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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011

TUESDAY, 13 SEPTEMBER 2011

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Tuesday, 13 September 2011

Senators in attendance: Senators Boyce, Brandis, Cash, Crossin and Di Natale

Terms of reference for the inquiry:

To inquire into and report on:
Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011

WITNESSES

BAXTER, Mr James Victor, Assistant Secretary, WTO Trade Law Branch, Department of Foreign Affairs and Trade 22

CONNELL, Mr Mark, Head, Corporate and Regulatory Affairs, British American Tobacco Australia Ltd 1

COTTERELL, Mr Simon, Assistant Secretary, Department of Health and Ageing 22

CROW, Mr David, Managing Director, British American Tobacco Australia Ltd 1

EVANS, Professor Simon Charles, Private capacity 12

FAULKNER, Mr James Richard, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department 22

HUXTABLE, Ms Rosemary, Deputy Secretary, Department of Health and Ageing 22

MICHAEL, Mr Heath, Australian Retailers Association 1

MYERS, Mr Allan, Legal Representative, British American Tobacco Australia Ltd 1

NOONAN, Mr Philip, Director General, IP Australia 22

REID, Mr Chris, General Counsel, Department of Health and Ageing 22

RIMMER, Dr Matthew Rhys, Private capacity 12

SMYTH, Mr Nathan, First Assistant Secretary, Department of Health and Ageing 22

CONNELL, Mr Mark, Head, Corporate and Regulatory Affairs, British American Tobacco Australia Ltd

CROW, Mr David, Managing Director, British American Tobacco Australia Ltd

MICHAEL, Mr Heath, Australian Retailers Association

MYERS, Mr Allan, Legal Representative, British American Tobacco Australia Ltd

Committee met at 17:30

CHAIR (Senator Crossin): I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee and our inquiry into the provisions of the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011. The bill was referred by the Senate to this committee on 18 August 2011 for inquiry and report by 19 September 2011. We have received 40 submissions for this inquiry and all of those have been authorised for publication and are available on the committee's website. I remind witnesses that in giving evidence to the committee you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We do prefer all our evidence to be given in public, but we have a facility to go in camera if you believe it is necessary.

I welcome representatives from British American Tobacco Australia and the Australian Retailers Association. For our reference we have numbered the submission from the British American Tobacco Australia as No. 35 and we have numbered the submission from the Australian Retailers Association as No. 6, for those who want to access them. I assume there are no amendments to your submissions. I invite you to make an opening statement and then we will go to questions.

Mr Michael: ARA is attending this meeting in its capacity as the peak retail association body in the country. We have about 5½ thousand members, many of whom have raised concerns about legal and economic impacts. I will say that we do believe this legislation should be referred to an economics committee. Whether it can or cannot, we believe it does need to be referred there. The legal impacts our members are raising with us as major concerns relate to counterfeit product and illegal imports. We have a lot of evidence within the sector that our members in various sections of retail are struggling with illegal imports, such as clothing, electronic devices and the like. There have been a number of case studies done on that, and we have submitted some evidence on it. What is concerning us most of all is that, with the lack of branding and having plain packaging, that trade is going to increase quite dramatically for our members. In fact, I was speaking with a convenience store association only today and they gave me anecdotal evidence that their members are now dealing with approaches, something like once a week, on illegal product.

We are being told the same thing by many of our retailers who handle tobacco products.

I am not going to deal with points of law, as such; that is where British American Tobacco have got their expertise in this area. But what we are dealing with as a peak industry body is the real world impacts that our members will face if this legislation is passed and these laws are applied in their current form. I will finish my statement there.

CHAIR: Thank you. Is there anyone else? Mr Crow?

Mr Crow: Thank you. I would like to take this opportunity to thank the committee for inviting British American Tobacco to make representation to you on the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011. As I said before, my name is David Crow and I am the managing director of the Australian business. Beside me is Mark Connell who is the head of Regulatory and Corporate Affairs. As neither Mark nor I are lawyers we also have with us today our legal counsel, Allan Myers QC, one of Australia's leading constitutional lawyers. We thought it might be useful for this committee to be able to have Allan here to talk about the issues about law and, obviously, around Henry VIII.

Let me start off by stating that smoking can cause serious and fatal disease, including lung cancer, emphysema, chronic bronchitis and heart disease. While the only way to avoid the risks of smoking is not to smoke, a real world view suggests that a large number of people will continue to choose to smoke even though they are aware of the risks. We believe that tobacco products are only suitable for adult consumers. We do not want children to smoke. As a father I do not want my children to smoke, I do not think anyone in this House would want anyone who is under the age of 18 to smoke and I do not think the population of Australia wants anyone under the age of 18 to smoke. Consequently we believe that tobacco should be regulated. We do not wish to prevent proportionate tobacco regulation, and we support regulations that are the product of evidence based and consultative policy making.

Now I understand that the focus of this committee is the constitutionality or otherwise of what is known as the Henry VIII clause in the draft bill. BATA's position is clear. Henry VIII clauses when framed in broad and ill-defined terms—as is the case in this draft bill—are bad law. The Administrative Review Council said in 1992:

… it is clearly inappropriate for a body subordinate to Parliament to amend or alter an Act of Parliament. This is particularly so when changes affect the essential elements of a scheme, alter the ambit of legislation, place restrictions on rights, or alter obligations.

The Henry VIII clause in this draft bill does exactly what the Administrative Review Council said should not be done. If passed in its present form it will permit the government, through a process not subject to proper review with the necessary checks and balances of parliament, to change the law and in doing so affect the legal rights, including property rights, of manufacturers, retailers and others involved in the industry.

Not only is this bad law—and as such often rejected by lawmakers as a dangerous precedent—it also sends the wrong message to current and future enterprise in Australia. Bad law such as this will serve as a disincentive to all legitimate trademark owners wishing to invest in their brands. Indeed, why would any legitimate trademark owner do so if the threat of such an investment to shareholders was constantly at risk at the whim of the minister of the day?

The trade marks amendment bill cannot be viewed in isolation. In our opinion, it is a fallback legislation intended to protect the government in the event the Tobacco Plain Packaging Bill 2011 is struck down by the courts. Our objection goes much further than the trade marks amendment bill. We say the whole legislative package, including the TPP bill, is misguided in policy, bad in point of principle and basically bad in law.

The trade marks amendment bill, together with the TPP bill, offends many of the principles fundamental to our democracy. Firstly, it offends one of Australia's constitution's founding principles: the state should not take people's property without adequate compensation. Secondly, it offends the notion that the state should not unjustly affect settled legal property rights. Thirdly, it trammels the social compact that political policy should not be discriminatory. Policy should not unfairly be at the cost of one part of society only. And fourthly, it is a package which offends notions that predate Henry VIII. Laws should be certain and understood by all who are affected by them, especially laws that have criminal or quasi-criminal sanctions attaching to their implementation.

BATA's property rights are recognised by law, including the Trade Marks Act, the Copyright Act and the Designs Act. Before Federation the courts of each state, and since Federation, the High Court, have repeatedly recognised and protected each of the property rights. Indeed, the High Court went further in the Gallo case, noting that trademarks are a badge of origin to distinguish between products, and said that their value is derived from their use and effectiveness. This legislative package removes both elements of value and does so in terms which specifically exclude the payment of adequate compensation.

As is often the case, it falls to the Senate and this committee to review this bill to ensure that there are no unintended consequences in legislation passed by the other place. The real reason we are discussing the Henry VIII clause is because the federal government rushed the development of the plain packaging legislation. They did not consult with industry, they did not consult with retailers or with manufacturers nor did they undertake the proper regulatory processes, neglecting to undertake a regulatory impact statement. When considering this bill and plain packaging more broadly, I ask that you ensure you have access to all legal and constitutional advice available on this matter as this is not the first time that plain packaging has been discussed in a forum such as this.

In September 1997 the then government noted that it had obtained advice of the Attorney-General's Department on the legal and constitutional barriers to generic packaging, commonly known as the A-G's legal advice. Upon receiving this advice the then government decided against proceeding with plain packaging, at least partially on the basis that plain packaging risked violating Australia's domestic laws and international treaty obligations. The High Court's recent ruling on Malaysian asylum seekers reinforces why the parliament must ensure that all decisions taken are legally sound. Given that the Senate is poised to vote on this legislation and to make it law in the next couple of weeks, the minister must be 100 per cent confident that her legal advice is sound and will sustain a High Court challenge.

While our proprietary rights are critical, they are not the only consideration you should bear in mind in your review. The stripping of these rights will lead to a growth in illegal tobacco trade, which will in turn lead to a greater availability of untaxed, cheap tobacco products in the market and a possible increase in tobacco consumption. Cheap tobacco sells for about 40 per cent of legal tobacco in Australia today. Furthermore, the structure of the bill and draft regulations means that the tobacco industry will not be able to comply with the legislation within the short time frames provided for. We would need at least 12 months preparation period, with a minimum of ideally 12- or, more tightly, a six-month flush-through period for our retail colleagues to ensure the legitimate market can adapt to the new regulatory regime.

This is pretty standard; this was the case when we introduced reduced fire-risk cigarettes in consultation with the ACCC, and also when graphic health warnings came in in 2006. The period was about 18 months, and that was deemed to be an international standard. To this end I would like to extend an offer to the committee and all the members to tour our factory in Sydney to obtain an understanding of the manufacturing process and all the technicalities that go with that in terms of how we change our business in situations like this.

There is a great deal to consider, and we wish to assist this committee as much as we are able to. To conclude, given that this is a demonstrably bad law I respectfully ask the committee to reject the Trade Marks Amendment (Tobacco Plain Packaging) Bill of 2011. I also ask that the committee recommend further investigation, including that a full and proper regulatory impact statement be undertaken into the TPP bill given the significant unintended consequences. Furthermore, it is worth considering whether voting to remove intellectual property would create a dangerous precedent that would be used for other products in the future.

This bill is really about the removal of a legitimate company's property in a legitimate industry—a legal industry. Can I ask, is that really the role of the Australian government, and is that really the role of this parliament—to remove legal trademarks from a legal product in a legal industry in a legal democracy?

