalence rates, the results are certainly consistent with tobacco plain packaging having its intended effect of contributing to a reduction in tobacco use. More importantly, however, these results directly contradict the complainants' claims that tobacco plain packaging has not been effective, and may have even "backfired".

5. The complainants' claims regarding youth smoking prevalence in Australia are misleading

75. Each of the complainants makes much of the fact that the results from the most recent National Drug Strategy Household Survey purport to show an increase in daily and occasional smoking among 12-17 year olds between 2010 and 2013.¹⁴⁰⁶ The complainants allege that these results demonstrate that smoking among youths has actually *increased* following the introduction of the tobacco plain packaging measure.¹⁴⁰⁷ As explained below, this is misleading.

76. First, the National Drug Strategy Household Survey results relied on by the complainants report smoking rates only for the years 2010 and 2013. Even if there was an increase in youth smoking (and, as discussed below, the survey results certainly do not establish that there was), it would not be possible to attribute that increase to the tobacco plain packaging measure in the way that the complainants have sought. The complainants themselves were fully aware of this, as some were at pains to emphasise the very same point in relation to the record decline in total smoking prevalence between 2010 and 2013.¹⁴⁰⁸

77. In any event, however, the youth smoking rates relied on by the complainants were not statistically significant. Indeed, the National Drug Strategy Household Survey report states that the trend in smoking rates for those aged 12-17 should be

¹⁴⁰⁶ Ukraine's first written submission, paras. 400, 511, 525; Indonesia's first written submission, para. 412; Cuba's first written submission, para. 163; Dominican Republic's first written submission, para. 523; Honduras' first written submission, para. 395.

¹⁴⁰⁷ Ukraine's first written submission, paras. 400, 511, 525; Indonesia's first written submission, para. 412; Cuba's first written submission, para. 163; Dominican Republic's first written submission, para. 523; Honduras' first written submission, para. 395.

¹⁴⁰⁸ Ukraine's first written submission, para. 523; Cuba's first written submission, para. 162; Indonesia's first written submission, paras. 348-349.

interpreted with caution.¹⁴⁰⁹ None of the complainants sought fit to mention that the results they were relying on were statistically insignificant.

78. In her expert report, Dr Chipty explains in further detail what the youth smoking prevalence results from the National Drug Strategy Household Survey actually mean.¹⁴¹⁰ According to Dr Chipty:

One cannot conclude from these data that daily smoking increased in the youth population following Plain Packaging. Given sampling error associated with these estimates, actual youth daily smoking prevalence among the underlying population may, in reality, be flat or decreasing.¹⁴¹¹

79. Therefore, it is impossible to say with any certainty based on the National Drug Strategy Household Survey data whether smoking prevalence among youths has increased or decreased (or remained the same). Importantly, as Dr Chipty observes, one *cannot* use the results – as the complainants have – to suggest that the tobacco plain packaging measure has "backfired".¹⁴¹²

80. To demonstrate this point further, Australia requested that Dr Chipty analyse trends in youth smoking rates in the Roy Morgan Single Source survey data. This survey only includes people aged 14 years and older, so the sample is necessarily limited to 14-17 year olds. However, the survey is much more frequent than the National Drug Strategy Household Survey. Dr Chipty's analysis shows that in the 12 months following the introduction of the tobacco plain packaging measure in October 2012, youth smoking decreased by over 8% (from 6.1% to 5.6%).¹⁴¹³ However, as with the National Drug Strategy Household Survey results, this decrease was not statistically significant.¹⁴¹⁴

¹⁴⁰⁹ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian Institute of Health and Welfare Survey (2014)), Exhibit AUS-48, p. 21.

¹⁴¹⁰ Expert of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 71-76.

¹⁴¹¹ Expert of T. Chipty (9 March 2015), Exhibit AUS-17, para. 72.

¹⁴¹² Expert of T. Chipty (9 March 2015), Exhibit AUS-17, para. 76.

¹⁴¹³ Expert of T. Chipty (9 March 2015), Exhibit AUS-17, para. 78, Figure 16.

¹⁴¹⁴ Expert of T. Chipty (9 March 2015), Exhibit AUS-17, para. 78, Figure 16.

81. Dr Chipty also analysed trends in youth (14-24 year olds) smoking initiation based on the National Drug Strategy Household Survey results.¹⁴¹⁵ Her results suggest a significant decline in youth initiation between 2010 and 2013. For each wave of the survey, Dr Chipty calculated the share of "never-daily-smokers" who initiated daily smoking at the same age that they completed the survey.¹⁴¹⁶ On average, this initiation rate reflects initiation within a six-month period prior to the survey.¹⁴¹⁷ Dr Chipty finds that the smoking initiation rate has been declining over time, and that the change in the percentage of non-smoking youths initiating smoking in the period from their last birthday and when they completed the National Drug Strategy Household Survey survey fell from 1% in 2010 to 0.4% in 2013 (a 60% reduction) which is statistically significant.¹⁴¹⁸ It is not possible to attribute this decline specifically to the tobacco plain packaging measure. However, it is further evidence of just how successful Australia's comprehensive approach to tobacco control has been.

6. State level smoking prevalence

82. A number of the complainants also point to various state-level data sets in support of claims that smoking prevalence has actually *increased* in some states following the introduction of the tobacco plain packaging measure.¹⁴¹⁹ In particular, the complainants allege that smoking prevalence has increased in New South Wales,¹⁴²⁰ Victoria,¹⁴²¹ Queensland¹⁴²² and South Australia.¹⁴²³

¹⁴¹⁵ Expert of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 82-84.

