

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, Geographical Indications and other
Plain Packaging Requirements Applicable to
Tobacco Products and Packaging
(WT/DS435/441/458/467)**

**Oral Statement of Australia at the First Meeting of
the Panel**

Geneva, 1 June 2015

Ambassador's Statement

1. Mr Chairman, distinguished members of the Panel, good afternoon. My name is Hamish McCormick, and I am Australia's Ambassador and Permanent Representative to the World Trade Organization. Australia is pleased to have this opportunity to present its views at the beginning of this first substantive meeting of the Panel.

2. I would like to take the opportunity to remind the Panel why Australia is here. This dispute concerns the regulation of the promotion of a unique, highly addictive, and deadly product.

3. Tobacco use is a global epidemic recognised by the World Health Organization. Tobacco use is the world's leading cause of preventable morbidity and mortality, causing the deaths of nearly 6,000,000 people annually. This is estimated to rise to 8,000,000 deaths annually by 2030, if affirmative action is not taken by all nations. It is fitting, in this regard, that we are meeting the day after World No Tobacco Day, which is marked by the World Health Organization and countries around the world every year to encourage existing tobacco users to quit.

4. Because of the deadly effects of tobacco use, 180 countries are parties to the World Health Organization Framework Convention on Tobacco Control. As outlined in its Preamble, the Convention provides a framework for tobacco control measures to be implemented by the Parties at the national, regional, and international levels in order to reduce the prevalence of tobacco use and exposure to tobacco smoke.

5. Further, and highlighting the seriousness of the effect of tobacco consumption in developing countries, the United Nations has highlighted the implementation of the Framework Convention on Tobacco Control as a sustainable development goal for the post-2015 development agenda.

6. The *amici* filed by the World Health Organization and the Framework Convention on Tobacco Control Secretariat;¹ the Union of International Cancer Control;² and the

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.

Healthy Caribbean Coalition³ highlight the severe risks and consequences of tobacco use across the globe.

7. At home, in Australia, as many as two in every three Australian smokers die prematurely from smoking-related diseases. This amounts to nearly 15,000 deaths of Australian citizens each year. These statistics are unacceptable.

8. The Australian Government, in giving effect to its obligations under the Framework Convention on Tobacco Control, introduced the tobacco plain packaging measure to improve the public health of Australian citizens. This decision was made in the context of the comprehensive range of Australian tobacco control measures, including advertising and promotional bans, excise measures, graphic health warnings, and investments in anti-smoking initiatives.

9. What was missing from this comprehensive range of tobacco control measures was the regulation of the tobacco pack. The tobacco pack was, to use a direct quote from the tobacco industry, the "final communication vehicle"⁴ for advertising and promoting their product to potential and current consumers. In the context of increasingly stringent advertising restrictions in Australia over the course of the past 20 years, regulating the use of the tobacco pack was the next logical step for Australian tobacco control efforts. It is this logical step that Australia has now taken to improve the public health of its citizens.

10. Mr Chairman, Australia was a founding member of the GATT 1947 and is a strong supporter of the multilateral trading system. We believe in rules-based trade. The rules set forth in the covered agreements clearly permit WTO Members to adopt measures to promote public health objectives, and that is precisely what the measure at issue in this dispute does. The complainants' case is a frontal assault on that right. This

² Union for International Cancer Control and Cancer Council Australia, *Written Submission of Non-Party Amici Curiae* (11 February 2015), Exhibit AUS-38.

³ Healthy Caribbean Coalition, *Amicus Curiae Brief* (22 April 2015), Exhibit AUS-515.

⁴ Philip Morris, "Marketing issues corporate affairs conference" (27 May 1994), Exhibit AUS-82, p. 21, Bates No. 2504015017/5042.

morning, the complainants took the position that unless Australia introduces empirical evidence that unequivocally demonstrates that tobacco plain packaging has made an actual contribution to reducing smoking rates in Australia in the limited period since its implementation, the Panel must find that this measure is inconsistent with the covered agreements. I would ask you to pause and consider the implications of their position. Not only are the complainants improperly asking you to gauge the potential effectiveness of a long-term public policy instrument through a short-term lens, but more broadly, they are asking you to restrict the ability of WTO Members to address complex public health problems comprehensively through a variety of measures, some of which by their very design may only achieve their objectives over the long run. I trust that you will find this as troubling a proposition as Australia does. As my colleagues will now proceed to discuss, there is no incompatibility whatsoever between Australia's tobacco plain packaging measure and the provisions of the covered agreements.

Introduction

11. Good afternoon, Mr Chairman and distinguished members of the Panel. My name is Elisabeth Bowes and I am the head of the Department of Foreign Affairs and Trade's Tobacco Plain Packaging Taskforce.

12. As I'm sure the Panel is aware, these disputes are part of a global litigation strategy against tobacco plain packaging. The tobacco industry and its supporters have challenged tobacco plain packaging in national courts and before investor-State tribunals, and have threatened litigation against countries that are considering the adoption of tobacco plain packaging. Just ten days ago, the tobacco industry filed suit against tobacco plain packaging in the courts of the United Kingdom. Other lawsuits are certain to follow as other countries proceed to adopt tobacco plain packaging in accordance with the recommendations of the Conference of Parties to the Framework Convention on Tobacco Control.

13. I invite you to pause and ask yourself this question – why does the tobacco industry care so much about tobacco plain packaging? Why all of this litigation? Is it only because tobacco companies believe that branded packages can induce existing

smokers to switch from one brand to another? Is it only because tobacco companies think that branded packages can induce existing smokers to pay a "price premium" for their products? Or is it because, as they have acknowledged in internal industry documents, tobacco companies use tobacco packaging as a medium for advertising and promoting their products to anyone who happens to see a package – whether that person is an existing smoker, a smoker trying to quit, or a young person who has never smoked?

14. Therein lies one of the core contradictions in the complainants' case. The complainants would have the Panel believe that branded tobacco packaging influences certain human behaviours, but not others. They would have you believe that branded tobacco packaging can influence an existing smoker to switch from one brand to another, for example, but somehow does not constitute a form of advertising and promotion that can increase the appeal of tobacco products to people who have never smoked or to people who are trying to quit. The tobacco industry has been peddling this line for years, unsuccessfully, and has never explained how a branded tobacco package can have the magical property of ceasing to have any influence beyond its influence on existing smokers.