Thank you for allowing me to make these opening remarks. I think Allan may have some remarks as well.

Mr Myers: I appear before the committee today on behalf of British American Tobacco Australia Ltd to assist the committee, as I can, in its consideration of the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011. This bill must be viewed in the context in which it was drafted—that is, to support the objective of introducing a regime for plain packaging of tobacco products in Australia. The Trade Marks Amendment Bill and the Trade Marks Amendment (Tobacco Plain Packaging) Bill are unfair and badly drafted. They will cause harm within Australia and will damage Australia's international standing without any proven countervailing benefits.

Let me make a few comments about the drafting and validity of the trade marks amendment bill. It is settled law that a trademark is personal property. The Trade Marks Act 1995 of the Commonwealth and the decisions of the courts have long recognised that a trademark is valuable personal property. Trademarks are able to be registered and protected so that they may be used in commerce. They are regarded as beneficial for the whole community. The law recognises that trademarks are personal property which the owner is entitled to use, just like if you are the owner of a freehold interest in land you are entitled to use the land. The value of the trademark comes from its distinctiveness, its use in the market and its recognition by consumers. The Trade Marks Amendment Bill, in combination with the plain packaging bill, seeks to upset this established law and business practice by extinguishing the most valuable uses of trademarks. The commercial use of property, the very lifeblood of the existence and value of a trademark, is being effectively extinguished by this legislation. Now that might be something that my client would have to put up with if it were being compensated for the extinguishment of its valuable property. But that is not the case. Rather, this legislation excludes that possibility—that is, the entitlement that my client wishes to claim to compensation on just terms for the extinguishment of its valuable property rights.

The Henry VIII clause, as it is always called because that great king employed it to advantage at a certain time in English history, authorises the making of regulations which are inconsistent with the provisions of a statute enacted by parliament. It is a remarkable provision. The Trade Marks Amendment Bill does only one thing: it introduces into the Trade Marks Act a Henry VIII clause, which will provide for the making of regulations that can change the substantive effect of the Trade Marks Act. It is a very broad clause, and this is the difficulty with it. The regulations can deem something to have happened or not to have happened; to be or not to be the case; to have or not to have a particular effect. They can be inconsistent with the act and they can prevail over the act and so, theoretically, if the opening words were satisfied it would be possible to say that the Trade Marks Act does not apply.

There are very serious reasons why the use of these clauses is bad policy. It has got nothing to do with tobacco legislation. This is just bad policy and bad law-making. These clauses undermine the separation of powers of the legislature and the executive. Numerous bodies and respected academics have commented on the objectionable nature of the clauses and the role they play in eroding the proper role of the legislature, and some of the submissions that you have, which I have been provided with, build on that.

The proposed section 231A is particularly objectionable in the light of the extremely broad range of powers that it delegates and the fact that it expressly provides for the making of regulations that are inconsistent with the Trade Marks Act. One asks why amendments to the Trade Marks Act, if deemed necessary to take into account the effect of the plain packaging bill, could not have been made in the usual way by the introduction of relevant amending legislation; There is no real answer to that.

There is no reasonable justification for the introduction of a clause of this scope in these circumstances. The committee should recommend against the incorporation of this provision into the Trade Marks Act. Furthermore, there are strong arguments, which are elaborated in some of the written submissions that you have received, why the 'Henry VIII' clause is unconstitutional. I am instructed that my client will challenge its constitutional validity if it is enacted. The trade marks amendment bill cannot be viewed in isolation because its very purpose is to allow parliament to alter the Trade Marks Act to take into account the affect of the plain packaging bill.

The second principle issue I draw to the committee's attention in relation to this suite of legislation is the very real possibility that it will place Australia in violation of its obligations under international treaties. Again, many of the submissions you have received from bodies within and outside Australia—who are serious and respectable organisations—quite properly say that the plain packaging legislation, together with this amendment to the Trade Marks Act in particular, will be a violation of Australia's obligations under the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property. I mention article 20 of TRIPS which provides that trademarks should not be unjustifiably encumbered by special requirements. Given that no evidence is advanced to support the notion that plain packaging will have the effect of decreasing smoking rates—it is just hope that that will happen—the encumbrances provided for by the plain packaging legislation are not necessary or justified and do not fall within the exceptions to article 20 of TRIPS.

The other matter I would like to mention at this time is that it has been put forward that the Framework Convention on Tobacco Control is the basis upon which the government is obliged to introduce plain packaging legislation. But this, with respect, is not correct. The only reference to plain packaging in the Framework Convention on Tobacco Control is contained in the associated guidelines to that convention and the guidelines do not require Australia to introduce plain packaging legislation. This is made clear by guideline 46, under article 11 of the convention which states that the parties should consider adopting measures to restrict or prohibit the use of trademarks, logos et cetera as this may increase the effectiveness of health warnings. The guidelines do not require this to be done; they say it is something that may be considered. Similarly, guidelines in relation to the implementation of article 13 of that convention provide that the parties should consider the introduction of plain packaging legislation. Australia is not required or obliged to introduce plain packaging legislation by reason of the convention. It considered this matter a decade or so ago and decided not to do it because of the difficulties of a constitutional kind, one supposes, and because of the violation—potentially—of Australia's treaties by doing so.

May I say this in conclusion, and I say it respectfully to the committee: the role you play in this inquiry is extremely important. Not only should you consider the questionable legislative techniques in the trade marks amendment bill, but you should also consider the role that this bill plays in the whole suite of plain packaging legislation. There are serious risks that this suite of legislation will affect fundamental rights protected by the Constitution—this is the acquisition of property on just terms—and constitute a violation of international law. You can help to ensure that these things do not happen. These are matters that are quite separate from any consideration of control of tobacco.

Senator CASH: Are you able to table your opening statements to the committee, please?

Mr Myers: Yes.

Senator CASH: Mr Crow, Mr Myers, on British American Tobacco Australia's behalf, has confirmed that in the event that this legislation is passed, you will be mounting a legal challenge.

You posed a question for government and I assume the department in your opening statement and that question was: Are you 100 per cent sure that your legal advice is sound and will in fact survive a High Court challenge? Can I pose that question to you?

Mr Crow: Yes, I think it is a good question. I will pass to Allan, because obviously Allan is working with us, but firstly can I just say, yes, we will obviously challenge this if the law comes. We do not want to. It is not a great role for an organisation to be, let us say, debating and conflicting with government. It is obviously not a great place to be when you are in a corporate or any organisation. We do not want to. We hope that this committee can really look at this law as it stands, look at the faults in it and be open enough to recommend that this law actually is held and rejected and the package sent back for a full RIS so that the evidence can be gained and it is done properly. I just do not think the department has done the homework and I do not think it is prepared.

CHAIR: When you say you intend to mount a challenge, do you mean on this trademarks amendment bill or on the total plain packaging bill as well—the main substantive bill? Or would you be challenging just this trademarks bill?

Mr Crow: I think we would be challenging on both, but today we are talking about trademarks amendment. Absolutely on trademarks amendment.

CHAIR: You would be specifically challenging that?

Mr Crow: That is right.

CHAIR: Okay, I just wanted to clarify that.

Mr Crow: Allan, do you want to pick up the question as well?

Mr Myers: Yes, if it would be helpful. The really serious questions about the validity of both parts of this suite of legislation about the Tobacco Plain Packaging Bill and also about the Trade Marks Amendment (Tobacco Plain Packaging) Bill and the question with the trademarks amendment bill when you get to a constitutional level is this: can parliament delegate to the extent which it has in this case its legislative powers? Because it has handed over, in effect, to the executive the power to enact binding laws that are inconsistent with the Trade Marks Act.

CHAIR: Mr Myers, could I ask you, and in that regard, certainly, the Madrid protocol is being relied on as an example of where the parliament has done this before. Why do you say that in the circumstances of this particular legislation we are unable to do that as a parliament but in the case of the Madrid protocol, the parliament was able to do that?

Mr Myers: Everything turns upon the particular enactment that one is concerned with but this is an extremely broad provision. The provision of the Trade Marks Act that deals with the Madrid convention or protocol is circumscribed by the words that enable regulations to be made to give effect to that protocol. But as I mentioned in my opening statement it is hard to conceive of broader words in relation to this provision and we will be suggesting to the High Court that there must be somewhere that the line is drawn and parliament comes to legislate rather to delegate its legislative power.

Senator BOYCE: Mr Myers, the explanatory memorandum says that the provision in the Trade Marks Act is an equivalent provision with that in the Madrid protocol. Would you agree with that statement?

Mr Myers: No, I would not. It is something like it but it is not equivalent. That means that it is of equal character or effect, and we say no, it is not.

Senator CASH: Mr Myers, in that regard, in your considered legal opinion, under the way in which this legislation is currently drafted, what is the extent and scope of what the parliament is actually allowing the minister to do?

Mr Myers: The minister can do anything in relation to trademarks.

Senator CASH: In relation to trademarks.

Mr Myers: Yes, anything.

Senator CASH: So there may well be—in fact there will be—unintended powers that the minister is actually given.

Mr Myers: Of course. The minister can do anything. It is practically unlimited in its terms.

Senator BRANDIS: So your argument would be, Mr Myers, that, because the minister can do virtually anything, it is an executive act, not a legislative act and for this piece of legislation to be valid it has to be an exercise of the legislative power of the Commonwealth and this would not be. Is that what it amounts to?

Mr Myers: Yes, it does. And it is interesting to read the submission of the Department of Health and Ageing and, with respect to those who wrote that, they just do not draw an issue on this point; they just avoid it. They say nothing, in effect.

CHAIR: The Scrutiny of Bills Committee is a committee of this parliament and they are always looking at issues in relation to the Henry VIII clause; that is one of their terms of reference. They have signalled that this is it. They then say that they do not have an issue with it because the explanatory memorandum is fairly complete in its explanation. It says that the objective of any such regulations would be to ensure that applications for trademark registration and registered owners of trademarks—which would be your client, for example—are not disadvantaged by the practical operation of the Tobacco Plain Packaging Bill. Are you saying that you are not reassured that this piece of legislation, that is seeking to change the packaging of cigarettes in this country, would ensure that you are not disadvantaged by the substantive legislation?

