



JTI's response to the Australian Government's Consultation Paper on the Tobacco Plain Packaging Bill 2011 Exposure Draft

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JTI is part of the Japan Tobacco Group of Companies, a leading international tobacco product manufacturer. It markets world-renowned brands such as Winston, Mild Seven and Camel. Its other international brands sold outside Australia include Benson & Hedges, Silk Cut, Sobranie of London, Glamour and LD. With headquarters in Geneva, Switzerland, and net sales of USD 10.2 billion in the fiscal year ended December 31, 2010, JTI has about 25,000 employees and operations in 120 countries. For more information, visit www.jti.com.

JTI currently manufactures three different brands of tobacco product sold in Australia: two brands of cigarettes (Camel and More) and one brand of other tobacco product, Old Holborn.

1. EXECUTIVE SUMMARY

1.1 JTI is categorically opposed to plain packaging and the other proposals in the Government's Consultation Paper of 7 April 2011 (the *Consultation*) on the Tobacco Plain Packaging Bill 2011 Exposure Draft (the *Draft*).

1.2 It is among JTI's core beliefs that minors should not smoke and should not be able to obtain tobacco products and that adult smokers should be appropriately informed about the risks of smoking before they make the decision to smoke. These beliefs are central to our Code of Conduct, marketing practices, operational policies and the way JTI does business. However, JTI will question, and where necessary challenge, regulation that is flawed, unreasonable, disproportionate or without evidential foundation.

1.3 Although JTI does not have a corporate presence in Australia and its products (which represent only a small share of the Australian market) are distributed by third parties who may submit their own proposals to the consultation, the significance of the proposals in the Draft make it important and necessary to set out JTI's objection to it. JTI believes firmly that the proposals are manifestly disproportionate and inappropriate and that, given the serious concerns identified in this submission, the Government's plain packaging and other proposals should not be progressed further.

JTI's key objections to the proposals

An unjustified expropriation of property

1.4 Plain packaging would prevent JTI from using its brands, which are – as with any consumer product manufacturer – JTI's most valuable assets. In our view, the measures proposed by the Draft are not only an unconstitutional acquisition of property on unjust terms, they are also an unjustified expropriation of our property.

A disproportionate measure without an appropriate evidential basis

1.5 The Consultation ignores a key fact: there is no credible evidence to demonstrate that plain packaging is capable of achieving the Government's stated objectives (set out below). The Government appears to have accepted this. It was reported on 24 May 2011 that Federal Health Minister Nicola Roxon said, in response to a call for such evidence, that: "[t]he sort of proof they are looking for doesn't exist when this hasn't been introduced around the world".¹ Against this backdrop, the plain packaging proposal seeks to dictate arbitrarily the appearance of product packaging on the basis of a fundamental mischaracterisation of the role of packaging.

An unreasonable interference with lawful market activity

1.6 Packaging plays an important role in the consumer goods market. It conveys guarantees of a product's origin and quality, and the investment in it. Plain packaging frustrates the provision of these guarantees, thereby impeding lawful competitive market activity. This is compounded by the ability of plain packaging to facilitate unlawful market activity through illicit trade and counterfeit products.

¹ See <http://www.news.com.au/breaking-news/no-proof-plain-packs-will-cut-smoking-roxon/story-e6frfku0-1226061939855#ixzz1NNYBf29Z>.

1.7 Given its leading international position and modest Australian presence, JTI's market share has significant potential for growth, through competition with well-established brands. JTI is therefore also concerned about the market crystallisation effects of plain packaging, which will deprive it of any meaningful ability to introduce international brands to the market for existing Australian adult smokers.

A failure to meet international and Australia's own Better Regulation principles

1.8 Tobacco products carry risks to health and we believe that appropriate and proportionate regulation of our industry is both necessary and right. JTI supports legislative measures on tobacco control that meet the Better Regulation principles defined by the OECD² and endorsed in the Handbook of the Australian Office of Best Practice Regulation (the *Handbook*).³ However, when measured against this benchmark and that of the Australian Constitution, the Consultation and Draft fall short of these fundamental requirements in a number of ways, as detailed in Part 4 below.

A packaging law seeking to go beyond the pack

1.9 The Draft is characterised as a bill regarding packaging, but also seeks to facilitate the regulation of the design of tobacco products themselves,⁴ and to increase the size of the front of pack health warnings. Like the plain packaging proposal, JTI rejects entirely these provisions of the Draft. Contrary to Better Regulation principles, the Government has cited no evidence demonstrating that either measure would achieve the objective of changing smoking behaviour. Further, the proposal to allow the regulation of the design of the product itself is vague and potentially very far reaching. If it proceeds with the Draft, the Government must consult separately on such proposals, having undertaken a full and proper review of the evidence and the impact of these proposals.

Outline of JTI's submission

1.10 In accordance with these views, this submission addresses the following:

- (a) **Part 2:** the role of tobacco product packaging and the mischaracterisation of this role in the Consultation;
- (b) **Part 3:** why the plain packaging proposal will not meet the Government's stated objectives and why some of the stated objectives are ill-defined or duplicative of existing regulation;

² See page 3 of the OECD Guiding Principles for Regulatory Quality and Performance, 2005, available at <http://www.oecd.org/dataoecd/19/51/37318586.pdf> (the *OECD Guiding Principles*).

³ Page 5 of the Best Practice Regulation Handbook (June 2010), <http://www.finance.gov.au/obpr/proposal/gov-requirements.html#handbook>.

⁴ For example, the Draft vaguely states that the requirements may “*specify conditions for using any design of packaging or any design of tobacco product*” or “*otherwise relate to the appearance, size or shape of packaging or tobacco products*” (emphasis added): see clause 14(2)(d) and (e) of the Draft. Page 14 of the Consultation elaborates on measures which may be captured under these requirements, such as “*the cigarette stick appearance be limited to either plain white, or plain white with an ‘imitation cork’ filter top*”.

- (c) **Part 4:** the inconsistency of the plain packaging and other proposals with Better Regulation principles and with fundamental rights and constitutional guarantees;
- (d) **Part 5:** the ways in which the plain packaging proposal will impede lawful activity and yet facilitate unlawful activity;
- (e) **Part 6:** the alternative regulatory solutions that would better achieve the Government's objectives whilst avoiding the serious negative consequences of plain packaging; and
- (f) **Part 7:** the changes to the legislative timetable that would be necessary to properly implement the plain packaging and other proposals even if they were capable of being taken forward.

2. MISCHARACTERISATION OF THE ROLE OF PACKAGING

2.1 Tobacco is a legal product and effective communication of the health risks of smoking can and should be achieved without having a disproportionate impact on legitimate competition, consumer choice, intellectual property rights and protected freedoms. The ability of manufacturers to distinguish their products through packaging provides a key means by which consumers are able to freely exercise economic rights of purchase.

2.2 Smoking is an adult choice and JTI believes in openness and transparency about the products adult smokers choose to purchase. Packaging is used by existing adult smokers to identify, obtain information about and choose tobacco products easily and without confusion. Distinctive product packaging is thus fundamental to facilitate inter- and intra-brand⁵ navigation and competition, and is the primary tool for developing brand equity, innovation and non-price competition. Manufacturers and consumers must be able to identify and distinguish products. This is an essential function of packaging and trade marks. Packaging also:

- (a) ***reaffirms brand equity and brand identity:*** in Australia, packaging is one of the last remaining, and therefore an essential, means by which JTI identifies and differentiates its products;
- (b) ***enables consumer choice:*** the packaging supports branding, facilitates greater product variety and thereby increases consumer choice;
- (c) ***supports product innovation:*** JTI innovates in packaging design and conveys information to consumers, on the pack, about product changes and improvements;
- (d) ***maintains quality standards:*** packaging serves as a symbol to consumers that JTI stands behind its products. It provides an incentive to manufacturers to preserve the integrity of their products, and so protects consumers;

⁵ Inter-brand is used in this document to refer to navigation and competition between different brands of tobacco product (i.e. More and Camel) whereas intra-brand refers to it between members of the same brand family (i.e. Camel Blue or Camel Filter).