15. It is easy to see, however, why the complainants seek to convince you that branded tobacco packaging is not a form of advertising and promotion. As of 2012, there were 127 countries that maintained complete or partial bans on the advertising and promotion of tobacco products.⁵ Honduras is among the countries that maintain bans on tobacco advertising in print and broadcast media, as well as in outdoor advertising.⁶ There is no credible doubt about the effectiveness of these measures, or the causal pathway by which they operate. By reducing the appeal of smoking, increasing the effectiveness of health warnings, and reducing the ability to mislead, restrictions on tobacco advertising and promotion contribute to improving public health.

⁵ World Health Organization Global Health Observatory Data: Tobacco Use, AUS-516, *available at* <http://www.who.int/gho/tobacco/policies/en/>.

⁶ World Health Organization Report on the Global Tobacco Epidemic, 2013 (Country Profile: Honduras), Exhibit AUS-517, *available at* http://www.who.int/tobacco/surveillance/policy/country_profile/hnd.pdf?ua=1.

16. Tobacco plain packaging is simply an extension of this widely-adopted type of tobacco control measure to a different advertising medium. Contrary to the impression that the complainants try to create, tobacco plain packaging is not a radical departure from existing tobacco control strategies. In *Brazil – Retreaded Tyres*, the Appellate Body recognised that comprehensive policies to address a complex public health issue often entail "mutually enforcing pillars".⁷ And that is exactly the approach Australia has undertaken for many decades, establishing a comprehensive range of tobacco control measures including taxation measures, anti-smoking initiatives, graphic health warnings, and increasingly stringent advertising restrictions.

17. Nor is the tobacco plain packaging measure a type of measure that is directed in particular at the use of trademarks. The causal pathways by which tobacco plain packaging is expected to contribute to Australia's public health objectives are similar to the causal pathways by which other forms of restrictions on tobacco advertising operate. The only difference is, that by removing advertising from the pack itself, tobacco plain packaging has the added benefit of increasing the salience and effectiveness of health warnings on the pack.

18. The complainants' assertion that tobacco packaging does not constitute a medium for advertising and promotion is contrary to common sense, contrary to the evidence, and contrary to many decades of the tobacco industry's own practices. As Professor Tavassoli discusses in his expert report, it is commonly accepted in the marketing industry that retail packaging is a medium for advertising and promotion of the packaged product.⁸ Tobacco industry representatives have repeatedly acknowledged that the industry uses packaging as an advertising medium. For example, a representative of British American Tobacco Australia recently acknowledged that "tobacco companies, like other consumer goods companies, see branded packaging as one of the tools of advertising".⁹ This stands to reason – why else would tobacco companies expend considerable amounts of time and

⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154.

⁸ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, paras. 30-33.

⁹ C. Chantler, *Standardised packaging of tobacco: A Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.22.

money designing tobacco packaging, if not for the purpose of making their products more appealing to consumers?

19. As I discussed a moment ago, the tobacco industry's well-worn answer is that branded packaging serves only to: encourage or deter existing smokers from switching from one brand to another; maintain consumer loyalty; and, allow tobacco companies to extract a price premium for their product. This well-worn answer is on full display in the complainants' submissions in this dispute.¹⁰ The proposition that the packaging serves only these purposes has been advanced by the industry repeatedly in other fora and resoundingly rejected.¹¹

20. Australia trusts that the Panel will find this answer to be as inconsistent and illogical as we do. Clearly, the tobacco industry considers branded packaging to affect human behaviour – otherwise it would not have spent billions of dollars on advertising and promotion, and invested heavily in market research to guide these massive expenditures.¹² Just as branded packaging has behavioural effects that the tobacco industry considers important to *its* bottom line, branded packaging has behavioural effects that are important to the bottom line of public health. The tobacco industry cannot simultaneously maintain that branded packaging affects certain consumer purchase decisions, such as the decision to switch from one brand to another, while having no effect whatsoever on encouraging initiation of tobacco use by young people or discouraging cessation attempts. Packaging affects attitudes and behaviour, and behaviour affects ultimate outcomes. That's as true for the outcomes that the tobacco industry cares about, as it is for the outcomes that public health officials care about.

21. The fact that tobacco packaging is a form of advertising and promotion that affects public health outcomes is what led the parties to the Framework Convention on Tobacco Control to recommend tobacco plain packaging as a means of implementing

¹⁰ See, e.g. Dominican Republic's first written submission, para. 668; Honduras' first written submission, para. 689; Expert Report of J-B. E.M..Steenkamp (29 September 2014), Exhibit DR/HON-5, para. 61-65.

¹¹ See e.g. *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.

¹² Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para.61.

their obligations under Articles 11 and 13 of the Convention. Here again, the complainants ask you to accept an extraordinary proposition – that the 130 countries that were parties to the Framework Convention on Tobacco Control recommended the adoption of a measure that will make no contribution whatsoever to the fulfilment of the Convention's objectives. In fact, as I'll discuss in a moment, the complainants would have the Panel believe that tobacco plain packaging will actually undermine the Convention's objectives by leading to an *increase* in tobacco prevalence and consumption. In other words, the complainants would have the Panel attribute to these 130 countries an act of collective irrationality that would be unparalleled in the history of global public health. Australia is confident that the Panel will not readily accept this proposition.

22. In sum, there is no credible basis for the complainants' assertion that tobacco packaging is not a form of advertising. Nor is there any credible basis for their assertion that branded packaging has no effect on perceptions and behaviours that encourage the initiation of tobacco use or discourage attempts at cessation. These are counterintuitive assertions that are belied by the tobacco industry's own admissions and conduct. Tobacco plain packaging is a limitation on the ability of tobacco companies to advertise and promote their product. It is a logical extension of other restrictions on tobacco advertising and promotion to what the tobacco industry itself has characterized as a "billboard" for their product.

The Objectives and Operation of Australia's Tobacco Plain Packaging Measure

23. Australia's tobacco plain packaging measure advances our legitimate public health objectives while preserving the ability of manufacturers to distinguish their products in the course of trade. In order to demonstrate this, Australia has prepared a visual presentation that has been "beamed up" onto the screen, and to which I now draw your attention. For the assistance of the readership here, these slides are also attached to the oral statement as an exhibit.¹³

¹³ Powerpoint Presentation displayed during Australia's Oral Statement, 1 June 2015, Geneva, AUS-514.