Mr Myers: I am certainly putting that, but I am also putting something else. That statement you have read is manifestly incorrect because there are no limits on the relevant exercise of powers under this legislation. It does not say that it is for the purpose of protecting the owners of trademarks to ensure that they do not lose their registration. It says nothing like that.

CHAIR: But it does say that registered owners are not disadvantaged. Why would you think that the minister would use it to disadvantage you?

Mr Myers: Because the proposed legislation—the bill—simply is not limited in that way. The minister can use it for any of the purposes which it authorises and there are no words within it that create limits for the purposes of the kind that you mentioned.

Senator CASH: Mr Myers, I just wish to bring to your attention and ask for your comment on the following. The Senate Standing Committee for the Scrutiny of Bills drew attention to this aspect of the bill as the so called Henry VIII clause. It then described what a Henry VIII clause is. The Scrutiny of Bills Committee noted that while section 231A enables regulations to be made which are inconsistent with the Trade Marks Act, the explanatory memorandum to the trademarks bill contains a detailed explanation for the possible need for this clause, including the need for the Australian government to comply with its obligations under the Madrid protocol. In the circumstances, the Scrutiny of Bills Committee concluded that it would make no further comment. What is your response to that? What is the Scrutiny of Bills Committee telling this committee?

Mr Myers: The Scrutiny of Bills Committee is really saying, 'Trust the minister for the time being; in the future he will do the right thing.' I am not wanting to be cynical about it at all, but there are none of the sorts of limitations that the Scrutiny of Bills Committee has mentioned. If this power were desired to be limited in the ways that both of you senators have read out, there could be words that do that, but there are no words that do that.

Senator CASH: So you could put forward an amendment to the legislation to actually do exactly what you have just stated?

Mr Myers: You could do that, yes.

Senator BRANDIS: Are you submitting to the committee that there is a difference in kind or a difference in legal character between a delegation to a minister for a limited and specific purpose and what purports to be a delegation to a minister for unlimited and unconfined purposes that is not merely a matter of degree, but a conceptual difference in legal character?

Mr Myers: I am. This is without relevant limitations.

Senator BRANDIS: Are you aware of any court in the Commonwealth, not just in Australia, considering a Henry VIII clause as broad as this?

Mr Myers: No. Certainly varieties of Henry VIII clauses have been considered by courts in Australia and England—there is no question about that—but not a clause of this breadth.

Senator BRANDIS: So there is no reason to believe that the jurisprudence would allow a clause of this breadth, if it is even correct to characterise this as a delegation?

Mr Myers: That is what we intend to submit to the High Court if this is enacted, yes.

Senator CASH: What is the fundamental difference between the Madrid protocol and what is proposed under this bill, in relation to what Senator Brandis has just put to you?

Mr Myers: The Madrid protocol deals with issues that are quite specific and identified and this gives open slather.

Senator CASH: The department does say, though, in its submission under the heading of the use of a Henry VIII clause, that the use of a Henry VIII clause in this case is preferred to avoid the need to amend the Trade Marks Act itself in recognition of the need for robustness and clarity in the Trade Marks Act and regulations and to ensure that legislative action to protect the rights of trademark owners can be taken quickly should the need arise. Legally, where does the department stand in relation to that?

Mr Myers: It is mere assertion. It is just dust that is thrown up to conceal the issue, with respect to that submission.

Senator BRANDIS: But suppose we put one of these clauses in every act and the parliament would never have to meet.

Mr Myers: You would not have to meet. You would be able to stay home in Darwin or Brisbane.

CHAIR: Just before I go to Senator Di Natale, I want to ask you one particular question. Given, let us assume, the Tobacco Plain Packaging bill, the main substantive bill, actually passes the parliament, then, firstly, do you think there is a need to amend the Trade Marks Act and, secondly, if so, rather than this, what would you see as an amendment to essentially protect your property rights? In other words, if you are saying not this, do you have a

solution? I know you do not like the title 'main substantive bill', so let us just accept the fact that has gone through the parliament—

Mr Myers: No, I do understand that I am being asked a question on assumption.

CHAIR: You understand what I am asking you?

Mr Myers: Yes. The plain packaging bill itself is the legislation which affects adversely the property rights of my client because it prevents my client from using its rights on the occasions that it would be valuable for my client to do so. It can use the trademark on its correspondence but it cannot use it in association or even close to association with the goods that it wishes to sell.

CHAIR: So not in advertising, not in jingles, not at sporting venues—nowhere.

Mr Myers: Exactly—all sorts of things, and there is no getting around that. This is the problem with plain packaging legislation and, if the parliament wants to enact plain packaging legislation, it is pretty simple: they face up to the fact that they are taking people's property away and pay for it. That is it.

CHAIR: Okay.

Senator CASH: That would be the simplest way—

Senator DI NATALE: I am not a lawyer and it appears that this will be tested in the courts. But just an interesting question that I cannot quite grasp, Mr Myers: how does a change in law which diminishes the value of a trademark really amount to the appropriation of property by the Commonwealth when the Commonwealth is not actually taking on that trademark for its own use? I do not quite understand that principle.

Mr Myers: It does not just diminish the value of the trademark; it diminishes the value because it prevents the exercise of the property right—that is, to use the trademark in association with one's goods. That is the first thing. The second is that the trademark is, in a broad sense, being appropriated for the benefit of the Commonwealth because the Commonwealth is seeking to obtain the benefits that it sees from preventing people like my client using the trademark. The acquisition of property simply does not refer to marching in and taking someone's house like in *The Castle* or some other film that one may have seen; it includes quite a wide range of activities which, in a broad sense, can be regarded as an acquisition of the benefits associated with property.

Senator DI NATALE: I have just got a few questions of Mr Crow, if I may. I think there is an assertion that somehow the bill will serve as a disincentive to trademark owners.

Mr Crow: That is correct.

Senator DI NATALE: Given that it refers specifically to tobacco, why on earth would it affect somebody who makes washing machines or televisions? I mean this is a bill directed specifically at tobacco. Why is there an implication that somehow it is going to have an impact on other industries?

Mr Crow: Very simply. I am not the lawyer. If the legal questions go to Allan I will take the commercial and the lay person's view. It is simply the fact that the government is taking an action to remove the property from a legal product, which is legally trademarked in a legal industry in a democracy and, obviously, under the guise of reducing tobacco consumption. Our contention is very straightforward. I cannot fight with the government, I cannot stop the government doing this, but what I can do is make it very clear what the consequences will be, which is that it will increase smoking in this country. It means that more illegal product comes into the country. Illegal product is very cheap. They do not pay tax—about 70 per cent of the price of the product—and they bring it in and so more people, more kids, will smoke. The product pricing goes down and more people will smoke. This is not smart.

The fact that you have a precedent, in my language as a commercial guy, and you have done it with tobacco, there is absolutely no reason why you would not do it at some stage in the future. I am talking about at any time, whether it be a month, a year or in 10 governments time. It would happen on alcohol, on fast foods and on many, many other industries. There have been calls already on many other industries on the back of this issue to introduce plain packaging on fast foods from some of the antagonists of the fast food industry. That is just natural because they see this and they look at copycatting. That is a concern, obviously not for me specifically today, because we are talking about the trademarks bill, but really a concern for society that if the government takes this course, where is the ability for consumers to choose? They are the consequences.

We are very open in this submission; we are trying to be really rational about this. We are trying to give you very clear, open feedback and dialogue about what the issues are to ensure that you make good law. This is bad law. That is why we said, 'Look, reject this bill, as you can do. Take the package back to the lower house and the minister and do a proper regulatory impact statement and get the evidence. Go and do the work, go and do the homework and do it right. Now, that may mean three months more, six months more—whatever it takes—but do

it right the first time rather than go through a process where I then am forced to challenge and protect my property rights. This is not smart. It is not smart for me. It is going to cost me money and my shareholders' money and my owners in London, who own this company. Obviously it is going to frustrate the government and the courts also get frustrated and say, 'What's going on? This is just another bad law.' They are the consequences we keep talking about.

Senator DI NATALE: You are asserting that price will go down because, essentially, there is the loss of differentiation between various tobacco products and therefore smoking rates will go up and it will have the reverse effect. But surely that could be addressed through a floor price on cigarettes, could it not?

Mr Crow: It is something that has been talked about in this debate over the last six months.

Senator DI NATALE: So that assertion may not be correct if a floor price is introduced?

Mr Crow: What I can assert is what I see in front of me and I play the game that I see in front of me.

Senator DI NATALE: I am putting to you the proposition that if a floor price was introduced, that issue of price decreasing and, therefore, the impact on smoking rates would be addressed.

Mr Crow: There would be issues with that. We would very much like to sit down and talk about that as a potential solution, but that is exactly the reason why we want the package to be sent back to the health department, to build a proper RIS and do it properly because no-one knows—this is the problem. The minister has clearly stated in radio interview and in press interviews in the last three months that there is no robust evidence to suggest that this will work. This is not smart.

Mr Connell: This was a draft RIS document from April 2010 from the department of health which says:

Smokers could face lower costs of purchasing cigarettes – and higher health impacts and costs associated with higher rates of consumption – if plain packaging leads manufacturers to disinvest in branding and compete solely on price, driving tobacco prices down.

So that was the department of health's own draft RIS in April 2010.

Mr Crow: It is spot on.

Senator DI NATALE: Could that issue be addressed with a floor price?

Mr Crow: Could it? It is one of series of options that need to be discussed and the issue is—

Senator DI NATALE: Thank you. My next question—

Mr Crow: Senator, can I just make the point before you move on and it is not a long one. That is exactly the reason why we want you to do it properly and send it back; it is because we do not know the issue.

Senator DI NATALE: If it is done properly it does not negate from the point you make in your submission that without brand differentiation, manufacturers will be forced to compete on price. I do not want to get into a legal argument because I am not a lawyer and this will be tested by far greater legal minds than mine, but in your submission you make the point that if it is successful and that a legal challenge is unsuccessful then manufacturers will be forced to compete on the grounds of price. My proposition to you is that could be addressed with a floor price.