- (e) ***assists intermediate distributors and retailers***: distinctive product packaging facilitates the product supply and stocking processes; and
- (f) ***inhibits illegal activity***: distinctive packaging complicates the manufacture of counterfeit products and provides an incentive to manufacturers to preserve the integrity of their products.

2.3 Given that it has both branding and functional roles, the packaging of tobacco products can be understood as having a continuing, independent function in itself, as well as being an integral and inseparable part of what is purchased by adult smokers when they buy a tobacco product.⁶

Packaging is not a predictor of smoking

2.4 The objectives underpinning the proposals, which are detailed in Part 3 below, are based upon a series of assumptions and assertions that are wrong, and which have the effect of incorrectly defining discussions regarding the effects of plain packaging. As discussed in Part 3 below, the assumption that there is a causal link between tobacco product packaging and smoking initiation, on the one hand, and continuation, on the other, is flawed and inconsistent with contemporary, credible and scientifically rigorous understanding of smoking behaviour.

Packaging facilitates inter- and intra-brand competition

2.5 The Australian tobacco market is highly competitive but it is a mature one. Manufacturers compete and innovate in order to gain market share. Market share of brands fluctuates, illustrating that there is genuine inter-brand competition, particularly when a new brand or product is introduced to the market. Inter-brand competition in this market therefore remains fierce, with local brands competing to preserve or expand market share, and imports competing to take market share from locally established brands and from other imported brands. The competition for market share is therefore vital.

2.6 Tobacco companies need, and have a right, to distinguish and differentiate their products, without confusion, from those of their competitors.⁷ This also enables and reaffirms the importance of consumer choice in a market where a wide variety of tobacco products are available.

⁶ Dr Andrew Lilico, an expert commissioned to conduct an economic analysis of the potential impacts of a proposal to introduce plain packaging explains this further at paragraphs 1.8 and 2.2 to 2.6 of his report (***Dr Lilico's Report***): see "*Economic Analysis of a Display Ban and/or Plain Packs Requirement in the UK*", 2 September 2008, available at <http://www.jti.com/file.axd?pointerid=8e10b02017a843cd920459089c544088&versionid=aa0f965e4e1d49788be3e8dec22f7273&ed62df69c100481fbd3b1502e53ebd20>.

⁷ The Australian High Court has recognised the ability to distinguish products as an important element of the "use" of a trade mark in the context of trade mark law. For example, in *E and J Gallo Winery v Lion Nathan Australia Pty Ltd* [2010] HCA 15, the High Court found that "*the concept of 'use' of a trade mark... must be understood in the context of s 17 [of the Trade Marks Act], which describes a trade mark as a sign used, or intended to be used, to 'distinguish' the goods of one person from the goods of others.*"

2.7 Consumers are entitled to expect a product to be of a quality consistent with previous experience and to hold the trade mark proprietor liable for failure to perform.⁸ If packaging is no longer distinctive:

- (a) competition is distorted because consumers are less able to identify their choice of product or select alternative products; and
- (b) consumers are less likely to be sure of the origin and quality of goods.

2.8 The Consultation fails to take account of any of these important risks to market dynamics (which are discussed in Part 5 below).

3. PLAIN PACKAGING WILL NOT MEET THE STATED OBJECTIVES

The stated objectives

3.1 The Consultation and the Draft essentially state three objectives for the Government's plain packaging proposal:

- (a) plain packaging will change smoker behaviour thereby reducing levels of smoking and exposure to smoke;⁹
- (b) Australia is obliged to introduce plain packaging by international law;¹⁰ and
- (c) objectives (a) and (b) will be supported by a reduction in the attractiveness of tobacco products, an increase in the noticeability and effectiveness of health warnings, a reduction in the ability of packaging to mislead consumers and removal of any ability to "advertise" on packaging.¹¹

3.2 For the reasons set out in Parts 3 and 4 below, JTI considers that there is insufficient evidence that the proposal will meet the key objectives; the assertion that Australia has international law "obligations" to introduce plain packaging is incorrect; and the supporting objectives are ill-defined and insufficiently connected to the key objectives.

Absence of credible evidence

3.3 The burden lies on the Government to justify the introduction of plain packaging. It must provide credible evidence demonstrating that the proposal will achieve its goals.

⁸ Schechter (1927) 40 Harv LR 813.

⁹ Clause 3(1)(a) of the Draft states that the Government seeks "*to improve public health by:*
(i) *discouraging people from taking up smoking, or using tobacco products;*
(ii) *encouraging people to give up smoking, and to stop using tobacco products;*
(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*".

¹⁰ Clause 3(1)(b) of the Draft states that the Government seeks "*to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control*". For the reasons set out in Part 4 below, this reasoning mischaracterises the provisions of the WHO Framework Convention on Tobacco Control (*FCTC*), which does not oblige any country to mandate plain packaging.

¹¹ Page 10 of the Consultation and clause 3(2) of the Draft.

3.4 Expert analysis prepared for JTI shows that the consumer survey analysis relied on by the Government **is not credible evidence that plain packaging will change actual smoking behaviour** (either by way of a reduction in smoking uptake by minors or increased smoking cessation among minors or adults).¹²

3.5 JTI acknowledges that, as no country has introduced it, no observed evidence will exist relating to the effect of plain packaging on actual smoking behaviour. The principles of Better Regulation require the Government, in these circumstances, to be even more vigilant to ensure that the evidence base is the “best available” and “reliable” (i.e. of the requisite quality). Further reasons to question the evidence relied on in the Consultation are detailed below.

3.6 Contrary to Better Regulation principles, the Government is seeking to introduce regulation without credible underlying empirical evidence able to demonstrate that it will be effective in achieving its objectives.

The proposal will not change actual smoker behaviour

3.7 The proposal is based on fundamentally misconceived and out-dated notions of smoking behaviours: that tobacco packaging is a predictor of smoking initiation; and that the provision of yet more information about the health risks of smoking will change smoking behaviour. These notions are wrong, and are not supported by science.

3.8 A plain packaging measure will be ineffective if it is not based on, and consistent with, a credible and scientifically rigorous understanding of smoking behaviour. Knowing how and why minors decide to experiment with tobacco products and how they obtain tobacco products are prerequisites for the design of regulatory interventions that will be effective in changing their behaviour. Understanding how adult consumers weigh up the risks and benefits of smoking is critical to designing effective methods to communicate with them in a way that is likely to cause them to change their behaviour.

3.9 The need for, and likely success of, tobacco regulation can only be properly and coherently assessed if it is informed by the best contemporary science on the smoking behaviour of adults and minors. In December 2010, JTI responded to the European Commission’s Consultation on possible changes to the Tobacco Products

¹² This conclusion is based on expert reports prepared for JTI. Professor Timothy M. Devinney (Professor of Strategy at the University of Technology, Sydney and Conjoint Professor in the Faculty of Medicine at the University of New South Wales) is an expert in consumer survey research, experimental methods and associated statistical analysis. His report (30 November 2010) entitled “*Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products*” is available at http://www.jti.com/documents/corp_reponsibility/16e56b87d2814d84acdd3a75e9d7e689/Devinney.pdf.

Dr Warren J. Keegan (Distinguished Professor of Marketing and International Business at the Lubin School of Business, Pace University, New York) is, in particular, an expert in consumer survey research and analysis. See in this regard, his report “*Analysis of Consumer Survey Evidence Relevant to DG SANCO’s Proposal to Increase the Size of Health Warnings on Tobacco Packaging*”, available at http://www.jti.com/documents/corp_reponsibility/16e56b87d2814d84acdd3a75e9d7e689/Keegan-co-Report.pdf, and the previous reports referred to in it.