24. As explained in detail in our first written submission, the general objective of the tobacco plain packaging measure is to improve public health by discouraging initiation, encouraging cessation, discouraging relapse, and reducing exposure to smoke. The tobacco plain packaging legislation sets out three specific mechanisms to achieve these broader objectives, being to: reduce the appeal of tobacco products, increase the effectiveness of health warnings, and reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking or using tobacco products. Achievement of these specific mechanisms will directly contribute to the overall objective of improving public health. I will now ask my colleagues to provide the Panel, the Secretariat, and the complainants with examples of actual cigarette packets which relate to some of the slides that we are now viewing. My colleagues are setting these out, in order, and I will refer to some of these during the presentation. Australia has attached a new exhibit list to its oral statement, which identifies each of the packs that we are handing out.

25. First, let's look generally at the ways in which tobacco companies design tobacco product packaging to appeal to consumers.

Overall Appeal

Slide 2 (Marlboro)

26. Here you see a classic Marlboro pack on the left, and a plain packaged Marlboro pack on the right. The branded Marlboro pack has the common graphic design elements of an appealing package. I invite you to look closely at these distinctive elements: the distinctive chevron shape, the "royal crest" of Philip Morris, and the use of a distinctive typeface. The use of the colour red is associated in the tobacco industry – and among tobacco consumers – with a "strong" flavoured cigarette.¹⁴ I also encourage you feel the tactile nature of the pack through the embossed chevron.

¹⁴ 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.

27. The package on the right of the screen continues to convey what this product is – a package of Marlboro brand cigarettes of the "red" variant. As detailed in Australia's first written submission, the tobacco plain packaging measure requires that the branded portion of the pack be 'drab dark brown' in Pantone 448C, with a standardized font style and size. The use of appealing graphic and structural designs is removed by the tobacco plain packaging measure, which standardizes the structure and size of the pack of the tobacco products itself. Note that the plain package has a significantly larger graphic health warning, a feature that was introduced at the same time as the introduction of the tobacco plain packaging requirements. Note also that, under Australian law, these graphic health warnings are to be rotated so that not every pack in front of you will have the same warning.

Slide 3 (Romeo y Julieta)

28. Returning your attention back to the screen, one can see that these appealing characteristics are not limited to the packaging of cigarette products, as this picture of a *Romeo y Julieta* cigar clearly demonstrates. And, Mr Chairman, I'm afraid that the Australian government's largesse does not extend to providing you with an example of this cigar. The embossed, red and gold band suggests that it is expensive and luxurious – the very image that cigar producers have tried to manufacture and maintain.¹⁵

29. The tobacco plain packaging measure applies equally to these non-cigarette tobacco products such as cigars. Under the Tobacco Plain Packaging Regulations,¹⁶ the tobacco plain packaging measure requires cigar packaging to be standardized in the same Pantone 448C 'drab dark brown' colour, and provides specifications for size requirements and required marks. The cigar tube must be rigid, have a cylindrical cross-section, meet minimum dimensions, and carry a health warning. Incidentally note that the health warning is specific to cigars, states that cigar smoking is not a safe alternative, and

¹⁵ 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.

¹⁶ TPP Regulations, AUS-2.

addresses a common misperception that cigars are somehow a safer form of smoking. They are not.

Appealing to youth

30. One of the more insidious industry practices that tobacco plain packaging seeks to address is the use of the tobacco package to appeal to young people.

31. Let's have a look at some of the packs that were available in Australia prior to the introduction of the tobacco plain packaging measure, which highlight the way in which tobacco packs can be used to appeal to young people.

Slides 4 and 5 (Fantasia)

32. Here in front of you, and on the screen we have a pack that is so blatantly marketed to young people that it is almost unbelievable. Let's start with the name: Fantasia. Fantasia is a film produced by Disney, a leading producer of children's movies – as you can see on the screen. Note that the stylized typeface on the cigarette package is obviously meant to invoke the styling of the word "Fantasia" in Disney's artwork for the movie.

33. Now I would invite you to open this pack. Inside we find ten brightly-coloured cigarettes that look like coloured pencils or crayons. By opening like a book, the pack shape allows all of the brightly-coloured cigarettes to be seen at once. Personally, this reminds me of the "Golden Books" that I read as a child, and the crayons that went with them to colour them in.

34. I ask you? Do you think this pack was meant to appeal to young people?

Slide 6 (Sobranie)

35. The Fantasia pack was not an isolated incident. Turning back to the screen, we have a colourful package of "Sobranie of London Cocktail" cigarettes. Like the Fantasia cigarettes, the Sobranie cigarettes are brightly coloured. Note also the use of gold tissue

on the inside of the package, which seems to convey an association with wealth and exclusivity. These cigarettes are likely to appeal to teenage girls and young women.

Slide 7 (Vibes)

36. In relation to the adolescent end of the market, here we have on the screen a package of "Vibes" brand flavoured cigarettes. The pack, with its bright lights and slightly blurred images, is reminiscent of living in a big city and frequenting nightclubs and bars – the very activity adolescents and young adults thrive upon. Note how the cigarettes are described as "special sparkling" – I'm not even sure what that means. It probably has something to do with "experiencing these city vibes" or "experiencing the Vibes flavour".

37. Note also as you can see on the screen that the cigarettes inside the pack have a distinctive black and gold filter end. Given that this colouring has no practical purpose, it can be surmised that they were designed to portray urban glamour and sophistication.

Appealing to women

38. The tobacco industry, as is evident in its internal documents, has also consciously developed advertising strategies, through the pack, to appeal to women.

Slide 8 (Pall Mall)

39. As you can see on the screen, the Pall Mall slims pack on the left hand side appears as overtly feminine. Pink/purple packaging suggests promotion to the female market, and is reminiscent of bright, trendy products that would be attractive to young girls and women. This is further highlighted by the pattern you see along the left side of the pack: while it appears to be part of the Pall Mall crest logo, the swirling purple on white pattern can also suggest innocence and fun. Adding the silver script, in contrast, seems to imply a hint of elegance and sophistication.

40. By stark contrast, notice the plain packaged version of Pall Mall Slims on the right of the screen. The brand and variant names are clearly visible, but what is removed

is the appealing graphic design and the bright colours. This, as you can see, makes a huge difference to the appeal of the pack itself.