Mr Crow: Can I just make one point before you move on? That is on the legal tobacco trade. That is fantastic and there is options around that and there is excise options that government have and a range of options that need to be debated and researched by the department—and no doubt Treasury and economics committees—and do it properly. The issue that also stands is, with a flood of illegal tobacco coming into the market today, it has gone up 150 per cent in the last three years due to excise. It is growing very rapidly. This comes in from Indonesia, from China. It is smuggled in—the triads bring it in. They use it as a cash flow mechanism for many other dangerous industries that come in. Just literally, I think it was last week, they had a seizure of 60 tonnes in Sydney, 25 million cigarettes, $450,000 in cash. Those products cannot be monitored through mechanisms like floor pricing. That product sells for 40 to 45 per cent of the price of a normal packet of cigarettes—about six bucks a pack versus about $17. This is uncontrollable by any mechanism like a floor price or excise. Those kinds of things actually increase the incentive for smugglers to bring their product in. That is the issue.

Senator DI NATALE: So what you are describing is a problem that exists already, irrespective of whether this legislation is passed or not, so it seems that it needs to be addressed. I take that point.

Mr Crow: And will get worse with the legislation passing.

Senator DI NATALE: In your submission you say there is no clear evidence for the effectiveness of plain packaging and yet you have not provided any evidence to justify the assertion that in fact an increase in the

consumption of illegal tobacco products will occur, so I think you are perhaps subject to the same accusation that you are making of the government.

Mr Crow: I rest on the last three years of evidence. It is up 150 per cent—

Senator DI NATALE: In the absence of plain packaging.

Mr Crow: Plain packaging obviously makes it easier to print, to copy and to distribute and confuse the retail trade. If you talk to the ARA guys—

Senator DI NATALE: So it is an untested hypothesis that you are putting forward.

Mr Crow: It has been seen in many other industries right across the country from software to clothing to alcohol products—a raft of issues that are available in Australia. The empirical evidence is there.

Senator DI NATALE: The next question I have got is in terms of your support for regulations that are based on research that has been conducted both in Australia and internationally. In your submission you quote a number of pieces of government policy that should be supported, but you do not include warning labels as part of the suite of policies that should be supported. Given that the evidence is very clear on warning labels, why has that been excluded from your submission.

Mr Crow: I do not know. We do support warning consumers and warning labels, absolutely. Absolutely no drama at all.

Senator DI NATALE: Okay. Thank you.

Mr Crow: In a proportionate, normal way.

Senator CASH: I just have one question for Mr Crow and one for Mr Myers. Mr Crow, just in relation to potential consequences that you alluded to, what are the potential consequences in the event that your legal challenge is successful in terms of compensation? Have you had that estimated yet?

Mr Crow: We have not. Obviously, we are starting to do work on that as we get closer to the bill. At the moment we are focusing on ensuring the bill does not pass and we are trying to give as much evidence and as much information to you and your colleagues in the lower house just recently and now in the Senate to ensure that you pass great law rather than bad law. We hope that you get access to the Attorney-General's review back in 1995, as I said in the opening. We hope you get access to the department of health's legal review that they have obviously just done. I think it is imperative that senators have the ability to see that before you have to decide on what is a law that is obviously, by many, many people, seen as a bad law. We are looking at a—

Senator CASH: I will stop you there, I do apologise. In relation to your submission at 7.2, you actually state whilst the amount of any compensation would ultimately be a question of the courts, commentators have put a compensation figure for the TPP bill and the proposed increase in graphic health warnings could be in the vicinity of $3 billion. Is that a fair estimate? Is that an estimate that you have had a look at? Is that just a figure that has been plucked out of the air?

Mr Crow: No, we are currently doing work on trying to do the evaluations of this, getting ready for any potential challenge—

Senator CASH: Are we talking millions, hundreds of millions or billions?

Mr Crow: It would be in the billions.

Senator CASH: It is in the billions?

Mr Crow: I think when they reviewed it in 1995—

Senator BRANDIS: In the billions, did you say?

Mr Crow: In the billions, yes. Our business is worth approximately probably $7 billion or $8 billion. The brands would be worth roughly probably half of that.

Senator BOYCE: Just for your company?

Mr Crow: Yes, just for our company, and obviously Philip Morris and Imperial would be there as well. We do not actually have a number and I am being very open with that obviously. We will work on that as we work towards a challenge because obviously that would form part of our claim as the challenge moves into the court structures of the High Court.

Senator CASH: Mr Myers, in relation to proposed section 231A, the department states that if the parliament believes any regulation made under proposed section 231A inappropriately modifies the operation of the Trade Marks Act 1995, the parliament will have the opportunity to disallow the regulation. The departments would seem to put forward that that is the answer. Is that the answer?

Mr Myers: Not in my view as a voter in this country. You do not have to be a lawyer to answer that question.

Senator CASH: As a constitutional lawyer? As a QC what do you say to that?

Mr Myers: I do not think it is any answer at all. It is the difference between parliament enacting the legislation and parliament exercising some sort of control over the regulation-making power—different things altogether.

Senator BRANDIS: Based on the premise that it is a validly made regulation too—

Mr Myers: Of course it is.

Senator BRANDIS: so it becomes a circular argument, doesn't it?

Mr Myers: Of course it does.

CHAIR: But we do have plenty of regulations that are made and parliament has the opportunity, within 15 sitting days of that parliament, to disallow that regulation. Hundreds of regulations are looked at through the Senate Standing Committee on Regulations and Ordinances, so it is not an unusual process to disallow rather than actually vote and support. You would understand that. But your basic premise though, as Senator Brandis pointed out, is that you believe that the regulation itself is fundamentally flawed and the wrong way to go.

Mr Myers: Yes, I do but if I were asked, on the assumption that it is not, 'Is that a good result?' it is still not a good result, because parliament should make the laws, not just supervise regulations made by the executive.

Senator CASH: I have one more question in relation to the illegal tobacco trade and the questioning of Senator Di Natale. Mr Crow, would you be able to take on notice to provide the committee any additional information in relation to the potential increase in the illegal tobacco trade should this go through?

Mr Crow: Absolutely.

Senator BOYCE: I have what I hope are two fairly quick questions. It seems a little surreal reading your submission and then that of the Department of Health and Ageing. They make the comment that you will be able to continue to use your tobacco trademark on your letterheads and your wholesale packaging. Could you perhaps tell us a little bit about what value you see in that?

Mr Crow: Limited. The role of a trademark is to allow a product to be differentiated from another product. I am not the lawyer, just to remind everyone in the room, but we looked at the Gallo case, which went through the High Court, and there is a great definition of a trademark being a badge of origin so you know where it comes from, who made it and why it makes it different from another product; otherwise, it is a commodity. The value is attached to the use of the trademark and the intellectual property to allow it to be sold, in our case, to consumers. At this stage, if we could use it on a letterhead and on a piece of wholesale packaging, obviously the use would be extremely limited and of extremely low value and would mean we have lost a lot of value.

Senator Brandis interjecting—

Mr Crow: Totally right.

Senator BRANDIS: To accept that the value of a trademark is an aspect of the marketability of the product—

Mr Crow: Totally right.

Senator BOYCE: The retained value within the trademark, if that is the use you have of it, would be very small—or, to use Senator Brandis's word, negligible.

Mr Crow: Negligible, I think, is a good word.

Senator BOYCE: The other thing I would like your comment on is another comment from the Department of Health and Ageing saying:

... the provisions of the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 provide additional assurance that the rights of trade mark owners can be protected in an expeditious way should unanticipated circumstances arise—

hence the need for a Henry VIII clause according to the department. Could I have some comment on that?

Mr Myers: It depends on one's state of mind. I would be very surprised if my client or any other tobacco company felt any sort of comfort or assurance from the existence of the proposed amendment to the trade mark act.

Senator BOYCE: In fact your—

Mr Myers: On the contrary, it exposes one to any sort of alteration of the trademark rights.

Senator BOYCE: So rather than increase your assurance, it decreases it and increases your nervousness about what might happen.

Mr Myers: Absolutely.

Senator BRANDIS: One more question to you, Mr Myers. Mightn't it be able to be argued, from a constitutional point of view, that this act is not invalid but it means nothing, because what would be invalid would be a regulation made pursuant to the act by the minister given that there is no limitation upon the regulation making power, that the regulation would be invalid as a legislative act not sanctioned by the Constitution, but this act of parliament of itself is not invalid?

Mr Myers: Yes, and that was the suggestion, if I may say so, with respect, that you made to me when I was answering an earlier question. I was concentrating upon the validity of the proposed amendment to the act and I was saying it may be invalid as a delegation of legislative power. But as you correctly point out, there is a second level at which an argument can operate and that is in relation to the validity of the regulations themselves.

I would like to mention one other thing, which is that the notion that one could have price controls constitutionally is a very difficult one. That would almost certainly offend section 92 of the Constitution in the first place, and I would very much doubt that any parliament would think that that was the way to go in relation to any matter in Australia.

Senator BRANDIS: Mr Myers, this parliament has done some pretty strange things.

CHAIR: And so have others, Senator Brandis—in fact, some even stranger than ours. It is not unknown to have a floor price for alcohol, for example, in certain areas, so it could be conceived that you could do similar for tobacco pricing.

Mr Myers: Perhaps I should not have made the remark. I do think there would be big constitutional issues in trying to enact legislation that prescribes a minimum price at which something can be sold. I can see that the supposed guarantee of free trade in Australia, section 92, would be impaired by that.

CHAIR: Okay. I thank you very much for your two submissions and also for making yourself available for our hearing this evening. It is appreciated.

Mr Myers: Thank you.

RIMMER, Dr Matthew Rhys, Private capacity

EVANS, Professor Simon Charles, Private capacity

[18:28]

CHAIR: Welcome to our public inquiry into this legislation. For the *Hansard* record would you state the capacity in which you appear.

Dr Rimmer: I am an associate professor at the ANU College of Law and an Australian Research Council Future Fellow, and I appear in my own capacity.

Professor Evans: I am a professor at the Melbourne Law School at the University of Melbourne, and I appear in a personal capacity.