Directive, which also discussed plain packaging.¹³ The Government may therefore find it useful to consider the two relevant reports by leading experts (notably Professors Steinberg,¹⁴ Dhar and Nowlis¹⁵) which accompanied JTI's submission to the Commission. In their reports, these Professors give their independent opinions on the basis of contemporary scientific thinking, on how the smoking behaviour of adults and minors should best be understood. In JTI's opinion, it flows from these experts' findings that:

- (a) **measures to reduce smoking among minors will only be effective if they control the ability of minors to obtain tobacco products and remove cigarettes from the social networks of teenagers.** Access-based solutions take due account of the fact that minors are naturally more prone to risk-taking behaviour than adults. As Professor Steinberg explains, decision-making during adolescence is characterised by a heightened emphasis on rewards over risks; a tendency to focus on the immediate, rather than longer term, consequences of a decision; a susceptibility to peer influence; and weak self-regulation. Minors are well aware of the risks of smoking, but may choose to experiment anyway. These factors, together, explain why a psychological profile characterised by sensation-seeking, peer and family influence (i.e. peers and family members who smoke) and the availability of cigarettes are the main risk factors for smoking. Accordingly, measures focussed on packaging are unlikely to be effective; and
- (b) **measures directed at adult smoking behaviour need to target adults' decision-making at the point of consumption in order to be effective,** taking due account of the analysis that adults employ when making decisions about risk. They would also need to be more individualised and to be positively framed, in the light of the triggers to smoking behaviour. Professors Dhar and Nowlis therefore dismiss the likely effectiveness of interventions that reflect the so-called "traditional model" of consumer decision making, which is based on the notion that rational consumers will shift their smoking behaviour in accordance with the evaluation of information on the health risks of smoking.

¹³ JTI's response is available at http://www.jti.com/cr_home/industry_regulation.

¹⁴ Professor Laurence Steinberg, Distinguished University Professor and Laura H. Carnell Professor of Psychology at Temple University, Philadelphia, United States of America, is a leading authority on adolescent judgment, decision making and risk taking. His report, entitled "*Adolescent Decision Making and the Prevention of Underage Smoking*" is available at http://www.jti.com/documents/corp_reponsibility/16e56b87d2814d84acdd3a75e9d7e689/Steinberg.pdf.

¹⁵ JTI's response in relation to the issues of smoking among adults is guided by the report of Professor Ravi Dhar and Professor Stephen Nowlis entitled "*Report on the Consumer Behaviour and Decision-Making of Cigarette Smokers*", available at http://www.jti.com/documents/corp_reponsibility/16e56b87d2814d84acdd3a75e9d7e689/Dhar-Nowlis.pdf. Professor Ravi Dhar is the George Rogers Clark Professor of Management and Marketing and Director of the Centre for Customer Insights at the Yale School of Management, New Haven, United States of America. Professor Stephen Nowlis is the August A Busch, Jr Distinguished Professor of Marketing in the Olin School of Business at Washington University in St Louis, United States of America.

The other ‘reasons’ for seeking to mandate plain packaging are flawed

3.10 The Consultation and Draft identify additional reasons for seeking to mandate plain packaging: reducing the attractiveness of tobacco products; increasing the salience of health warnings; reducing the ability for packaging to “mislead” consumers;¹⁶ and removing “*one of the last remaining frontiers for tobacco advertising*”.¹⁷ None of these reasons justify the mandating of plain packaging as they are, variously: insufficiently articulated and evidenced; insufficiently capable of changing smoker behaviour; and unnecessarily duplicative of existing regulation.

Attractiveness is not a proper policy objective

3.11 Reducing “attractiveness” *per se* is not, and cannot be, a self-standing objective that can justify tobacco regulation. It is an amorphous and vague concept incapable of legitimately supporting a public health policy regulatory goal or objective. It fails established “issue definition” criteria: it is lacking in any evidential foundation and is inherently uncertain and arbitrary.¹⁸ It simply acts as an umbrella term, and the Government must identify, articulate clearly and assess the evidence against the underlying public policy objective(s).

3.12 Equally, the denormalisation of smoking advocated by the Consultation¹⁹ is not, and cannot be, a self-standing objective. It is not legitimate to seek to discriminate against, stigmatise or ostracise existing adult smokers, or to treat the purchase or use of tobacco, as “abnormal”, “unacceptable” or “tainted”. As a policy objective, it runs counter to the hallmarks of Australia as a democratic society (notably pluralism, tolerance and broadmindedness), lacks any evidential foundation and is arbitrary. “Denormalisation” adds nothing to underlying public health rationale.

No evidence that increasing the prominence of health warnings will affect smoking behaviour

3.13 ‘Noticing’ something – such as a health warning on a tobacco product – does not necessarily translate into a change in actual smoking behaviour by consumer survey respondents.²⁰ The Government must demonstrate convincingly that its proposal would not only enhance the “visibility”, “prominence” or “salience” of

¹⁶ Clause 3 of the Draft and page 9 of the Consultation indicate that the Australian Government is proposing plain packaging in order to: “*reduce the attractiveness and appeal of tobacco products to consumers, particularly young people; increase the noticeability and effectiveness of mandated health warnings; and reduce the ability of the packaging of tobacco products to mislead consumers about the harmful effects of smoking*”.

¹⁷ Page 1 of the Consultation.

¹⁸ The OECD’s first principle of good regulation (OECD Guiding Principles) concerns issue identification. Furthermore, pages 28 and 29 of the Handbook detail a number of steps that should be taken to clearly “identify the problem” early in the RIS.

¹⁹ For example, the Consultation suggests that an objective of the plain packaging proposal is to reduce “*perceptions about the likely enjoyment and desirability of smoking*”: see page 6 of the Consultation.

²⁰ Increasing the prominence of health warnings would only affect behaviour to the extent that such warnings had not been noticed previously.

health warnings, but that it would actually result in changes to smoking behaviour (such as reducing smoking uptake by minors).

Packaging does not mislead consumers

3.14 Neither the Draft nor the Consultation address exactly how tobacco packaging might mislead consumers. The risk of misleading conduct in the consumer goods industry is already highly regulated in Australia.²¹ This ensures that all parties remain accountable for their marketing practices. New legislation to prevent consumers being misled is therefore unnecessary.

3.15 If the concern underlying the Government's reference to misleading packaging relates to pack colours, JTI wishes to clarify certain misconceptions underlying such assertions. Some commentators perpetuate the misconception that colour acts as a misleading indication of the relative health risks of smoking one particular product in comparison with another. The colours used by JTI on packaging are not intended to, and do not, communicate any message as to the health risks associated with smoking a pack of cigarettes, relative or otherwise. Consumers, in fact, take smoking-related health messages from a variety of different sources and media, including on-pack health warnings, and are well aware of the health risks of smoking.

3.16 Further, no Australian or international regulator has found that colour use on tobacco product packaging communicates misleading messages to consumers.

Packaging is not promotional advertising

3.17 JTI does not accept that the cigarette pack itself constitutes a form of promotional advertising and that it should be regulated as if that were the case.

3.18 Australia rightly recognises the difference between the advertising and promotion of tobacco products on the one hand, and the labelling and design of the pack itself on the other, and regulates them separately.²² The FCTC adopts the same, separate approach.²³ The Consultation's categorisation of tobacco packaging as advertising has therefore abandoned the position clearly and correctly adopted previously by the Government, without any relevant evidential basis or relevant expert analysis.

²¹ In Australia, the consumer protection provisions in Chapters 2 and 3 of the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (formerly sections 52 and 53 of the Trade Practices Act) are well-established and provide protection for consumers and businesses from misleading or deceptive conduct in trade and commerce. These provisions apply to all manner of representations including those made in marketing and advertising, on packaging and accompanying collateral materials.