Slide 9 (Vogue)

41. Similarly, you have in front of you a Vogue slims pack, which is seemingly based upon the concepts of fashion, beauty and glamour – just like the magazine of the same name. They are also presented on the screen. This pack seems to conjure up images of luxury and celebrity style for sophisticated young women – just like me really. As you can see, the pack itself seems slim and glamorous – open the pack, and even the cigarettes themselves are long and slender. The distinctive design of the package suggests elegance, class and refinement. By the way, as I'll come back to you in a moment, you might want to notice when you close the pack up again, the health warning on the top of the pack. Notice that there is a slight greenish tinge that is cast over the child in the health warning. This seems to be a deliberate ploy to distract from the salience of the health warning itself, as it blends in with the green colour of the pack.

42. Now, By contrast, let's now look at the plain packaged version of vogue slims, also shown on the screen. Hold up the pack side by side. The plain packaged version of the Vogue slims is vastly different, and clearly undermines the association between the cigarettes and the slim, glamorous, sophisticated women who may smoke them. As Australia discussed in its first written submission, the removal of positive perceptions of smokers is important to reducing the appeal of the package and its influence on smoking behaviour. As is evident from the pictures before you, the tobacco plain packaging measure is clearly effective in this regard.

Slide 10 (Vogue lipstick pack)

43. I turn now to a pack that is not available on the Australian market but is in fact available on the Canadian market. There is also a picture of this pack of Vogue cigarettes on the screen. It demonstrates what the tobacco industry will do when there are no regulations on the shape and size of the package.

44. This type of pack is called a "lipstick pack", for obvious reasons. These superslim lipstick packs include cigarettes that are much slimmer and longer than normal cigarettes, and are encased in a pack of bright colours – similar to those used to package beauty products. You can see for yourself the text at the bottom of the packet says that this is "a pack designed in Paris". "*Un paquet conçu à Paris.*" Obviously *très chic, ce paquet.*

Distracting from health warnings

45. Not only does the tobacco industry seek to appeal to consumers and potential consumers through the packaging, as is clearly evident from what I have just shown you, but they also attempt to deliberately detract from health warnings on tobacco products.

Slide 11 (Davidoff)

46. You have in front of you and beamed up on the screen, a picture of a Davidoff pack. The Davidoff pack shows how the design of a pack can detract from health warnings, in addition to appealing to consumers. Have a look at the bevelled edge, which is a unique pack shape which has appealing attributes, but which also wraps part of the graphic health warning around the side of the pack. Also, look at the gold tinge that has been cast over the health warning itself – it is almost the same shade of gold as the branded part of the pack. Once again, this seems to be a deliberate ploy on the part of the tobacco industry to blend the health warning into the package so that it is less noticeable and salient.

47. Under Australia's tobacco plain packaging measure, the graphic health warning – also bearing a gangrenous foot as you can see on the screen – is far more salient, and not only because the graphic health warning is larger. The absence of any colour, figurative or design elements means that there is nothing to distract the consumer from the health warning. This is really evident when you hold the two packs side by side.

Slide 12 (Nat Sherman)

48. I turn now to another example of the blending of the health warning into the colour of the pack. The sick baby in the health warning message has been coloured the

same shade as the branded pack itself. In doing so, the baby somehow looks fake, giving the impression that – if noticed at all – this is not a real or serious issue. Note also the deceptive descriptor of "Naturals: 100% additive-free natural tobacco", which is seen clearly on the box. This descriptor misleads consumers by improperly suggesting that some cigarettes are somehow less harmful than other tobacco products. The combined effect of these packaging design elements means that the effect of the health warning is significantly diminished.

Slide 13 (Stuyvesant)

49. Finally, let's have a look at some Peter Stuyvesant packs. These are also beamed up on the screen. This brand's use of black packaging causes the health warning to bleed into the pack. Just have a look at the pack on the right hand side of the screen, you will immediately notice the smiling, attractive, blond woman in the centre of the pack. What is not obvious is that she is answering a Quitline call from a man on the left hand side of the pack. In fact, you can barely even see him.

Distinguishing between Brands and Variants

Slide 14

50. Australia's tobacco plain packaging measure addresses the types of concerns that I've just identified, by removing the ability of the tobacco industry to appeal to young people, and removing the ability of the tobacco industry to detract from the health warnings or mislead consumers as to the harms of tobacco products. The tobacco plain packaging measure accomplishes these objectives while preserving the ability of tobacco manufacturers to distinguish their products in the course of trade. Under Australia's measure, manufacturers can use company, brand and variant names in a standardized typeface to identify and distinguish their products.

51. I would invite you to take a look at these three cigarette packages on the screen. I would also invite you to have a look again at the "Choice" brand plain packaged pack that

the Dominican Republic handed out this morning,¹⁷ the one that would be complaint with Australia's measure. As Honduras and the Dominican Republic explained in their statements this morning, the "essential function" of a trademark is to "distinguish[] products in the course of trade". Looking at the plain packaged Choice pack that the Dominican Republic handed out, and looking at the three plain packaged packs on the screen, I would ask you this – can you tell which pack is "Longbeach Rich Blue"? Which pack is "Choice Rich Gold"? Of course you can. Australian's plain packaging measure has no effect on whether tobacco products can be distinguished in the course of trade. The brand and variant names are clearly distinguishable on the bottom 25% of the pack.

Slide 15

52. I would note that the same is true for different variants within the same brand. Is it possible to tell which one of these is the "Dunhill Refined Grey"? Of course it is.

Slide 16

53. Finally, I'd just like to remind you that, in the Australian market, consumers do not see tobacco packages prior to the purchase of the product. In most Australian stores, this was true prior to the introduction of tobacco plain packaging, and it is true afterwards.

54. Is it possible in this picture to tell whether the tobacco packages behind the grey cabinets are branded or plain? No, it isn't. The tobacco plain packaging measure has had no effect on how consumers purchase tobacco products. In the Australian market, the consumer must request a tobacco product by reference to its brand and variant names. Those are the names that still appear on the package.