CHAIR: Thank you. Dr Rimmer, we have a submission from you and it is No. 26, for our purposes. Professor Evans, your submission is No. 1, and I note that it is a joint submission with Mr Jason Bosland. I now invite you to provide us with an opening statement or some comments about your submissions and then we will go to questions.

Dr Rimmer: I think it will be very useful to begin this discussion by focusing on the question of health law. I think this issue is one primarily focused upon dealing with tobacco advertising and tobacco related trademarks. It is particularly worth while to think about the way in which the legislation provides best practice for the implementation of the World Health Organisation Framework Convention on Tobacco Control, and it is worth remembering that the World Health Organisation has been particularly vocal in its support for the legislative measure put forward by the Minister for Health and Ageing and by the Labor government.

Senator Boyce interjecting—

CHAIR: Maybe we will go to that later.

Dr Rimmer: In particular when they made a submission during the discussion on the exposure bill, the World Health Organisation emphasised that it viewed tobacco use as one of the greatest threats to public health the world has ever faced. Tobacco consumption currently kills nearly 6,000,000 people a year through direct use and the deadly effects of second-hand smoke. Tobacco is without a doubt the single most preventable cause of death in the world today. It is the only legal consumer product that kills up to half of those who use it as intended and recommended by the manufacturer. In particular, they talked about the role of the World Health Organisation Framework Convention on Tobacco Control and noted that it explicitly addresses and provides member states with a direct response to the globalisation of the tobacco epidemic. They noted that it had over 170 contracting parties.

I think it is worthwhile given the previous submissions to mention the obligations and then talk about the guidelines in terms of the approach of the World Health Organisation. Article 5 deals with general obligations stressing that each party should:

... develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes—

Article 11 deals packaging and labelling of tobacco products, and in particular stresses:

Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild".

Article 13 deals with tobacco advertising, promotion and sponsorship and recognises that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.

In my submission I also point out that the guidelines for the implementation of articles 11 and 13 of the World Health Organisation Framework Convention on Tobacco Control deal with the question of plain packaging. In relation to article 11, it says:

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

There is also discussion in relation to article 13 about how the effect of advertising or promotion on packaging can be eliminated by requiring plain packaging, and it goes on and discusses that.

Essentially, the World Health Organisation also stressed through its internal documentation that the tobacco settlements revealed a lot of information about the way in which tobacco companies used packaging to try to persuade consumers to buy their products. There is also the peer-reviewed research.

In Australia, for instance, there is the Cancer Council, and the Melanie Wakefield in particular has been very systematic in her empirical research looking at some of the documentation of tobacco companies and what packaging is used for and what its impacts are. Both are very strongly of the view that there are strong public health benefits of plain packaging. They are very concerned about tobacco industry interference particularly in the proposed Australian scheme and they have suggested that the tobacco companies have been using sophisticated methods to undermine meaningful health policies, laws and initiatives that are adopted and implemented.

I think that is an important framework within which to consider all the other legal issues, because they are pertinent to questions about trademark law and international trade law and also questions about constitutional law.

In terms of my own submission, if you have a look at the paper, essentially I have addressed the nature and role of the trademark law. I talk about the legislation and the regulations and I argue that they are within the federal government's broad power to make law with respect to intellectual property. I discuss how the measure is consistent with international intellectual property agreements like the TRIPS agreement. I take issue with the characterisation of the TRIPS agreement that has been put forward both today by the tobacco industry but also in some of their submissions. I also make some submissions on the intellectual property power and its relationship with acquisition of property on just terms. I also talk a little bit about the implied freedom of political communication.

CHAIR: Will get to expand on some of those through our questions, because your submission is quite detailed in relation to this trademarks bill and the amendments and the arguments there. Professor Evans, did you want to provide us with some opening remarks?

Prof. Evans: Certainly. Thank you, Senator. I thank the committee for the opportunity to expand on the written submission. As you noted, it was prepared with my colleague, Jason Bosland. My area of expertise and research is in Australian constitutional law, in particular on the operation of section 51(xxxi) of the Constitution—the power to acquire property subject to just terms. I have also carried out research on the parliament's role in protecting rights, and therefore have some knowledge and expertise on Henry VIII clauses. So in my comments I will focus on those issues of constitutionality rather than directly on questions of policy.

Focusing first on the plain packaging bill rather than the trademarks bill, which is the focus of the written submission. In summary we see there being four principal issues. The first is what is the content of the trademark right in Australia? That is a question of interpreting the Trade Marks Act. The reason that it is necessary to do that is in order to assess the impact of the plain packaging bill on the Trade Marks Act. Our conclusion is that, although a narrow interpretation of the content of trademark rights is possible, on the better construction, the plain packaging bill does interfere with property rights protected by trademarks.

CHAIR: Professor Evans, just hold that thought. All divisions are real, so the bells say we have to go. So we are going to, as Shrek would say, 'Run away', and once we have voted democratically, we will be back.

Proceedings suspended from 18:37 to 18:49

CHAIR: Professor Evans, I am sorry, you were interrupted by the division in chamber. Please continue. It might be hard for you to pick up your train of thought, but thank you.

Prof. Evans: I said there were four issues that we thought were relevant to the question before the committee about the plain packaging legislation. I talked about the first of those and concluded that the plain packaging legislation does indeed interfere with the rights contained within the tobacco companies' trademarks, although there is some debate around that question.

The questions of greater significance are around the effect of section 51(xxxi) of the Constitution, which, as the High Court has repeatedly held, does provide a guarantee of property rights. Three questions arise: are the trademarks property; are they acquired; and, if they are acquired, is the acquisition one that requires just terms? We think the answer is abundantly clear that trademarks constitute property for the purpose of section 51(xxxi) and so an acquisition of trademark rights falls within the protection of the guarantee.

However, on current authority, there is very little prospect that the High Court would conclude that the plain packaging legislation effects an acquisition of those property rights. That is because the High Court's jurisprudence on section 51(xxxi) draws a distinction between an acquisition and a regulation or deprivation of property. An acquisition of property is one in which the Commonwealth, or some third-party on behalf of the Commonwealth, acquires some identifiable benefit or advantage relating to the ownership or use of property. On our analysis, there is no such transfer of property rights from the trademark owners to the Commonwealth or any

third party. That may be a matter of policy significance—that the trademark owners are deprived of significant value—but we argue it is not a matter of constitutional significance because of the way the High Court has interpreted the guarantee in section 51(xxxi).

The most recent decision on point could not be more clear. It was a decision in the case of ICM Agriculture Pty Ltd The Commonwealth [2009] HCA51 decided in 2009. There a majority of six justices of the High Court affirmed this proposition—that an acquisition under section 51(xxxi) requires some measurable advantage of a proprietary kind to be derived by the Commonwealth. They affirmed that proposition. There was a dissent from Justice Heydon, a dissent in strong terms, but it was one justice. Although Justice Heydon's arguments drew some support from earlier judgments of the High Court, they were, again, judgments of single justices—principally Justice Callinan.

So our analysis is that the High Court case law is abundantly clear that on current authorities the majority would conclude that the plain packaging legislation does not affect an acquisition that requires compensation.

CHAIR: I am sorry to interrupt you—we do not normally interrupt people in their opening statements. But for my own purpose, can I clarify with you: is that because you are not actually taking away the trademark from these companies? They still actually acquire, they own, and they are the rightful body that legally has this trademark—you are not seeking to remove the acquisition from them? Is that right?

Prof. Evans: There are two elements to the conclusion. The first is, as you say, that the trademark owners remain the trademark owners. However, the more significant component is that the Commonwealth does not acquire the right to use the trademark. The Commonwealth does not acquire any benefit. It is not like *The Castle* where the Commonwealth gets the benefit of the house in order to operate the airport, to give a vernacular example. That is the distinction that the High Court is drawing in these cases: the distinction between, for example, taking a house in order to build a road or an airport, which manifestly requires compensation; on the other hand, imposing a zoning regulation—you cannot build more than two stories or you cannot paint your house bright pink. That, although it effects perhaps the value of the property owners rights, it affects what they can do with their property, it does not affect an acquisition that requires compensation under the Constitution. It is a fine distinction. It may be an unappealing distinction from a policy point of view. But that is the line the High Court has taken. That is why we conclude that, from a point of view of constitutional risk analysis, there is very little risk that the plain packaging legislation if enacted would be unconstitutional for effecting an acquisition of property.

CHAIR: You heard the companies before us today who were saying that, because the possible use of regulations through the Henry VIII clause makes it so uncertain for them—that is, they do not know what is going to be in their regulations, whether they will be positive or negative—their rights are being diminished in the way they can use that trademark.

Prof. Evans: I heard the submissions. Accepting at face value everything that was said, my conclusion would be that that does not give rise to a constitutional concern. It does not amount to an acquisition of that property on current authorities because the Commonwealth does not get anything.

CHAIR: I see.

Prof. Evans: From a point of view of the rule of law, from the point of view of policy, there may be other concerns. There may be amendments that could be made to the legislation to narrow those areas of concern, but from the point of view of whether there is a $3 billion exposure for compensation for acquisition of property, my analysis is that there is no acquisition of property requiring compensation under the Constitution.

CHAIR: I see.

Prof. Evans: There is a raft of subsidiary tests for when an acquisition of property falls outside section 51.(xxxi) of the Constitution. It is probably not necessary to go through them one after another. Our conclusion is that those do not actually protect the bill. The reason the bill does not affect an acquisition is because the Commonwealth does not get anything; there is no transfer from the trademark owners to the Commonwealth.

CHAIR: Okay.

Dr Rimmer: I would like to add to that. The intellectual property power of the federal government is very broad and the federal government is constantly amending, revising and adjusting the rights, exceptions and remedies in trademark law, patent law, copyright law, circuit layouts. I am very concerned by the overly broad view taken of the application of the acquisition of property clause in relation to the intellectual property power by the tobacco industry, given the very broad way that the power has been viewed by the High Court of Australia in the case of Grain Pool of WA v Commonwealth [2000] HCA 14; 202 CLR 479; 170 ALR 111; 74 ALJR 648 (23 March 2000. The High Court unanimously took the view that there was very broad power and even though the

constitutional power did not specifically mention plant breeders' rights it still had the power to make laws with respect to those rights.