²² *The Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) is the primary federal legislative measure containing restrictions on packaging, labelling and health warnings. By contrast, it is the *Tobacco Advertising Prohibition Act 1992* (Cth) which regulates advertising and promotion. Page 6 of the Consultation confirms this view and states that “words, signs and symbols that appear on a tobacco product or its packaging are currently a key exception to the definition of a ‘tobacco advertisement’ in the TAP Act”.

²³ Available at: http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf. See Articles 11 and 13 of the FCTC. JTI notes that the non-binding guidelines on Articles 11 and 13, issued by the Conference of the Parties, merge these separate provisions, without any evidential basis.

4. THE PROPOSAL IS AT ODDS WITH BETTER REGULATION AND CONSTITUTIONAL GUARANTEES

The Draft and the Consultation fall short of international standards and the Government's own Handbook on regulatory best practice

4.1 The Government has recognised in its Handbook that adherence to international Better Regulation principles (such as those defined by the OECD) is of general benefit to Australian society as the regulatory framework within which businesses operate is a key determinant of competitiveness, growth, and employment performance. As the Handbook itself notes: “*poor regulation can cause frustration and unintended consequences, or simply add red tape that adds nothing useful to the economy*”.²⁴

4.2 Unfortunately, the Draft and Consultation, and the procedure the Government has followed to date, fall short of the international principles of Better Regulation as well as the those set out in the Handbook, which has resulted in obvious and serious flaws.

Any regulation must have a clear legal basis

4.3 In conflict with the Better Regulation principle that all regulatory measures should rigorously respect the rule of law, the Government has sought to base its plain packaging proposal on an incorrect assertion that Australia is legally obliged to mandate plain packaging.

4.4 The failure to meet this Better Regulation principle is of particular concern to JTI. The Draft states that one of its objectives is “*to give effect to certain **obligations** that Australia has as a party to the Convention on Tobacco Control*” (emphasis added).²⁵ This analysis is incorrect as the FCTC does not mandate, and, indeed, does not even mention, plain packaging.²⁶ Whilst the non-binding²⁷ guidelines adopted by the FCTC Conference of the Parties mention plain packaging, they merely note that it is a measure that Parties can “consider”. In any event, as the guidelines themselves make clear, they do not change Australia’s FCTC obligations. Furthermore, the FCTC requires that measures be implemented in accordance with national law.²⁸ In Australia, this would mean that were the FCTC to impose obligations requiring the introduction of plain packaging (which it does not), such measures could only be

²⁴ See page 3 of the Handbook.

²⁵ See clause 3(1)(b) of the Draft.

²⁶ See also paragraph 95 of Professor Daniel Gervais’ report entitled “*Analysis of the Compatibility of Certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention*”, which is available at http://www.jti.com/documents/corp_reponsibility/16e56b87d2814d84acdd3a75e9d7e689/Gervais.pdf (*Professor Gervais’ Report*).

²⁷ This is reflected expressly in the recitals to the guidelines in respect of Articles 11 and 13 of the FCTC.

²⁸ Express references are made to “national law” in each of Articles 5, 11 and 13, which are the three FCTC Articles on which the Government has purportedly based the Draft, according to pages 6 and 7 of the Consultation.

introduced in a way which is consistent with the Constitutional guarantee of “just terms” in relation to the acquisition of property.²⁹

*The objectives must be clearly stated and legitimate*³⁰

4.5 Both the Handbook, and the Better Regulation principles on which it is based, require that any regulatory measure is founded on clear and legitimate objectives. As addressed in detail in Part 3 above, there are serious doubts regarding the legitimacy and clear definition of the objectives of the measures.

There must be clear evidence to support the proposal, and the evidence base must be reliable and the best available

4.6 The Handbook and international Better Regulation principles each require that regulatory measures be based on clear evidence that the measure is justified, based on a realistic assessment of the measure’s effectiveness.

4.7 There are major flaws in the evidence presented by the Government in support of plain packaging, particularly in light of the analysis in the expert reports noted at paragraphs 3.4 and 3.9 above. Further, the Government has contracted out the analysis of the design features of plain packaging to an inappropriate and potentially biased body that lacks expertise on some key issues, such as international law obligations and intellectual property rights, and the findings of such research have not been made public.

4.8 The Government is relying on research undertaken by an “Expert Advisory Group”. The Consultation suggests that the group is made up of “*leading experts in tobacco control*” and that its remit was to “*oversee consumer research on optimal design and design features that take into account concerns expressed by retailers about handling of packages*”.³¹

4.9 Many of the members of the Expert Advisory Group are also authors of the studies proposed by the Government as evidence in support of plain packaging.³² It is

²⁹ See paragraphs 4.27 to 4.29 below.

³⁰ See pages 28 and 33 of the Handbook.

³¹ See page 11 of the Consultation.

³² Four of the nine members of the Expert Advisory Group (listed on page 12 of the Consultation) authored five of the nine studies referenced on page 6 as an “evidence base” for the plain packaging proposal:

<i>Members (p.12)</i>	<i>Studies (p.6)</i>
<i>Professor Ron Borland PhD</i>	<ul style="list-style-type: none"> • Wakefield, M, Germain D, Durkin S, Hammond D, Goldberg M and Borland R 2011. Effects of increasing size of health warnings on plain vs branded packs. Presentation at Society for Research on Nicotine and Tobacco 17th Annual Meeting, February 17, 2011. Toronto, Canada.
<i>Professor Melanie Wakefield PhD</i>	
<i>Assistant Professor David Hammond</i>	<ul style="list-style-type: none"> • Hammond D & Parkinson C 2009. The impact of cigarette package design on perceptions of risk’, Journal of Public Health. • Hammond, D 2010. “Plain packaging” regulations for tobacco products: the impact of standardizing the color and design of cigarette packs. Salud pública Méx. 2010. • Hammond D, Daniel S 2011. Plain packaging: Findings from female youth in the UK. Paper presented at the Society for Research on Nicotine and Tobacco, 17 February 2011.
<i>Professor Janet Hoek</i>	<ul style="list-style-type: none"> • Hoek J, Wong C, Gendall P, et al 2010. Effects of dissuasive packaging on young adult smokers. Tobacco Control doi:10.1136/tc.2010.037861.

hard to see how these individuals, some of whom are prolific in the field of tobacco control and strong proponents of plain packaging, are able to exercise the necessary independent thinking when considering the possible effectiveness of the measure. Moreover, plain packaging raises complex questions which require input from trade mark and Constitutional law experts. The Expert Advisory Group has no members with identifiable experience in these areas, and instead has a heavy bias towards the social sciences.

4.10 Reflecting this general lack of credible evidence as to effectiveness of plain packaging, JTI notes that no government in the world has adopted plain packaging legislation. It was considered by the Canadian and Australian governments in the mid-1990s,³³ but rejected by both. Indeed, the Australian Senate Community Affairs References Committee has previously concluded that there was “*not sufficient evidence to recommend that tobacco products be sold in generic packaging*”.³⁴ This view was repeated in 2008 by the UK Department of Health. More recently, in March 2010, the Lithuanian Parliament voted against a plain packaging proposal.

4.11 Justifiably, there is a heavy burden on governments who want to displace JTI’s fundamental rights that are protected by Constitutions, international law and trade treaties, and national law. The Government must provide reliable evidence demonstrating clearly that plain packaging will achieve identified policy objectives. This burden is not, and cannot be, met by the Draft.

Accurate and complete regulatory impact assessment should be undertaken

4.12 The Consultation is not accompanied by a proper Regulatory Impact Assessment (*RIA*), which should include a Regulation Impact Statement (*RIS*).