55. What this demonstrates, among other things, is that our tobacco plain packaging measure is addressed to the ways in which branded tobacco packages serve to advertise and promote the product after the product is sold. As I explained earlier, tobacco plain

¹⁷ Mock ups illustrating variations in the design elements of cigarettes packaging, Exhibit DR-246.

packaging is a logical extension of Australia's comprehensive restrictions on tobacco advertising and promotion. Tobacco plain packaging is about reducing the ability of the package to serve as a mobile billboard for the product. By reducing the appeal of tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead, this measure will contribute to improving public health outcomes as part of our comprehensive array of tobacco control measures.

56. Mr Chairman, members of the Panel, I trust that this visual presentation has been helpful in describing the objectives and operation of our tobacco plain packaging measure. Having seen this presentation, I would ask you to consider this question – is it really plausible for the complainants to assert that this measure will make *no* contribution to Australia's public health objectives? That is what the complainants have set out to prove to you in this dispute – not only that tobacco plain packaging will make no contribution to Australia's public health objectives, but that it will affirmatively undermine those objectives. The complainants would have you believe that Australia, the Conference of Parties to the Framework Convention on Tobacco Control, and the countries that are actively considering or are in the process of implementing tobacco plain packaging are acting contrary to their stated public health objectives.

57. But if the complainants believe that tobacco plain packaging will lead to *increased* sales and consumption of tobacco products, then what are we doing here? As tobacco exporting countries, presumably they would consider this to be a good thing. This is another one of the contradictions that runs all the way through the complainants' case. The complainants want you to believe that tobacco plain packaging will be ineffective as a public health measure, but will somehow have an adverse effect on their trade interests, for example, that it will be "trade restrictive" within the sense of Article 2.2 of the TBT Agreement. Just as they want you to believe that tobacco packaging isn't a medium for advertising – except when it is – they want you to believe that tobacco plain packaging will have a significant effect on trade, except when it won't. It's no wonder that the complainants struggle to keep all of these balls in the air simultaneously. Perhaps this explains why the complainants this morning effectively abandoned their argument that tobacco plain packaging has led to an increase in tobacco

consumption, the so-called "backfire" proposition that their latest expert, Professor List, expressly rejects.

58. These flimsy and contradictory arguments are the basis for a series of unmeritorious legal claims set out by the complainants in their first written submissions. I will now address the flaws in the complainants' arguments under the TRIPS Agreement and why the Panel must reject those claims. My colleague, Stephen Bouwhuis, will speak to the claims made under the TBT Agreement.

The complainants' claims under the TRIPS Agreement

59. I will begin my discussion of the complainants' claims under the TRIPS Agreement with their claims under Article 20. As you know, Article 20 provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". For reasons that I will explain, Australia considers that the complainants have failed to establish the threshold applicability of this provision to the tobacco plain packaging measure. Even if they had, however, the complainants have not even remotely discharged their burden of establishing that the special requirements set forth in the tobacco plain packaging measure "unjustifiably" encumber the use of a trademark in the course of trade. It should be apparent from the presentation that I just gave you that any such encumbrance is manifestly *not* "unjustifiable" under a proper interpretation of this term.

60. There are two points to be made at the outset. First, for the reasons that we set forth in our first written submission, Australia does not consider that the aspects of the tobacco plain packaging measure that prohibit the use of certain types of trademarks, such as composite or figurative trademarks, fall within the scope of Article 20. As Australia and several of the third parties have explained, Article 20, properly interpreted in its context, concerns special requirements that encumber the use of a trademark in the course of trade when domestic law otherwise permits that trademark to be used.¹⁸ A

¹⁸ See Australia first written submission, paras. 338-342; Singapore's third party written submission, paras. 43-45; Norway's third party written submission, paras. 50-52; Argentina's third party written submission, para. 10; Canada's third party written submission, para. 64.

contrary interpretation would have potentially far-reaching consequences for the application of Article 20 – consequences that, in Australia's view, were not intended.

61. The second point to be made at the threshold concerns the complainants' failure to identify any respect in which the tobacco plain packaging measure encumbers the use of a trademark "in the course of trade", taking into account the existence of comprehensive point-of-sale restrictions in the Australian market. As I illustrated in my presentation a moment ago, consumers do not see tobacco packages in the Australian market until after they have requested a particular tobacco product by reference to its brand and variant name. Because the tobacco plain packaging measure continues to permit tobacco manufacturers to place their trademarked brand and variant names on the package, the measure at issue in this dispute has had no effect on the use of trademarks to distinguish one product from another in the course of trade.

62. Even assuming, *arguendo*, that prohibitions on the use of trademarks fall within the scope of Article 20, and that the complainants had identified a relevant encumbrance upon the use of trademarks in the course of trade, the fact would remain that the complainants have failed to demonstrate that any such encumbrance is "unjustifiable". Thus, the Panel must reject the complainants' claims under Article 20 in any event, and in all events.

63. Let's begin by clearing aside the issue of who has the burden of proof under Article 20. Article 20 is not an exceptions provision that a Member must invoke in response to a claim of inconsistency. It is an affirmative obligation not to encumber "unjustifiably" the use of a trademark in the course of trade. In order to establish a *prima facie* claim of inconsistency under Article 20, the complaining Member must therefore demonstrate that the measure at issue imposes "special requirements", that these special requirements "encumber" the "use" of a trademark "in the course of trade", and that any such encumbrance has been imposed "unjustifiably". Clearly, the burden of proof belongs to the complainants.

64. Then we come to the meaning of the term "unjustifiably". Australia considers it telling that not even the third parties that were otherwise supportive of the complainants'

claims in this dispute appeared prepared to endorse the proposition that the term "unjustifiably" imposes a standard of "necessity" or "least restrictiveness". This proposition finds no support in the ordinary meaning of the term "unjustifiably" interpreted in its context and in light of the object and purpose of the TRIPS Agreement. It amounts to a blatant attempt to replace the word "unjustifiably" with an altogether different standard that appears in other provisions of the covered agreements. But treaty interpretation is not an occasion for rewriting what the provision actually says.