It was very interesting to hear the submissions before that did not really even touch upon the very broad nature of that power. It seems to me illogical that Justice Gummow, having written such a masterful judgment on the broad nature of that power, would allow that power to be cut down so brutally by an acquisition of property on just terms cause. There have been a few cases that dealt with the interrelationship between the intellectual property power and the acquisition of property on just terms clauses. The High Court has currently heard a test case involving the music industry protesting a cap on the levy and they have argued that that is an acquisition of property on something other than just terms. That has been heard and you can see the arguments in relation to that.

The two key early decisions are really the Blank Tape case and the Nintendo case. In the Blank Tape case there is a kind of slender obiter the blank tapes levy was an acquisition of property, but they could knock it out on the grounds that it was a kind of a tax.

The countervailing precedent is the one that dealt with the validity of the Circuit Layouts Act which is a sui generis piece of intellectual property legislation. I think it is worth mentioning that, because the current Chief Justice has picked up that authority in cases since then. In that case the High Court observed that the power over intellectual property was a broad one with respect to copyrights, patents of inventions and designs and trademarks and it is of the essence of that grant of legislation power that it authorises the making of laws which create, confirm, provide for the enforcement of intellectual property rights and regional compositions inventions, designs, trademarks and other products of intellectual effort and it is of the nature of such laws that they confer such rights on authors, inventors and designers. Inevitably such laws made at their commencement impact upon proprietary rights to the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer. The grant of legislative power contained in section 51.(xviii) manifests a contrary intention which precludes the operation of section 51.(xxxi).

The other point I would make is a comparative point. It was very remiss of British American Tobacco not to talk about their failed action in the European Court of Justice, a Superior Court in which they tried to attack the validity of tobacco advertising on the grounds that it was an interference with the right to property and they also raised the point about a violation of article 20 of the TRIPS agreement. The European Court of Justice said, no, a legitimate purpose was being served in that particular case in terms of the larger health objectives and they did not feel constrained in that case by article 20 of the TRIPS agreement. I think that is worth remembering.

In the United States there are some early battles—they call it the Takings Clause in the United States. President Obama has got some new anti-tobacco legislation and the tobacco companies have been complaining about graphic warnings being placed upon their products and they have been trying to mount arguments about due process and First Amendment rights and the Takings Clause. There was a recent case in a Kentucky court of some kind where they just said that they did not have jurisdiction in relation to the Takings Clause.

CHAIR: I think we will go to questions. I think that is probably where we get the most value out of your work and research.

Senator DI NATALE: We have heard two presentations with almost diametrically opposed legal opinions on this matter and both of whom, I have to say, quoted *The Castle*. I suppose if you were to summarise your response to the lawyer from British American Tobacco, you would tell him that he is dreaming. This is clearly an issue that will need to be resolved in the courts if that is the course of action chosen by the industry. Do you have a sense of where the legal consensus lies in this area? You have used the word 'vexatious' in one of your presentations and there is an implication there that the vast legal view on this is that they have got the vibe of the Constitution wrong. You would say that the vast consensus rests with you on this issue—would that be a fair summation?

Dr Rimmer: Sure. I am happy to take on that point, maybe looking, firstly, and the some of the larger international considerations, because I think that is quite an important point. There have been arguments today that the Australian government is somehow constrained by the TRIPS agreement from making laws concerning the good health of its population, and advertising in relation to tobacco.

At the very outset it is worth remembering that internal documents from British American Tobacco emphasised that current conventions and treaties afford little protection for tobacco companies. I think that is a very important point. As part of the tobacco settlement we got candid insights into what they thought about the impact of these international treaties. They are quite explicit:

... the documents emphasize that arguments about intellectual property, trade, and property rights under 'GATT/TRIPS' would provide 'little joy'—

and that is quite explicit. It goes on:

Accordingly, the internal documents emphasize that tobacco companies should try to resist the introduction of plain packaging of tobacco products through a combination of 'domestic political solutions', promoting 'international debate', and the provision of an 'expert bank'.

As a kind of scholar of the TRIPS agreement, having co-edited a big collection for Cambridge University Press on *Incentives for Global Public Health* and the relationship between the TRIPS agreement and access to essential medicines, I have been quite alarmed by the way in which the tobacco industry has represented the TRIPS agreement. Really, it has been a travesty particularly in the way in which they have dealt with article 7 and article 8 of the TRIPS agreement, but also how they have dealt with clauses like article 20 and the disparaging way in which they have tried to argue that the Doha declaration is of no relevance to this particular case.

I think that it is very important to remember that the TRIPS agreement is not some sort of charter of intellectual property owners' rights. The TRIPS agreement, as spelt out in articles 7 and 8, says that there is a mixture of public and private purposes. To my mind the key clause is article 8, which says:

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.

And that is reinforced by article 8.2 which also deals with anticompetitive conduct, and article 7 which talks about how one has to balance the protection enforcement of intellectual property rights with the transferring and dissemination of technology. Some of the submissions by some of the tobacco interests in the House of Reps and the Senate have tried to argue that that is a meaningless clause or we should not take any notice of it, or that it really sets up procrustean test whereby you have to demonstrate that any measures that are taken are necessary.

I think this provision is an interpretative aid to the interpretation of all the other provisions within the TRIPS agreement, and that has been clearly recognised and has been utilised to deal with a number of key public health issues over the years. To my mind, it is illogical that you have something like the Doha declaration which recognises that members of the World Trade Organisation can make good advantage of the flexibilities under the TRIPS agreement to deal with a wide range of public health concerns in relation to patent law and that somehow in relation to trademark law nation states are unable to avail themselves of the exceptions in relation to that. The basic proposition too is very strange when you think about it. You are meant to interpret international treaties as being harmonious with one another. I hardly think it likely that the TRIPS agreement is somehow going to strike down plain packaging, which is supported by the World Health Organisation Convention on Tobacco Control.

On article 20, I think it is worthwhile mentioning that article 20 has not successfully been used in a panel dispute yet in terms of the jurisprudence in relation to the TRIPS agreement. I think the submissions by the tobacco industry in relation to article 20 have been of varying quality. Some of them have been by non-lawyers like the Democracy Institute that did work for Imperial Tobacco and made various assertions about it. There are some other more sophisticated submissions—I think Japanese Tobacco hired Daniel Gervais to make a case—but to my mind, article 20 makes it clear:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements.

If you look at the evidence presented by the World Health Organisation, I think there is strong evidence that plain packaging measures are both necessary and justified.

The other important thing to remember is that in this particular case the federal government has gone to great lengths to ensure that the validity of the trademarks is protected and that trademark owners can still take action in respect of trademark infringement. So articles 15 to 21 are really the key articles dealing with trademarks and the TRIPS agreement.

Sometimes the tobacco companies have tried to raise issues about article 16, that they might not have the ability to bring action in relation to infringement or there might be a problem in relation to article 18, the requirement of use. But if you have a look at what the federal government has done, the federal government has been very systematic in saying that plain packaging is not going to affect any issues in terms of use. They made that very explicit in terms of the legislation. They have also said that merely because something is subject to plain packaging does not mean that it is contrary to law. They have also noted that you cannot revoke acceptance or revoke registration.

So, essentially trademark owners in tobacco productions still have the full suite of remedies available to take action relating to counterfeiting and in relation to a wide range of things. The other thing to remember is that governments have always retained a certain role in determinations relating to subject mature, the nature of rights, exceptions and remedies. It is not the case that every variation in intellectual property rights will result in

compensation. Hearing Simon's submission, I was reminded of the Patents Act, for instance, in relation to Crown acquisition of patents and Crown use of patents where there is provision for compensation. In relation to compulsory licensing, there is provision for compensation. But for instance if something is covered by a defence, there is no compensation whatsoever. If something is contrary to law, there is no compensation. If something does no satisfy threshold requirements in, say, patent law or trademark law, there is not necessarily any kind of compensation for a failed application.

I think it is also very important to remember that both the TRIPS agreement and Australia's intellectual property pieces of legislation do deal with compensation in certain circumstances where there is actual acquisition or actual use. But in this case, as Simon put it so pithily and eloquently, the government are not acquiring the trademarks of the tobacco industry. They are not using those trademarks in competition with those cigarette companies. That is partly why they have to make such convoluted arguments about constitutional law and international law because if there were use and acquisition they would be able to run a simple trademark infringement action.

Senator DI NATALE: A view was expressed at the end of the British American Tobacco submission about the constitutionality of a minimum floor price. Do either of you have a view on that?

Prof. Evans: I take you back to the question that Dr Rimmer addressed about the level of confidence we have in the outcome of constitutional challenge. I think there are now three grounds for such a challenge on the table: acquisition of property, Henry VIII clauses and floor price. On acquisition of property, on current authorities of the High Court, I would have very high confidence that such a challenge would fail because of the decision in ICM Agriculture in 2009, the six-to-one decision. Of course, it is always possible for the High Court to change its mind, as we know, but my confidence level in that is very high.

On the Henry VIII clause, I think one of the other submissions to this inquiry puts it as highly as it can be put—that is, it is a question that is open for reconsideration. On current authorities, a Henry VIII clause—regardless of its breadth—would be valid. The High Court has not articulated a test for what amounts to an unconstitutional abdication of legislative power that would be necessary in order to find invalidity on current authorities. The High Court has never found such an abdication and has not enunciated a clear test to say when that would arise. It would be taking a novel step to enunciate that test and find the Henry VIII clause invalid. As to whether there have been Henry VIII clauses of the breadth of the one found in the Trade Marks Amendment Act, I heard Mr Myers answer that he was not aware of any legislation or any case with a Henry VIII clause as broad as the one here. I do not have anything to add to that answer, although the Henry VIII clause in this bill does not strike me as particularly broad. It could be amended to confine its purposes in accordance with those expressed in the explanatory memorandum—that might be good policy—but I do not think it would affect validity.