4.13 The Government has recognised previously the need for an effective regulatory impact assessment process in order to achieve Better Regulation and give rise to “*sound analysis, informed decision making and transparency*”.³⁵

4.14 The Handbook states that “*central to the Government’s RIA process is the Regulation Impact Statement (RIS) ...It formalises and provides evidence of the key steps taken during the development of the proposal, and includes an assessment of the costs and benefits of each option*”.³⁶ In terms of when a RIS should be published, the Handbook advises that “*a RIS must be presented to the decision maker at the time the*

³³ Expert Panel Report for Health Canada (1995). “*National Survey of Teens: Knowledge, Attitudes, Beliefs and Smoking Behaviours*”, *When Packages Can’t Speak: Possible impacts of plain and generic packaging of tobacco products*. Health Canada, Ottawa. Report of the Senate Community Affairs References Committee. “*The tobacco industry and the costs of tobacco related illness*” (December 1995).

³⁴ Report of the Senate Community Affairs References Committee. “*The tobacco industry and the costs of tobacco related illness*” (December 1995).

³⁵ See page 7 of the Handbook.

³⁶ See page 7 of the Handbook.

*decision is made*³⁷ and that “*after a decision has been made, the RIS needs to be made public*”.³⁸

4.15 The Handbook requires that a RIS should set out:

- (a) the problem or issues that give rise to the need for action;
- (b) the desired objectives;
- (c) a range of options (regulatory and non-regulatory, as applicable) that may constitute feasible means for achieving the desired objectives;
- (d) an assessment of impact (costs, benefits and, where relevant, levels of risk) of a range of feasible options for consumers, business, government and the community;
- (e) a consultation statement;
- (f) a conclusion and recommended option; and
- (g) a strategy to implement the preferred option.³⁹

4.16 The Handbook also states that, in addition to these elements, where a regulatory proposal restricts competition: “*agencies must demonstrate in the RIS that the preferred option generates a net benefit to the community as a whole and that the only way of achieving the government’s objective is to restrict competition*”.⁴⁰

4.17 JTI is concerned that these steps have not been followed, in breach of the Government’s own requirements.

*Regulators must assess and evaluate existing legislation (including whether it is being effectively enforced) and other options before regulating further*⁴¹

4.18 The Consultation⁴² details a wide range of regulatory measures that the Australian and State governments have taken to reduce smoking, including, as recently as April 2010. These include significant tobacco excise and tax increases, the introduction of retail display bans and the banning of smoking outdoors and in vehicles. Given the very recent introduction of these measures, in the context of an already steadily declining rate of smoking,⁴³ the Government has failed to allow sufficient opportunity for these measures to work and to assess their effectiveness. Doing so would enable the Government to properly assess the need for plain packaging.

³⁷ See page 8 of the Handbook.

³⁸ See page 7 of the Handbook.

³⁹ See page 14 of the Handbook.

⁴⁰ See page 15 of the Handbook.

⁴¹ See page 32 of the Handbook.

⁴² Pages 4 and 5 of the Consultation.

⁴³ See page 3 of the Consultation.

4.19 According to the Handbook, where action has previously been taken to address an overarching objective, the Government should demonstrate whether or not existing regulation has been effective in addressing the problem, and if not, consider first whether *“the situation could be dealt with by improving enforcement or encouraging better compliance with the existing regulation”*.⁴⁴

4.20 In this regard, JTI notes that the approach set out in the Handbook is consistent with the view of Professor Cave,⁴⁵ who states that *“it is important for a regulator when considering further regulatory intervention to consider whether existing regulations are being effectively implemented and enforced. If they are not, then the regulator should consider whether doing so would obviate the need for new measures”*.⁴⁶

An inappropriate ‘layering’ of regulatory measures

4.21 The Government is (inappropriately and without careful thought) seeking to layer regulatory measure upon further regulatory measure.

4.22 The Handbook requires regulators to *“assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment”*.⁴⁷ The Government, in seeking to introduce a suite of regulatory measures in unison, would be inappropriately layering regulation upon further regulation, without assessing the impact of each individual measure. By way of example:

- (a) in addition to the introduction of a plain packaging measure, (to which JTI is categorically opposed, as explained above), the Consultation proposes, simultaneously, to increase the size of health warning on the front of the pack from 30% to 75% of the pack face; and
- (b) the Consultation additionally proposes regulating the appearance of the product itself, stating that the cigarette stick appearance should be limited to either plain white, or plain white with an ‘imitation cork’ filter tip.

The Government should consult on all key issues

4.23 The Handbook states that *“any policy development, including proposed new regulations or changes, will involve Consultation with relevant stakeholders, including the main parties affected by the proposal”*.⁴⁸

⁴⁴ See paragraph 3.14, page 32 of the Handbook.

⁴⁵ Professor Martin Cave, BP Centennial Professor at the London School of Economics and Political Science, United Kingdom, is an expert in the design of regulatory policies to achieve economic, and also social, objectives and in the fields of regulatory impact assessments and better regulation. Professor Cave’s report, prepared for JTI and entitled *“Better Regulation’ and certain tobacco control measures” (Professor Cave’s Report)* is available at http://www.jti.com/documents/corp_reponsibility/16e56b87d2814d84acdd3a75e9d7e689/Cave.pdf.

⁴⁶ See paragraph 7.1 of Professor Cave’s Report.

⁴⁷ See paragraph 1.17h, page 4 of the Handbook.

⁴⁸ See paragraph 3.66, page 44 of the Handbook.

4.24 The Government should undertake a proper consultation on all key issues set out in, or flowing from, the Draft in accordance with Better Regulation principles. JTI strongly believes that the Better Regulation principles demand that the form and content of all regulations that the Draft proposes be made are properly consulted on.

4.25 It is notable that the Government has failed to release now for consultation a draft of the regulations proposed to be made under (what is currently) clause 14 of the Draft. The most significant practical impacts of the proposed plain packaging regime will arise from the precise technical specifications for cigarette and other tobacco product (*OTP*) packaging proposed to be set out in these regulations. Accordingly, it is inappropriate that this Consultation is being conducted without a simultaneous consultation on these regulations.

The scope of the proposals must be clear

4.26 The failure to consult now on the regulations to be made under clause 14 is exacerbated by the fact that Consultation and Draft are inappropriately vague in terms of the application of the proposed measures to OTPs such as “roll-your-own” tobacco. One of the three brands of product JTI manufactures for sale in Australia is a non-cigarette product (Old Holborn). For the purposes of the Draft, JTI notes that the definition of a tobacco product would include OTPs⁴⁹ but, remarkably, the Consultation includes no details of the technical specifications potentially applicable to them. In fact, it does not mention such products at all despite the above provisions of the Draft. Contrary to Better Regulation principles, it is entirely unclear how the Government intends to regulate these products. A further detailed and meaningful consultation will therefore be required.

A breach of Constitutional guarantees

4.27 Plain packaging would involve the expropriation and acquisition of highly valuable intellectual property rights. Intellectual property is expressly recognised as a proprietary right by Australian law. The destruction of these rights through the prevention of their use on the very products for which they have been developed, applied and protected, without adequate justification or compensation, is inherently wrong. This will have unjustified impacts on JTI and others, whilst allowing the Government to benefit politically through its implementation of its flawed tobacco control policy. As such, the proposal breaches both the Australian Constitution, and is contrary to internationally recognised fundamental rights to property, to trade and the freedom of expression.

4.28 The protection of property is one of the very few fundamental guarantees that Australia’s founding fathers deemed necessary to entrench in the Constitution. In conflict with Better Regulation principles and the Handbook, the proposal engages this guarantee not accidentally, but knowingly, and in a way that ensures that the industry is denied all access to the guarantee of “just terms” in section 51(xxxi) of the Constitution.

⁴⁹ See clause 4 of the Draft.

4.29 The inclusion in the Draft of a provision allowing regulations to be made permitting the limited use of some trade marks on tobacco product packaging in specific ways⁵⁰ is clearly insufficient to remedy these concerns.