¹⁴¹⁶ Expert of T. Chipty (9 March 2015), Exhibit AUS-17, para. 82.

¹⁴¹⁷ Expert of T. Chipty (9 March 2015), Exhibit AUS-17, para. 82.

¹⁴¹⁸ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 82. Dr Chipty also presents an alternative analysis in her report which, on average, captures initiation during an eighteen-month period prior to the survey. The longer time period results in higher initiation rates (falling from 2.9% in 2010 to 2.4% in 2013, although this decline is not statistically significant). However, as Dr Chipty observes: "Given that initiation could have occurred, this alternative measure likely does not reflect the full effect of Plain Packaging on smoking initiation": Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 84.

¹⁴¹⁹ Honduras' first written submission, para. 397; Dominican Republic's first written submission, paras. 526-527; Indonesia's first written submission, paras. 116 and 351.

¹⁴²⁰ Indonesia's first written submission, para. 116.

¹⁴²¹ Dominican Republic's first written submission, para. 526; Indonesia's first written submission, paras. 116 and 351.

83. Leaving aside issues with the interpretation and presentation of the state-level data relied on by the complainants,¹⁴²⁴ Australia asked Dr Chipty to analyse state-level smoking rates using the Roy Morgan Single Source survey data (data which, Australia notes, was available to the complainants).

84. One of the main advantages of the Roy Morgan Single Source data over the various state-level data sets cited by the complainants is that the Roy Morgan data is collected monthly, allowing a more accurate comparison of smoking rates immediately prior to and following the introduction of the tobacco plain packaging measure. By way of example, the Victorian data relied upon by the complainants is based on a survey that is run in November and December of each year.¹⁴²⁵ The 2012 survey was run from 1 November to 3 December 2012. As explained above, a majority of smokers were already using plain packaged products by November 2012. The data therefore does not allow for a proper before/after analysis with respect to the introduction of the tobacco plain packaging measure.

85. According to Dr Chipty, a state-by-state analysis of the Roy Morgan data shows:

[T]hat there was a statistically significant *reduction* in overall smoking prevalence since the implementation of Plain Packaging in five of the six Australia states, including the four states cited by Complainants as showing increased smoking prevalence.¹⁴²⁶

¹⁴²² Dominican Republic's first written submission, para. 527; Indonesia's first written submission, para. 116.

¹⁴²³ Honduras' first written submission, para. 397; Dominican Republic's first written submission, para. 526; Indonesia's first written submission, paras. 116 and 351.

¹⁴²⁴ For example, Indonesia submitted that a New South Wales health survey reported that 16.4% of all adults in the state smoked in 2013, up from 14.7% in 2011: Indonesia's first written submissions, para. 116. While these figures are accurate, the context in which Indonesia relies on them is misleading. Importantly, Indonesia omitted to report the prevalence figures for 2012. What those figures show is that smoking prevalence in New South Wales actually *decreased* from 17.1% to 16.4% in the year following the introduction of the tobacco plain packaging measure: see Tobacco Key Facts and Figures, Exhibit IND-28, pp. 8-9.

¹⁴²⁵ M. Scollo et al, "Early Evidence about the Predicted Unintended Consequences of Standardised Packaging of Tobacco Products in Australia: a Cross-Sectional Study of the Place of Purchase, Regular Brands and Use of Illicit Tobacco", *BMJ Open*, 2014, Exhibit AUS-507, p. 3.

¹⁴²⁶ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, para. 81.

86. The table below presents the results of Dr Chipty's analysis.¹⁴²⁷ Overall smoking prevalence in Queensland, Western Australia and South Australia and the Northern Territory reduced significantly in the 12 months following the introduction of the tobacco plain packaging measure. While the decline in Victoria in the first 12 months was very small (and not statistically significant), it was followed by a much larger, statistically significant decline in the subsequent 12 months (although this result would have been confounded by the December 2013 excise increase). Similarly, although the decline in New South Wales in the first 12 months (from 17.7% to 17.2%) was not statistically significant, the decline in the subsequent 12 months (from 17.2% to 16.4%) was statistically significant.

State	Prevalence			Oct 2013 to Sept 2014 Sample Size
	Oct 2011 to Sept 2012	Oct 2012 to Sept 2013	Oct 2013 to Sept 2014	
New South Wales	17.7%	17.2%	16.4% *	16,589
Victoria	18.1%	18.0%	16.6% **	11,505
Queensland	20.6% ***	19.3% *	19.6%	10,010
Western Australia	19.7%	18.0% *	16.7%	5,190
South Australia and Northern Territory	20.4%	18.6% *	18.4%	4,797
Tasmania	22.2%	20.0%	20.8%	2,496

Notes: RMSS data are available monthly, and prevalence is calculated for each 12-month period ending September of each year. Prevalence is weighted using an annual population weight. Asterisks *, **, and *** denote statistically significant difference in prevalence between current and previous periods at the 10, 5, and 1 percent levels, respectively. The significant change from October 2010 – September 2011 to October 2011 – September 2012 in Queensland was negative.

Sources: RMSS, 2010 – 2014.

Figure 4: Overall Smoking Prevalence (Age 14+)

¹⁴²⁷ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 80-81, Table 14.