On the third question, on constitutionality of floor prices, I think Mr Myers rightly identified section 92 as a possible issue. There is not a clear path on the current authorities to concluding that any floor price would necessarily be invalid. The High Court would be stepping out and identifying a new test because the current approach to the High Court, adopted in 1988 in the case of Cole v Whitfield (1988) 165 CLR360, was directed to state anti-competitive protectionist legislation. There is a suggestion that section 92 continues to apply to the Commonwealth, but there is no clarity about what Commonwealth protectionist anti-competitive legislation would look like. There are, of course, various mechanisms that the Commonwealth could adopt to implement floor prices. An analogy might be found in some of the taxation legislation that requires floors to expenditure, for example the training guarantee levy legislation or the superannuation guarantee levy legislation which use equalising taxes to require certain levels of expenditure. A tax based equalisation or floor measure might be a possibility for the Commonwealth to consider. Whether that would escape section 92 I think is an open question.

Dr Rimmer: I would like to pick up on the Henry VIII clause discussion. I think it is very important to understand the origins of why such a clause was put into the regime to deal with the Madrid protocol. Do you understand the purpose of the Madrid protocol? It would be helpful to have an idea of why that clause was introduced in the first place.

Essentially, the World Intellectual Property Organisation helps facilitate international protection in relation to things like trademarks and patents. So the Madrid protocol has been to help facilitate international protection in relation to trademarks. The Patent Corporation Treaty is designed to assist in providing protection in different states in relation to patent protection.

I was somewhat surprised by the tack of the coalition in relation to the Henry VIII clause, because the coalition introduced the Henry VIII clause in 2000. The Hon. Warren Entsch said that the Henry VIII clause was necessary

to deal with the Madrid protocol because it was such a complex administrative system that they needed to be flexible to put most of the detail of the Madrid protocol procedures into trademark regulations. Entsch said:

The approach of having the regulations giving effect to the protocol is consistent with the approach that has been taken in the United Kingdom. By putting most of detail in the regulations, any of the changes to the Madrid Protocol procedures can be handled more flexible and efficiently.

He went on and said:

Parliament always has the opportunity to disallow regulations if it believes that the subject matter exceeds permissible boundaries for the regulation.

So the coalition at that time were obviously of the view that they had the constitutional power to insert such a clause and, indeed, they were of the view that it helped with the efficiency of those international administrative arrangements in relation to the Madrid protocol.

Senator, I think you made a very telling comment before when you asked whether there is a difference in the clause that has been put in the plain packaging regime. My observation would be that it is far narrower than the clause in the Madrid protocol provisions, obviously because it deals with just one of the classes of goods and services covered by the trademarks regime. There are 34 classes of goods and 11 classes of services in the schedule at the moment under Trade Marks Act. So rather than covering that whole breadth of various different distinctive signs that could be protected by trademark law, this provision is very narrow in its operation and focuses on tobacco and related products. So I would say it is clearly much narrower.

The other point that I would make, looking at the discussion from the Department of Health and Ageing, is that it was introduced to deal with concerns about the operation of the Madrid protocol in relation to tobacco products. Far from adversely impacting upon the tobacco industry, one could say that that kind of provision might assist them in terms of their international protection. I am not sure other trademark interests would be very happy about the tobacco industry destabilising the operation of the Madrid protocol here.

CHAIR: And that is the very question I put to them: whether they thought there were benefits in the Henry VIII clause, and they fundamentally said no.

Dr Rimmer: I think the other point is that it is worthwhile to look at the Trade Marks Act and its regulations. The Trade Marks Act has over two hundred pages and the regulations—

CHAIR: I just want to go to that—sorry, Senator Di Natale. I think you lead quite nicely into page 101, I think it is, of your submission where you make some comments about Dr Southcott's contribution in the House of Representatives and the view that the coalition will not be supporting this Trade Marks Amendment (Tobacco Plain Packaging) Bill obviously because he asserts that it relies too much on regulations. But you say that—

Dr Rimmer: I had a little bit of a look about how many times—

CHAIR: The trademarks bill does rely on regulations by its very nature—is that right?

Dr Rimmer: Having been here for the last decade or so, I can remember the Howard government being heavily reliant upon regulations in relation to trademark law, and copyright law in particular. I had a count, and the trademarks regulations were amended and revised over 20 times during the period of the Howard government.

Senator BOYCE: Providing the basic legislation—

Dr Rimmer: Perhaps the disturbing regulations that I have ever seen were partly during the Australia United States pretrade agreement. There were massive changes made to Australia's intellectual property regimes and we had this incredible situation where there was the treaty in 2004 and the amending legislation in relation to technological protection measures did not come out until 2006, and the regulations which deal with very important matters in terms of regulation were not actually shown to us until 2006.

CHAIR: But you say in your submission though, that at last look there are a good 215 pages worth of regulations and the act itself is 221 pages, so the Trade Marks Act, by its very nature, has a lot of regulations. But also when we talk about it—

Senator BOYCE: And overrides the act?

CHAIR: Just let me finish my question. Does it then override the substantive act? I would have thought that that is where the provision of the parliament comes in to disallow those regulations if there is a view that that is the case.

Dr Rimmer: I think the purposes of this in relation to the clause seem to be partly to deal with the Madrid protocol and partly to deal with any other issues that might come up in relation to plain packaging and thinking about the interaction between the trademarks regime and the plain packaging regime. Mark Davison, the eminent professor from Monash University, was heavily involved in the advisory committee so I think the provisions went

through a number of different stages. But perhaps that it is a way to deal with any other administrative concerns that might appear in relation to the plain packaging regime. It is not clear to me that there would be an adverse impact in relation to the tobacco company.

CHAIR: Senator Boyce, do you want to finish your questioning?

Senator BOYCE: I did have a question to ask, which basically goes to the point that we are inquiring into the Trade Marks Amendment (Tobacco Plain Packaging) Bill. Do you regard this as the best-practice way of achieving the government's intentions with the plain packaging bill?

Dr Rimmer: Yes.

Senator BOYCE: And why is that?

Dr Rimmer: I think the federal government have been very assiduous in thinking about their international obligations, which can constrain or limit in terms of what you can do—

Senator BOYCE: But why do you think a bill that sets up regulation to override an act is the preferable way of going or the best-practice way of going?

Dr Rimmer: You really need to read the two bits of the legislation next to one another. If you have a look at my submission, firstly—

Senator BOYCE: But the point is that we are looking at this bill.

Dr Rimmer: Can I just finish, please—I think they are interrelated.

CHAIR: In the same way we gave the company the liberty of actually putting their argument in context, I think Dr Rimmer is doing the same thing.

Dr Rimmer: So Section 28 of the Tobacco Plain Packaging Bill is quite critical, because that deals with all the specific issues in relation to trademark law that might pop up. Do you know much about trademark law?

Senator BOYCE: Yes.

Dr Rimmer: Okay, so there are multiple different grounds of objection that could be made in relation to a trademark. Sometimes there is a lot of debate over the key one, distinctiveness—inherent and acquired distinctiveness and whether or not a trademark is distinctive or not. The approach of this particular section is to, firstly, have a very general clause talking about how a trademark owner in relation to tobacco products can still use the trademark in Australia, or authorise another person to use the trademark, or assign it so those economic interests are reflected, and they are much more particularly—

Senator BOYCE: Sorry, could you take the leap please—today.

Dr Rimmer: I think it is important to—

CHAIR: That is what Dr Rimmer is saying—the leap is connected to section 28 of the act.

Dr Rimmer: I think there was a problem in terms of the tobacco submissions earlier in that they leaped straight into the Henry VIII clause without looking at the matching legislative structure that was set up. The way I see the structure is that you have that general clause and then it deals with any objections that could be made that the trademark was contrary to law. It deals with revocation and then it deals with the burden on the opponent in terms of any non-use objection. The regulations could deal with procedural matters. As to the extent they could deal with substantive matters, I am not sure whether IP Australia have necessarily been that keen on showing too much initiative in terms of using the discretion that they have had.

Senator BOYCE: So you are suggesting that parliamentary regulation should replace IP Australia's remit?

Dr Rimmer: No. In terms of IP Australia's approach, they want to ensure that the administrative system works well and that the two pieces of legislation synch with one another. But I do not think that IP Australia could ever be accused of being radical or acting in an adverse way. For instance, they have been—

Senator BOYCE: I am just not sure what the relevance of that is to this bill.

Dr Rimmer: It is relevant in terms of thinking about how the regulations might operate.

Senator BOYCE: But you are seeing the regulations as somehow replacing IP Australia because it is not an extremely active organisation in your view?

Dr Rimmer: I just do not really see how that Henry VIII clause could be used in the apocalyptic ways presented by British American Tobacco. Just as the Madrid Protocol clause has not, to my knowledge, been used in a way that would cause objection. That clause has not been attacked or challenged. If the tobacco industry are such champions about removing Henry VIII clauses from the Australian legal system, why did they not attack that

2000 clause dealing with the Henry VIII provisions in relation to the Madrid Protocol 11 years ago? I think it is very belated to come to be interested in this.

CHAIR: Professor Evans, did you want to say something?

Prof. Evans: Briefly. Henry VIII clauses are obviously an issue of small 'c' constitutional significance. They do not raise issues of constitutional validity but they do raise issues of constitutional propriety about the relationship between the parliament and the executive. They have been a matter of small 'c' constitutional concern for a long while. The Scrutiny of Bills Committee assiduously examines them and has made statements of principle about their propriety. The question whether this particular Henry VIII clause is appropriate in the context of that question of constitutional propriety is one that has to take into account, it seems to me, the purposes for which the regulation-making power is included.

Senator BOYCE: So the end justifies the means?

Prof. Evans: Well, the legislation is about making the decisions about what is appropriate and in the context of effective accountability mechanisms—that is, the power of disallowance under the Legislative Instruments Act, the power of parliamentary scrutiny and, of course, the power of the parliament to by legislation subsequently override a regulation even if it is not disallowed. As someone who is not expert in the application of trademarks to tobacco packaging or the health issues I cannot reach a final judgement, but it is a question of a policy question in the context of the issue of constitutional propriety. Fundamentally it is a legislative question for the Senate and for the House to determine.

Senator BOYCE: Thank you.