5. THE PROPOSAL IMPEDES AND RESTRICTS LAWFUL ACTIVITIES WHILST FACILITATING UNLAWFUL ONES

5.1 The potential economic, policy and legal effects of any regulatory proposal should be balanced carefully before action is taken. As set out below, a range of serious consequences would flow were the Government to enact the Draft. Given that its adverse effects are serious, and in the absence of reliable evidence to support the policy objective relied upon, this approach is flawed.

5.2 Enacting the Draft would lead to a series of negative and undesirable consequences, including:

- (a) the expropriation and/or impairment of JTI's IP rights, rights to property, freedom of expression and freedom to trade;
- (b) undermining the efforts in tackling the illicit trade in tobacco products;
- (c) the serious and unnecessary damage to the legitimate economic interests of manufacturers, their connected industries and competition in the Australian tobacco sector; and
- (d) a diminished contribution to the Australian economy.

Packaging uses important and valuable property

5.3 JTI has invested very substantially in its IP rights, brands and products, and this is reflected in the strong equity of its brands internationally, which are worth billions of Australian dollars. Extensive efforts are taken to protect such rights by way of a rolling programme of trade mark applications, registrations, oppositions, renewals and enforcement actions. Internationally, those enforcement efforts include registered trade mark infringement actions and actions to protect its unregistered proprietary rights by JTI, in addition to actions taken by regulatory enforcement agencies.

5.4 Registered trade marks, unregistered copyright and registered patents are recognised as forms of personal property in Australia.⁵¹ Registered trade marks confer on the trade mark owner the exclusive proprietary right to use the trade mark and authorise others to use the trade mark.⁵² Analogous provisions exist in the relevant legislation in respect of copyright and patents.⁵³

⁵⁰ See clause 11(2) of the Draft.

⁵¹ Section 21 of the Trade Marks Act 1995 (Cth), section 196 of the Copyright Act 1968 (Cth) and section 13 of the Patents Act 1990 (Cth) provide that registered trade marks, copyright and patents (respectively) are personal property.

⁵² Section 20 of the Trade Marks Act 1995 (Cth).

⁵³ Section 13 and 31 of the Copyright Act 1968 (Cth) and section 13 of the Patents Act 1990 (Cth).

5.5 JTI owns a broad range of sophisticated IP rights in relation to its tobacco products (including both unregistered and registered trade marks, patents and inventions, copyright works and other rights). Its portfolio of Australian trade marks includes a number of applications and registrations⁵⁴ in respect of tobacco products in Australia.

5.6 By way of example, the following image illustrates some of the trade marks which are registered in Australia for one of JTI's products:



5.7 If the Government were to prohibit the use of non-word trade marks on tobacco packaging, JTI would, for example, only be able to use the word “Camel” in a standard font on tobacco packaging. It could no longer use its 21 other Camel-related trade marks registered in Australia on tobacco packaging, the earliest of which has a registration date of 30 December 1926.

5.8 The existence and enforceability of intellectual property rights have been recognised as of paramount importance to the functioning of international markets and as necessary incentives for investment in R&D and innovation. The development of brand equity and goodwill is fundamental to market economies, consumer choice, innovation and product development.

5.9 Failing to take full and proper account of the effect of plain packaging leads, essentially, to the annihilation of this important and valuable property.

5.10 A prohibition on the use of JTI's trade mark portfolio in Australia would involve the suppression of the function of the registered trade marks to guarantee the

⁵⁴ In this context, trade marks may take a variety of forms including word marks (such as for characters comprising an unstylised brand name), and non-word marks (such as device or figurative marks, including for logos, designs, stylised characters and combinations of both logos and stylised characters, colour marks (whether alone or claimed as an element of another type of mark), and the shape of goods or their packaging).

origin of goods and services to a degree that undermines the commercial rationale for trade marks as recognised by Australian courts, and protected under Australian trade mark legislation.

5.11 JTI would be left unable to exploit key parts of its IP rights commercially, which would render them, for all practical purposes, valueless in Australia. At the very least, requiring JTI to comply with tobacco product requirements that only allow the use of word trade marks in a standard font would prevent JTI from making the paradigm use of its logos, image and stylised trade marks (on the packaging of the product itself) thereby depriving JTI of the benefit and economic value of the specific subject matter of such marks. Forcing brand names to be written in a standard font, colour and size is also an intolerable restriction on the normal and fair use of JTI's word trade marks.

5.12 Regulations that seek to restrict or prohibit the use of trade marks will also have a significant adverse impact on the existence and strength of the rights attaching to JTI's Australian trade marks, including in relation to trade mark infringement litigation and other proceedings, in particular against counterfeiters.

5.13 The destruction of the substance of certain IP rights would have a direct impact on the value of JTI's assets. According to international standard ISO 10668:2010⁵⁵ on brand valuation, the appraisal of a brand's value "*shall include an assessment of the legal protection afforded to the brand, identifying...the legal parameters influencing negatively or positively the value of the brand*". This standard states that those legal parameters include "*distinctiveness...scope of use...extent of use...notoriety/extent to which [the] brand is well-known...[and] ability of the owner to enforce legal rights*". Plain packaging adversely affects each of those parameters, thereby effectively destroying the value of the relevant trade marks.

Australia's obligations under international law

5.14 In addition to the points outlined above, the burden is on the Government to demonstrate that the Draft is consistent with Australia's obligations under TRIPS and other international law obligations on intellectual property rights. JTI believes that the adoption of a plain packaging measure would be in violation of these international obligations, and could give rise to disputes under the WTO Dispute Settlement Understanding (both of which are likely to cause harm to Australia's reputation with international investors). JTI's view is based on the opinion of Professor Gervais on the interpretation of TRIPS⁵⁶ and the Paris Convention.

5.15 In particular, Article 20 of TRIPS requires 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."

5.16 The proposed tobacco product requirements would constitute a special requirement encumbering the ability of JTI (and other manufacturers) to distinguish

⁵⁵ Available at: www.iso.org.

⁵⁶ See Professor Gervais' Report, referenced above at footnote 26.

its goods through trade marks from those of other entities. The requirements are likely to prohibit the use of non-word marks on packaging and require JTI to use word marks “in a special form”.

5.17 JTI acknowledges that WTO members may, in certain limited circumstances, take advantage of flexibilities within TRIPS to address public health concerns.⁵⁷ Indeed, Article 8.1 of TRIPS states 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*” (emphasis added). Article 8.1 does not avoid the need for WTO members to comply with Article 20 of TRIPS.

5.18 JTI believes that the Government would be unable to demonstrate that plain packaging is “justified” (Article 20) or “necessary” (Article 8) to achieve a legitimate public policy objective. Having regard to, first, the lack of reliable evidence that the Draft’s stated objectives would be achieved by plain packaging⁵⁸ and, second, to the availability of less trade restrictive alternative measures,⁵⁹ JTI considers that plain packaging will breach TRIPS.

5.19 In addition to Professor Gervais’ Report, the international law issues raised by plain packaging have been expressly recognised by both governments and expert bodies:

- (a) IP Australia has advised⁶⁰ the Government that “*plain packaging may not be consistent with Australia’s intellectual property treaty obligations*”. IP Australia acknowledges that “*requiring plain packaging would be regarded as encumbering [within Article 20 of TRIPS] the ability of an entity to distinguish its goods through its trade marks from those of other entities. IP Australia’s understanding is that this Article [20] was drafted with the intention of restricting mechanisms like plain packaging.*” Further, on Article 8.1 of TRIPS, IP Australia notes that “*it seems unlikely that this Article could be used to avoid Article 20*”;⁶¹
- (b) the International Trademark Association (*INTA*) has submitted its opinions opposing plain packaging to various governments since 1994;⁶²

⁵⁷ *Thailand – Restrictions on Importation and Internal Taxes on Cigarettes*, Panel Report, DS10/R-375/200, 7 November 1990.