65. Under the proper interpretation of the term "unjustifiably", the complainants must demonstrate that there is no rational connection between, on the one hand, any encumbrance upon the use of trademarks in the course of trade resulting from the special requirements at issue, and, on the other hand, the pursuit of Australia's legitimate public health objectives. This interpretation is directly supported by the manner in which panels and the Appellate Body have interpreted the term "unjustifiably" as it appears in other provisions of the covered agreements. Under the ordinary meaning of this term, the complainants must show that any encumbrance imposed by the tobacco plain packaging measure "cannot be reconciled with", does "not relate to" or "would go against" the legitimate public policy objectives of the measure.¹⁹

66. In this connection, I would ask you to recall the visual presentation that I gave earlier. Can it really be said, for example, that a measure that prevents tobacco companies from packaging cigarettes to look like a box of coloured pencils from Walt Disney bears no rational connection to the objective of reducing the appeal of smoking? Can it really be said, more generally, that a measure that reduces the ability of tobacco packaging to advertise and promote this deadly product bears no rational connection to Australia's legitimate public health objectives, when the tobacco industry itself has so skilfully used tobacco packaging to fulfil its own objectives? Clearly, these are not tenable assertions.

67. This is, again, why the complainants have gone to such lengths to persuade you that branded tobacco packaging is not a form of advertising and promotion. They understand that if branded tobacco packaging is a form of advertising and promotion – a

¹⁹ See Australia's first written submission, paras. 367-368.

self-evident fact that the tobacco industry itself has repeatedly acknowledged – then it is obvious that tobacco plain packaging "relates to", can be "reconciled with", and does not "go against" Australia's public health objectives. Tobacco plain packaging is, as we have explained, a logical extension of restrictions on the advertising and promotion of tobacco products that Australia and many other countries maintain. It is, moreover, a tobacco control measure that 180 countries have endorsed by becoming parties to the Framework Convention on Tobacco Control. It is not "unjustifiable" under any conceivable interpretation of this term. The Panel must therefore reject the complainants' claims under this provision.

68. This brings me to the complainants' other claims under the TRIPS Agreement. For the reasons that we explained in our first written submission, Australia considers these claims to be utterly lacking in merit. These claims depend upon a wholesale rewriting of the TRIPS Agreement.

69. It is apparent that the complainants' claims under Articles 2.1, 15, 16, 22.2 and 24.3 of the TRIPS Agreement depend on the existence of a positive "right of use" of a trademark or a sign. The complainants went out of their way this morning to dispute this characterization, arguing that they have never suggested that the TRIPS Agreement establishes a positive right of use. Australia welcomes the complainants' acknowledgement that no such right is found in the TRIPS Agreement. However, it is apparent from the complainants' own statements this morning that their claims are nonetheless dependent on the existence of such a right of use.

70. For example, in its opening statement this morning, Honduras explained that its claims under Article 15.4 are based on the fact that certain non-distinctive signs can only acquire distinctiveness through use. Honduras's chain of reasoning is that because the tobacco plain packaging measure does not allow such non-distinctive signs to be used on tobacco products, these signs cannot acquire distinctiveness, and thus cannot be registered as trademarks. This argument is clearly premised on the proposition that Australia's measure is in violation of Article 15.4 because it does not permit the use of these non-distinctive signs. Australia does not understand how Honduras can take the

position that its claim under this provision is not dependent on a right of use, notwithstanding its claim to the contrary.

71. Australia agrees with the complainants that trademarks fulfil an important economic function. Australia likewise agrees that trademark owners have a legitimate interest in using their trademarks to distinguish their products from those of other enterprises in the course of trade. As the Dominican Republic acknowledged in its oral statement this morning, however, "a legitimate *interest* in use is not the same as a *right* to use". We agree. The question before the Panel is what rights Members are required to confer under the TRIPS Agreement, and whether Australia's tobacco plain packaging measure is inconsistent with any of those obligations.

72. The complainants do not appear to disagree with Australia that the rights that Members are required to confer under the TRIPS Agreement are negative rights of exclusion. As the panel in *EC – Trademarks and Geographical Indications (Australia)* recognised, it is a "fundamental feature of intellectual property protection" 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."²⁰ As the panel explained, "if the drafters had intended to grant a positive right, they would have used positive language."²¹

73. Based upon their statements today, it appears to be undisputed that Australia's tobacco plain packaging measure does not create exceptions to the rights conferred by a trademark and is therefore not within the scope of Article 17 of the TRIPS Agreement. Notwithstanding this apparent agreement, the complainants continue to rely heavily upon the fact that, under Article 17, a Member is required to "take account of the legitimate interests of the owner of the trademark" when providing for any exceptions to the negative rights of exclusion that the Member is required to confer under Article 16. The

²⁰ Panel Report, *EC– Trademarks and Geographical Indications (Australia)*, para. 7.246

²¹ Panel Report, *EC– Trademarks Geographical Indications (Australia)*, para. 7.610; see also para. 7.611.

complainants seek to parlay this language in a provision that is not even at issue in this dispute into an overarching concept that "permeates" the TRIPS Agreement.

74. The ability to use a trademark on a product, and to sell that product on the market, is a general market freedom and is not a protected legal right under the TRIPS Agreement. This fundamental feature of intellectual property protection is recognised by the majority of third parties to this dispute. Canada has explained, for example, that to imply a positive right of use into the TRIPS Agreement "would do violence" to the text.²² Australia agrees with Canada and the other third parties in this regard.

75. It is Australia's submission that no amount of linguistic contortion can change the fact that there is no positive right to use a trademark or sign, implicit or explicit, that Members are required to confer under the TRIPS Agreement. Accepting this proposition would have far reaching implications for the ability of Members to implement any number of measures that may even remotely affect the ability of a trademark owner to use a trademark, and constrain Members' regulatory powers in ways that were never contemplated in the TRIPS Agreement. As paragraph 4 of the Doha Declaration on TRIPS and Public Health makes clear, a panel must be very cautious to interpret the TRIPS Agreement in a manner that does not limit WTO Members' right to protect public health and that respects the balance created in the TRIPS Agreement, as reflected in Articles 7 and 8.

76. The complainants continue their assault on the plain meaning of the text by asserting that Australia's measure "compels acts of unfair competition" in violation of Article 10*bis* of the Paris Convention and Article 22.2(b) of the TRIPS Agreement. By its terms, Article 10*bis* requires Members to assure effective protection against "dishonest" or "untruthful" *acts of commercial rivalry* between market actors. Government regulation is not an "act of commercial rivalry", and Australia's measure simply does not fall within the scope of Article 10*bis* of the Paris Convention. The obviousness of this proposition makes it unsurprising that not a single third party in this dispute was prepared to endorse the complainants' unfair competition claims.