⁵⁸ There is, without doubt, no prevailing scientific consensus (or sufficient evidence) that plain packaging would bring about a material contribution to the EU’s public health objectives (see *Brazil-Tyres*, Appellate Body Report, WT/DS332/AB/R, 3 December 2007, paragraph 151).

⁵⁹ *Thailand-Cigarettes* Panel Report, referenced above at footnote 57, at paragraphs 73-74.

⁶⁰ Parliamentary Secretary briefing B09/4084, 22 September 2009, authored by Ian Goss, IP Australia; document released under Freedom of Information requests (FOI 138 of 1660).

⁶¹ Parliamentary Secretary briefing B09/4084, 22 September 2009, authored by Ian Goss, IP Australia; document released under Freedom of Information requests (FOI 138 of 1660).

⁶² See notably INTA’s letter to the Canadian Standing Committee on Health, 27 April 1994, and to the Department of Health and Ageing, Australia, 24 February 2004.

- (c) the US Chamber of Commerce wrote to the Government to express its position that plain packaging would “*significantly infringe upon global IP and trademark protections*”, including inconsistency with TRIPS, the Paris Convention, TBT and the Australia-US Free Trade Agreement;⁶³ and
- (d) the International Chamber of Commerce has written to the Australian Minister for Trade to confirm the view that the measure proposed would “*restrain trade, hamper consumer choice and safety, subvert trademark and IP laws and increase counterfeiting*”, “*cause significant collateral damage to brand value generally*”, and would “*frustrat[e] the very purpose of [trade marks]*”.⁶⁴

Undermining efforts to tackle illicit trade

5.20 JTI believes that mandated plain packaging will significantly impede and restrict the lawful activity of manufacturers, while unintentionally facilitating illicit trade. It is not alone in this view. Most of the respondents in a UK consultation on plain packaging made just this point.⁶⁵ Ultimately, this will jeopardise the objectives of the FCTC regarding elimination of all forms of illicit trade.

5.21 These impacts are made more serious by the tendency of criminal gangs to evolve their activities to take advantage of regulatory developments or to focus on new activities where one form of illicit trade has been made more difficult or less profitable.

5.22 The impact of plain packaging on the illicit trade has been expressly recognised by the Government. IP Australia has stated: “*requiring plain packaging would make it easier for counterfeit products to be produced and would make it difficult to readily identify those counterfeit products*”.⁶⁶

5.23 JTI expects plain packaging to have a number of unintended consequences as regards illicit trade and is extremely concerned that mandating plain packaging will:

- (a) facilitate the manufacture of counterfeit products;
- (b) remove key cost constraints for counterfeiters, as each pack is essentially the same;
- (c) complicate regulator investigations/prosecutions;

⁶³ Letter from Myron Brilliant, Senior Vice President, Chamber of Commerce of the United State of America, dated 26 February 2010 to the Senate Standing Committee on Community Affairs, Australia.

⁶⁴ See the International Chamber of Commerce’s letter to the Australian Minister for Trade, 20 April 2011, available at http://www.iccwbo.org/uploadedFiles/BASCAP/Statements/Letter%20-%20Australian%20Trade%20Minister_plain_packaging.pdf.

⁶⁵ The UK Department of Health’s paper “*Consultation on the future of tobacco control: Consultation report*” dated 9 December 2008 states that most of the respondents opposed to “plain packaging” suggested that such a requirement would stimulate counterfeit and illicit trade (page 25, http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382).

⁶⁶ Parliamentary Secretary briefing B09/4084, 22 September 2009, authored by Ian Goss, IP Australia; document released under Freedom of Information requests (FOI 138 of 1660).

- (d) result in the continued creation of branded packs by counterfeiters, without JTI being able to enforce its trade marks;
- (e) crystallize pack design for the benefit of counterfeiters;
- (f) frustrate tracking and tracing initiatives;
- (g) restrict the ability to identify counterfeit product; and
- (h) impair the ability of enforcement authorities, as well as tobacco manufacturers, to take infringement action.

5.24 To the extent that enacting the Draft facilitates the trade in counterfeit and/or contraband cigarettes, increases demand for contraband and risks undoing efforts in tackling this trade, it will have these additional negative consequences:

- (a) undermining the Australian and the FCTC's illicit trade objectives;
- (b) posing further risks to consumers;
- (c) depriving governments of revenue;
- (d) causing significant losses to legitimate business; and
- (e) profiting serious criminal organisations.

Disproportionate impact on premium brand owners

5.25 Plain packaging eradicates branding and will erode brand equity most notably in leading, premium brands. Plain packaging will impact premium brand owners to a greater extent than other tobacco manufacturers whose Australian market share consists largely of non-premium brands.

5.26 The discriminatory effect of plain packaging for premium brand owners would be exacerbated if plain packaging were to lead to 'downtrading' in consumer purchasing and the eventual commoditisation of tobacco products.

Serious and unnecessary damage to legitimate economic interests and competition, including the risk of commoditisation

5.27 Expert consideration of plain packaging as a potential regulatory measure conducted by Dr Andrew Lilico⁶⁷ identifies that it would be likely to have significant repercussions on the operation of the market in tobacco products. For these reasons, JTI considers that it is highly likely that, were Australia to mandate plain packaging, it will result in:

- (a) a significant reduction in the typical 'brand switching' activity that JTI would normally expect to see carried out by existing adult smokers in the Australian market, as consumers' navigation between brands is frustrated;

⁶⁷ See footnote 6 above.

- (b) a corresponding increase in brand consolidation as consumers are left to request and purchase those brands of tobacco products familiar to them;
- (c) a significant reduction in consumer choice in legitimate tobacco products as JTI and other manufacturers who comply with legislative requirements are hampered in their ability to successfully launch new brands into the market (this is particularly concerning for JTI as a minority player in the market by contrast to others with large, well-established shares of the market); and
- (d) a barrier to new entrants (as entities seeking to enter the tobacco market will be unable to compete effectively with existing market participants on any basis other than price). As identified in respect of the UK in Dr Lilico's Report, at paragraphs 5.22 to 5.23, the erosion of the competitive position that brands afford would very probably result in an increased focus upon price as one of the most important remaining dimensions of competition.

5.28 Plain packaging could also lead, for practical purposes, to the crystallization of market shares such that the competitive process is undermined and market shares become (more-or-less) fixed.⁶⁸ Various effects may flow:

- (a) **Potential commoditisation/price effects:** an anticipated market reaction to plain packaging would be rapid falls in the prices of premium product, and then price stabilisation later as ongoing competitive pressures are reduced. Manufacturers could increasingly be forced to compete on the basis of price with the risk of market commoditisation;
- (b) **Market dynamics will be impaired:** as Dr Lilico finds in his analysis that the dynamics of concentration are likely to be very noticeably impaired, with materially greater market power of well-established brands and loss of competitive position for firms that depend upon innovation or brand proliferation. Dr Lilico states, at point 8 of the Summary of the Report's Findings, that "*a plain packs requirement [in the UK] would probably all-but end product innovation*" and that the negative competition effects would be noticeable and material;
- (c) **Lowering of quality standards:** a downward shift in product prices could lead to a reduction in the quality of tobacco products as margins are impacted. Further, where price becomes increasingly significant as the key product differentiator, there is an increased opportunity for others to enter the market with poor quality products through brands with no lasting presence, meaning those market entrants can effectively avoid responsibility for substandard products; and
- (d) **A reduction in consumer choice and a barrier to new entrants** (other than those reliant on lower prices as a differentiator), as discussed above.

5.29 Given these effects, plain packaging will affect potential new entrants and minority players, such as JTI, to a greater extent than their competitors with larger

⁶⁸ See paragraph 5.16 of Dr Lilico's Report, where Dr Lilico concludes that "*plain packs could even lead to the crystallisation of market shares, whereby "crystallisation" we mean that the competitive process would be so completely undermined that market shares would become more or less fixed*".

market shares. In particular, it is liable to severely affect minority players or brands not yet launched in the Australian market.