²² Canada's third party written submission, para. 40.

77. Mr Chairman, Members of the Panel, that completes our discussion of the complainants' claims under the TRIPS Agreement. For the reasons that we have explained here and in our first written submission, the Panel must reject the complainants' claims under the TRIPS Agreement in their entirety. I will now give the floor to my colleague Stephen Bouwhuis to discuss the complainants' claims under the TBT Agreement.

The Complainants' Claims under the TBT Agreement

78. Mr Chairman, distinguished members of the Panel, as my colleague has already addressed the TRIPS aspects of the dispute, I will now turn to the complainants' claims that the tobacco plain packaging measure is inconsistent with Article 2.2 of the TBT Agreement. As set out in Australia's first written submission, the complainants' claims under Article 2.2 are as unfounded and unconvincing as their claims under the TRIPS Agreement.

79. Rather than repeat all of that analysis this afternoon however, I will focus on a few salient aspects of the burden that the complainants confront in this dispute in seeking to establish their claims under Article 2.2.

80. At the outset, Australia underscores the significant evidentiary burden that a complainant faces in any case where it seeks to establish a violation of Article 2.2., a burden which the complainants seem to ignore in this case. Indeed, in all prior cases to date, the complainants were ultimately unable to establish a violation of Article 2.2, even in disputes involving a product ban, discriminatory measures, or where trade-restrictiveness was conceded. For example, in *US – Clove Cigarettes*, the panel had no difficulty in finding that a measure as trade restrictive as a product ban was not inconsistent with Article 2.2, in light of the measure's contribution to the United States' legitimate objective of protecting human health by banning flavored tobacco products that appealed particularly to youth, and the nature and gravity of the risks that non-fulfillment would create.

81. In contrast, the complainants in this dispute confront at least three factors that make their *prima facie* case even less tenable than that of all other prior unsuccessful Article 2.2 complainants. First, the tobacco plain packaging measure was adopted for the protection of human health and in accordance with relevant international standards under Article 2.5 of the TBT Agreement, and as such must be presumed *not* to constitute an "unnecessary obstacle to international trade". Second, the tobacco plain packaging measure is non-discriminatory, something the Appellate Body recently found might also raise the complainants' burden by requiring evidence of actual trade effects to substantiate an allegation of trade-restrictiveness.²³ Finally, in the absence of any evidence of actual trade effects, the complainants have failed to establish any other credible basis for a finding that the tobacco plain packaging measure is "trade-restrictive", which is a fundamental prerequisite for a finding that a is "more trade-restrictive than necessary" under Article 2.2.

82. In assessing whether the complainants have made a *prima facie* case under Article 2.2, the Panel should begin its analysis with Article 2.5 of the TBT Agreement. Article 2.5 provides that technical regulations adopted "in accordance with relevant international standards" are rebuttably presumed *not* to constitute "unnecessary obstacles to international trade" within the meaning of Article 2.2. As I will discuss next, Australia has demonstrated that the tobacco plain packaging measure was adopted "in accordance with relevant international standards" under Article 2.5. Accordingly, the Panel must ascertain whether the complainants have succeeded in rebutting the presumption that the tobacco plain packaging measure is not an "unnecessary obstacle to international trade" under Article 2.2. They have not even come close to doing so.

83. Pursuant to subsection 3(1)(b) of the Tobacco Plain Packaging Act, a section which the complainants ignore, the tobacco plain packaging measure gives effect to Australia's obligations as a party to the World Health Organization Framework Convention on Tobacco Control, and in particular, the Guidelines for the Implementation of Articles 11 and 13 of that Convention. These Guidelines expressly provide that parties

²³ Appellate Body Report, *US – COOL (Article 21.5)*, footnote 643 to para. 5.208.

to the Convention should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on the packaging of tobacco products. And in response to Indonesia's response to comments this afternoon, I would draw the Panel's attention to paragraph 46 of the FCTC Guidelines on Article 11, and paragraphs 16 and 17 of the guidelines on article 13. As Australia demonstrated in its first written submission, following the interpretative guidance provided by the Appellate Body in *US – Tuna II*, the Guidelines are a "relevant international standard" within the meaning of Article 2.5 of the TBT Agreement. This is because they are a document providing guidelines for tobacco products for repeated and common use that has been adopted by an international standardizing body, that is, a body with recognized activities in standardization, whose membership is open to WTO Members. The Guidelines were also adopted by consensus, are available to the public, and can be relied upon by all 180 Parties to the Convention, which includes 148 of the WTO's 160 Members.

84. For these reasons, Australia has established that the tobacco plain packaging measure was adopted "in accordance with relevant international standards" under Article 2.5 and therefore must be presumed *not* to constitute an "unnecessary obstacle[] to international trade" under Article 2.2. In Australia's view, the presumption reflected in Article 2.5 is the natural complement to the requirement in Article 2.4 that WTO Members base their technical regulations on international standards, which in turn reflects the key objective of the TBT Agreement of promoting the harmonization of standards at the international level. It follows that only in the most extraordinary circumstances would a complainant be able to succeed in establishing that technical regulations that were adopted in accordance with relevant international standards nonetheless constitute "unnecessary obstacles to international trade" within the meaning of Article 2.2. The complainants have identified no such circumstances in this case.

85. The complainants' claims under Article 2.2 also fail for an equally fundamental reason: they have not demonstrated that the tobacco plain packaging measure is trade restrictive. Australia notes at the outset that the complainants do not allege that the tobacco plain packaging measure is discriminatory. Although the complainants initially brought claims under Article 2.1 of the TBT Agreement, they have not pursued those

claims further. They have neither alleged nor demonstrated that the tobacco plain packaging measure has a detrimental impact on competitive opportunities for imported tobacco products relative to domestic tobacco products. This is an important point because it potentially increases their evidentiary burden under Article 2.2. The Appellate Body recently explained in *US – COOL (Article 21.5)* that "supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures that address a legitimate objective."²⁴ The tobacco plain packaging measure meets this test, as it is a technical regulation that addresses public health objectives in a non-discriminatory manner. Yet the complainants have not even acknowledged this latest jurisprudence regarding Article 2.2, let alone attempted to demonstrate that the measure they challenge has caused any actual trade effects.