5.30 Plain packaging would similarly cause significant confusion and disruption for participants in the product supply chain. For retailers and wholesalers, tasks which would have relied upon visual pack recognition, such as re-stocking, shelving and pack selection at a customer's request, will be made more difficult if that point of reference is removed. This may lead to an increase in the administrative burden for retailers due to the added time required to stock gantries in an appropriate manner and/or locate products in response to consumer requests. JTI is not satisfied that the Government's efforts to consult with retailers have done enough to address these concerns.

Diminished contribution to the economy

5.31 Any change to the packaging of tobacco products that is required as a result of plain packaging is likely to lead to significant job losses and reductions in income and economic activity in Australia on the basis of:

- (a) a shift from legitimate to illicit trade; and
- (b) 'downtrading' from premium to cheaper legal tobacco products.

5.32 Such a change will also represent a significant transition cost for manufacturers.

5.33 Plain packaging will undermine any future investment and innovation by the tobacco sector in packaging which will have severely detrimental economic impacts on numerous service industries, including pack designers, pack manufacturers and printing and ink suppliers.

6. ALTERNATIVE REGULATORY SOLUTIONS

6.1 JTI believes that it has demonstrated, through this submission and the referencing of leading experts' independent opinions, its commitment to the development of appropriate and proportionate tobacco regulation in Australia.

6.2 Whilst JTI's submissions address the Government's identification of some improperly defined and illegitimate public policy objectives, the more important Government objectives align with JTI's core beliefs. These include reducing minors' uptake of smoking, preventing minors' ability to obtain tobacco products and ensuring that adult smokers are informed about the health risks of smoking before they make the decision to smoke. JTI supports the Government in seeking to achieve these goals through appropriate and proportionate regulatory interventions.

6.3 JTI considers that there are also alternative regulatory solutions that are less restrictive, more targeted and proportionate as a means of addressing the legitimate objectives underpinning the Draft, such as smoking initiation by minors and their ability to obtain tobacco products, that should be pursued instead of plain packaging:

- (a) criminalisation of, or administrative sanctions for:
 - (i) the purchase or attempted purchase of tobacco products by minors;

- (ii) the consumption of tobacco products by minors;
- (b) greater resources and manpower for effective, targeted enforcement strategies; and
- (c) targeted public information campaigns to quickly and effectively raise awareness of the criminalisation of proxy and purchasing by minors.

6.4 Although there is already a very high level of awareness of the health risks of smoking amongst Australian consumers, JTI supports the continued provision of information to reaffirm the health risks of smoking.

6.5 Furthermore, efforts should not just focus on the lawful activities of the tobacco industry. Measures to tackle the illicit trade of tobacco products, particularly to minors, should be pursued (such as more targeted training and funding for enforcement agencies) so as to ensure that all forms of potential supply of tobacco products to minors are targeted and prevented.

7. A MEANINGFUL TRANSITIONAL REGIME

7.1 Without prejudice to JTI's strong belief that that the measures proposed in the Draft are inappropriate and constitutionally invalid, this section of our submission details some of the changes that would be necessary to allow a meaningful implementation of the proposed plain packaging requirements.

Timetable for implementation

7.2 The timetable proposed in the Consultation is unworkable in light of the logistical challenges involved in complying with the proposed plain packaging requirements. The introduction of any packaging changes would require extensive changes to printing layouts, and the proposed restraints on pack shapes would likely require bespoke packaging arrangements to be put in place (especially for products manufactured in overseas facilities, which create packs for sale in various different countries). These difficulties would be further complicated by requirements relating to the design of the product itself. The industry could not begin to prepare to manufacture products compliant with the legislative provisions until such time as the regulations contemplated by clause 14 of the Draft are drafted, consulted upon, finalised and published.

7.3 The current timetable envisages consultation on the draft regulations occurring in "the second half of 2011", with the Draft becoming law in January 2012, the import, supply and manufacture of non-compliant goods becoming unlawful in May 2012, and the sale of non-compliant products becoming unlawful in July 2012. Clearly, manufacturers will not have any certainty with respect to the final technical specifications until the regulations are formally made.

7.4 As the regulations cannot be formally made until the Draft becomes law, this will mean that there will be a maximum of just over 4 months (January 2012 to mid-May 2012) for tobacco manufacturers to ensure that plain packaging-compliant product is ready to enter the supply chain. Given the wide-ranging packaging specifications permitted to be included in the regulations by the Draft, this is clearly insufficient time for the industry to be expected to react to the changes. Further, the six week period between the ban on the import, supply and manufacture of trade

marked goods and the ban on their retail sale raises serious possibilities of surplus, unlawful stock still being in the supply chain, the wastage of which could give rise to significant losses not just by manufacturers, but by the wholesale and retail sectors. Wastage in the printing and packaging sector is also a real possibility.

The Government has acknowledged but not properly planned for, a legal challenge

7.5 The Consultation, and various clauses of the Draft, show that the Government has acknowledged the likelihood of legal challenges to the Draft if enacted.⁶⁹ The proposed 4 to 6 month timetable detailed above would be very unlikely to allow for the filing, consideration and ruling on a constitutional challenge to the legislation before it became necessary to comply. Accordingly, were the legislation to be held to be unconstitutional, manufacturers would still be required to go to the vast expense of implementing compliance for at least some period of time.

7.6 In accordance with the general principles of Better Regulation, the Government should factor sufficient time into the implementation timetable to enable compliance (see paragraphs 7.2 to 7.4 above) and, if the Government considers that a challenge is likely (as the Consultation and the Draft suggest), to provide sufficient flexibility as regards the commencement date of any legislative instrument to allow for the resolution of a Constitutional challenge before the requirements become binding.

7.7 JTI also invites the Government to progress regulations under both clauses 11(2) and 14 of the Draft as quickly as possible, to allow for efficient and complete consideration by the Court of all relevant material in any future Constitutional challenge. The content of the clause 14 regulations will obviously be crucial to the determination of any such challenge, as that will dictate the substance of the packaging requirements.

8. CONCLUSION

8.1 For the reasons stated above, JTI is categorically opposed to the proposals incorporated in the Draft and has serious concerns regarding the approach the Government has taken in seeking to implement plain packaging and other restrictions on the design and appearance of tobacco products.

8.2 JTI supports the regulation of tobacco products in a way which is consistent with international principles of Better Regulation, Australia's commitment to which is evidenced by the Handbook. However, JTI considers the proposals contained in the Draft to be flawed, unreasonable, disproportionate and without evidential foundation.

⁶⁹ For example, page 11 of the Consultation acknowledges that “[s]ome tobacco manufacturers have argued that legislation preventing the use of their trade marks on packaging would be an acquisition of property other than on just terms,” and that the Draft provides for alternative packaging requirements to apply if these arguments prove to be correct. Page 11 of the Consultation also notes that “alternative constitutional bases” for the Draft are provided “[i]n case there may be any doubt that all of the provisions are fully supported by the external affairs power.” Furthermore, clause 12 of the Draft provides that the Draft (should it become an Act) would not apply to the extent that it “would infringe any constitutional doctrine of implied freedom of political communication”. Each of the acknowledgements of doubt regarding the constitutional validity of the Draft evidences an acknowledgement of the risk that the Draft (should it become an Act) could be subject to a legal challenge.

The proposals fall short of the fundamental requirements set by the Handbook, and are inconsistent with fundamental rights guaranteed by the Australian Constitution.

8.3 JTI considers that the measures, if introduced, will produce detrimental and unintended consequences that are particularly concerning in light of the lack of meaningful evidence that the Draft will achieve the Government's stated objectives.

8.4 Should the Government proceed with its pursuit of these plain packaging measures notwithstanding these serious concerns, significant further consultation would be required, with the Government undertaking a full and proper review of the evidence, the impact of the measures and the practicalities surrounding their introduction.