86. Instead, the complainants' case of trade restrictiveness overwhelmingly focuses on the alleged "downtrading" effects of the tobacco plain packaging measure, which purportedly cause demand to shift from premium to less profitable market segments. Australia sees no basis for the proposition that alleged declines in the profits or shifts in the market shares of particular companies, by themselves, are legally sufficient to establish trade-restrictiveness under Article 2.2.

87. In this regard, Australia agrees with the European Union that, in order to show that the tobacco plain packaging measure is trade-restrictive within the meaning of Article 2.2, the complainants must demonstrate that it has a limiting effect on overall trade in tobacco products of all WTO Members.

88. Australia further agrees with the European Union that a measure that limits trade for one Member but that increases trade for all other Members, such that there is a net increase in trade, would not, without more, be trade-restrictive within the meaning of Article 2.2 of the TBT Agreement. As the European Union describes, issues related to the size of the cake are matters for Article 2.2; however, issues related to how the cake is sliced up are matters for Article 2.1.

²⁴ Appellate Body Report, *US – COOL (Article 21.5)*, footnote 643 to para. 5.208.

89. The complainants make no attempt to establish whether and to what extent any alleged downtrading effects of the tobacco plain packaging measure result in a *limiting* effect on overall trade in tobacco products. Their failure to do so is unsurprising, because total tobacco imports have increased since the introduction of the tobacco plain packaging measure. Further, overall prices of tobacco products in Australia have increased in this same period.

90. In any event, the complainants have failed to demonstrate that any downtrading effects in the Australian market are attributable to the tobacco plain packaging measure, rather than to other elements of Australia's comprehensive range of tobacco control measures, which include enlarged graphic health warnings, which were introduced simultaneously with tobacco plain packaging and which the complainants have not challenged in this case, despite Indonesia's focus on them this afternoon. Similarly, as Australia noted in its first written submission, downtrading is a global market trend that was occurring prior to the introduction of the tobacco plain packaging measure, and there is no evidence on the record which even attempts to isolate the effect of tobacco plain packaging on downtrading in Australia.

91. The complainants therefore offer no credible arguments or evidence to support their assertion that the tobacco plain packaging measure has been trade restrictive. A few of the complainants assert that the tobacco plain packaging measure increases barriers to entry in the Australian market because the measure reduces opportunities for new market entrants to compete on the basis of brand differentiation. However, as Australia noted in its first written submission, this assertion is directly contradicted by the complainants' own expert evidence,²⁵ which suggests that brand differentiation is itself a barrier to entry, and by the Houston Kemp report which demonstrates that tobacco plain packaging has not significantly altered the barriers to entry in the Australian market. Finally, a

²⁵ Specifically, Professor Steenkamp, an expert appointed by both the Dominican Republic and Honduras, notes that: "Brand differentiation results in consumers being more loyal to the brand, and being willing to pay a price premium. This allows firms to earn higher margins and financial returns and to create barriers to entry that make it difficult for other firms to enter the market." (Expert Report of J-B.E.M Steenkamp (29 September 2014), Exhibit DR/HON-5, paras. 9-10 and 43.

single complainant, Honduras,²⁶ asserts that the tobacco plain packaging measure entails "compliance" or "adaption" costs, but without even bothering to introduce any evidence to substantiate that there are any incremental costs imposed on foreign producers above those already required by existing regulation. Given the opportunity to remedy this defect this morning Honduras has failed to do so. Rather, Honduras just alleges increased compliance costs, ignoring that graphic health warnings were introduced at the same time and which would have required them to change their packaging in any event. Finally Australia notes that nor has Honduras demonstrated whether, and to what extent, these alleged increased compliance costs have resulted in a limiting effect on overall trade in tobacco products.

92. For all of these reasons, the Panel must dismiss the complainants' claims under Article 2.2. They have not begun to meet the burden they confront in seeking to overcome the presumption under Article 2.5 that the tobacco plain packaging measure is consistent with Article 2.2, nor have they been able to establish any credible evidence of trade restrictiveness as that term is properly interpreted – without which there can be no violation of Article 2.2.

93. In closing, I would note that there is an obvious way in which the complainants could have argued that the measure is trade restrictive – they could admit that, over time, Australia's measure will reduce demand for tobacco products by reducing initiation and relapse, and increasing quitting. In the context of Australia's market, where domestic production is being phased out, this would necessarily result in a reduction in imports. However, the complainants have avoided making this argument because it is lethal to their case. If the complainants were to establish that the measure is trade restrictive in this commonly understood sense, then it would be trade restrictive only to the extent required to contribute to Australia's public health objectives, and therefore would not be more trade restrictive than necessary.

²⁶ Honduras' first written submission, paras. 878-886.

Conclusion

94. Mr Chairman, distinguished members of the Panel, thank you for your attention this afternoon. My name is Jackie Davis and I am the Assistant Secretary for the Tobacco Control Taskforce at the Department of Health. I am the Australian public health official responsible for the implementation of our tobacco plain packaging measure.

95. On Wednesday of this week, the Panel will hear from the third parties in this dispute. I reviewed the delegation lists the other day, and I was gratified to see that many of my counterparts from other national governments will be present at that session. This underscores, in my view, the tremendous importance that the global public health community attaches to the issues that this Panel has been called upon to consider.

96. While Australia was the first country to implement tobacco plain packaging, there are other countries that have either adopted tobacco plain packaging measures or are actively considering the adoption of such measures. Many of the delegations that will be here on Wednesday are from those countries. As Australia has explained, tobacco plain packaging is a measure that the Conference of the Parties to the Framework Convention on Tobacco Control has specifically recommended for consideration as a means of implementing the parties' obligations concerning the packaging and advertising of tobacco products. It is therefore not surprising that public health officials from around the world are following this dispute closely.

97. Australia considers that there is no conflict between the trade liberalization goals of the WTO Agreements and the public health objectives of the Framework Convention on Tobacco Control. Trade and public health can and should be mutually supportive. For the reasons that we have explained in our first written submission and have elaborated upon today, Australia believes that the complainants' claims against Australia's tobacco plain packaging measure are completely unfounded. There is no conflict here.

98. On behalf of the Government of Australia, I would like to conclude by thanking the Panel and the members of the Secretariat staff for their hard work in preparing for this

first meeting of the Panel. We look forward to the remainder of the proceedings this week and look forward to answering your questions.