CHAIR: Dr Rimmer, do you want to say something in finishing?

Dr Rimmer: There is just one point that I want to pick up on. My co-authors from my original paper on addiction, Simon Chapman and Becky Freeman, have been concerned about the arguments by the tobacco industry that counterfeiting is on the rise in relation to tobacco products. I think it would be very useful for you to take notice of the submission to the House of Representatives by the Cancer Council of Victoria which emphasised that, in terms of their review of the research, tobacco industry claims that plain packaging will increase illicit trade are exaggerated and misleading. The industry's estimation of the current size of the illicit market in Australia, of 15.9 per cent, is based on one very small survey of 949 people, with a very low response rate. The government's national drug strategy household survey of more than 23,000 people suggests that only about 0.3 per cent of Australians, 1.5 per cent of smokers, use unbranded tobacco products half the time or more.

I also make the additional point that there has been a great problem in relation to policy debates over intellectual property, with intellectual property owners using rhetoric about piracy and counterfeiting in order to get much tougher protection in relation to intellectual property rights. I think I mentioned William Patry's work *Moral Panics and the Copyright Wars*, in which he talks about how rhetoric about piracy, not adequately backed up by independent empirical evidence, has been used to push for strengthened intellectual property rights. I think there was a bit of that rhetoric happening this evening.

The other thing, I think, was that someone had a question about the level of compensation if there was a successful action in relation to acquisition of property. My co-author, Simon Chapman, engaged in an analysis of some of the submissions that were made in some of the early inquiries and has argued that the figure of billions is a factoid, and in particular he was of the view that some very creative accounting had gone on—

CHAIR: And is that in your submission?

Dr Rimmer: Yes, there is a cross-reference to that. It is right at the end of the acquisition.

CHAIR: Yes, all right, thank you.

Dr Rimmer: But I think that is also worthwhile noting. From my perspective—

Senator BOYCE: Sorry, who was the author of that?

Dr Rimmer: Simon Chapman, who is a professor at the University of Sydney. He has done some work on public health. It shows amazing chutzpah by the tobacco industry to demand compensation for these perceived slights concerning trademarks when the tobacco industry has been—

Senator BOYCE: What relevance is this to the bill?

Dr Rimmer: It is relevant. It is relevant in terms of the question on compensation.

Senator BOYCE: Well, I do not think—

CHAIR: You have the right to enter the arguments we heard earlier.

Dr Rimmer: I think it is concerning that the tobacco industry has been in the media, in the parliament and in the court, demanding compensation for these perceived slights in relation to trademarks. But it has not necessarily been as willing to provide compensation in relation to a wide array of health related harms, particularly as highlighted by the World Health Organisation in its recent study on the tobacco epidemic. I find that most strange as an intellectual property lawyer.

CHAIR: I am sure that will be picked up by health experts. I thank you both for your submission and your time this evening. It is most appreciated, thank you very much.

HUXTABLE, Ms Rosemary, Deputy Secretary, Department of Health and Ageing

REID, Mr Chris, General Counsel, Department of Health and Ageing

SMYTH, Mr Nathan, First Assistant Secretary, Department of Health and Ageing

COTTERELL, Mr Simon, Assistant Secretary, Department of Health and Ageing

FAULKNER, Mr James Richard, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department

BAXTER, Mr James Victor, Assistant Secretary, WTO Trade Law Branch, Department of Foreign Affairs and Trade

NOONAN, Mr Philip, Director General, IP Australia

[19:37]

CHAIR: I just want to remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of them to superior officers or in fact even to the minister. This resolution prohibits questions asking for only opinions on matters of policy. It does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. Any claim that it would be contrary to the public interest to answer a question must be made by a minister and so should be accompanied by a statement setting out the basis of the claim and you can also refer that answer to the minister. Department of Health and Ageing, we have a submission from you which we have lodged as 36. Do you have an opening statement at all?

Ms Huxtable: We do. I would like to thank the committee for the opportunity to appear and to make this statement. I am making the statement on behalf of the Department of Health and Ageing, the Attorney-General's Department, the Department of Foreign Affairs and Trade, and IP Australia. The Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 is a consequential amendment bill to the Tobacco Plain Packaging Bill 2011. The two bills are together intended to implement the government's policy of mandating the plain packaging of tobacco products.

Tobacco smoking remains one of the leading causes of preventable death and disease among Australians, killing an estimated 15,000 Australians each year.

The cost of smoking to Australia's society and economy are estimated at $31.5 billion a year and, whilst smoking rates are falling, approximately three million Australians still smoke daily or weekly. The plain packaging measure is being introduced as part of a comprehensive program of tobacco control reforms which include: the 25 per cent excise increase on tobacco in April 2010, record investments in antismoking social marketing campaigns, additional support for people to quit smoking through extended listings of nicotine replacement therapies and other medicines on the PBS, and record investments in helping Indigenous communities to reduce smoking rates.

The Tobacco Plain Packaging Bill 2011 is intended to remove one of the last remaining forms of tobacco advertising: advertising on the retail packaging of tobacco products and the products themselves. The bill will prevent tobacco advertising, and promotion of tobacco products and tobacco product 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, reduce the ability of the tobacco product packaging to mislead consumers about the harms of smoking or using tobacco products and, through the achievement of these aims as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates in the long term.

The bill will prohibit the use of tobacco company trademarks, branding and logos on retail packaging of tobacco products and on tobacco products themselves other than the brand and variant names in a specified font, colour, size and location on the packaging. The bill will not, however, prevent the use of tobacco company trademarks, branding and logos on wholesale packaging of tobacco products or on business correspondence. Section 28 of the bill is intended to ensure that tobacco companies can continue to register, maintain the registration of, and protect their trademarks in Australia despite the proposed prohibition on their use on retail packaging and products in Australia.

The Trademarks Amendment (Tobacco Plain Packaging) Bill 2011 complements the Tobacco Plain Packaging Bill, and section 28 in particular. It amends the Trade Marks Act to allow regulations to be made in relation to the effect of the operation of the bill and its regulations on the Trade Marks Act. As set out in the explanatory memorandum to the bill and in Minister Roxon's second reading speech in the House of Representatives, this is so

that, if necessary, the government can quickly remedy any unintended interaction between the two pieces of legislation.

I would like to make two points in this regard. First, trademark law is complex; new and idiosyncratic trademark disputes often arise. And when new legislation is introduced affecting the operation of trademark law, the practical interpretation of that legislation in the courts, as applied to an idiosyncratic trademark dispute, cannot always be foreseen. Were a dispute over a tobacco trademark to arise in the courts and the courts interpreted the interaction of the Plain Packaging Act and the Trade Marks Act in the way that was not intended, the regulation-making power in the Trade Marks (Amendment) Act could be used quickly to restore appropriate protections or rights to trademark owners and/or applicants.

Second, as set out in the explanatory memorandum to the bill, section 189A of the Trade Marks Act provides a regulation-making power to give effect to the Madrid protocol. This regulation-making power, which was passed by the parliament in 2000, is known as a Henry VIII clause. Regulations under this section can be inconsistent with and prevail over the Trade Marks Act. Changes made to the trademarks regulations under section 189A may have unintended flow-on effects on the interactions between the Trade Marks Act and the Tobacco Plain Packaging Bill. This new regulation-making power in the Trade Marks (Amendment) Bill, a parallel Henry VIII clause in the proposed section 231A of the Trade Marks Act, specifically relating to interactions with the Tobacco Plain Packaging Bill, would provide for any such flow-on effects to be remedied.

Concerns have been expressed in the parliament about the use of Henry VIII clauses. The departments would like to make a number of points in relation to this. Firstly, any regulations made under this clause would be made to ensure no disadvantage to tobacco trademark owners and applicants. This is set out clearly in the explanatory memorandum which states that the objective of any such exercise of power under the bill will be to ensure that applicants for trademark registration and registered owners of trademarks are not disadvantaged by the practical operation of the Tobacco Plain Packaging Act.

Second, the scope of the regulation-making power is narrow, limited only to the effect of the operation of the Tobacco Plain Packaging Act 2011 and its regulations. As set out in the explanatory memorandum, that means such regulations are not intended to have any effect in relation to goods or services not governed by the Tobacco Plain Packaging Act and its regulations

Thirdly, any regulations will be subject to parliamentary scrutiny in line with standard parliamentary practice. If the regulations cause concern, parliament has the ability to disallow them.

The departments consider the trademarks amendment bill to be an important piece of complementary legislation that provides an additional level of assurance for tobacco companies—that the plain packaging bill will not affect the registration and protection of tobacco trademarks—and the government will be able to quickly remedy any unintended interactions between the bill and the Trade Marks Act to ensure tobacco trademark owners and trademark applicants are not disadvantaged. Thank you.

CHAIR: Thanks very much. Ms Huxtable, is it possible to get a copy of your statement now?

Ms Huxtable: Yes.

CHAIR: Sometimes it is not possible because people have got notes all over it.

Ms Huxtable: I might not have read every component entirely, so maybe it needs to be checked against the *Hansard*. Is that okay?

CHAIR: That is all right. I am just checking that it does not have scribbled notes next to it. Sometimes it is not in a form you can give us. Senator Cash, do you have some questions?

Senator CASH: Ms Huxtable, can I just confirm that the explanatory memorandum itself is not binding?

Ms Huxtable: I am probably not the best placed person to answer that except to the degree that I am aware that bills and explanatory memos do need to be read together in terms of interpreting legislation, but Mr Reid is the lawyer.

Senator CASH: I am referring specifically to the explanatory memorandum.

Mr Reid: An explanatory memorandum is something which can be used as an aid to interpretation of the legislation in certain circumstances, but not binding in itself.

Senator CASH: I will quote from British American Tobacco's submission to us today:

The Government also noted that it had obtained the advice of the Attorney General's Department on the "legal and constitutional barriers to generic packaging".

This is commonly known as the A-G's legal advice. Did you or anybody at the table seek a copy of that advice—the A-G's legal advice from September 1997—provided, I assume, to the Howard government?

Mr Reid: We are not aware of the 1997 legal advice.

Senator CASH: Could you take that on notice? Is there any legal advice around that time that—

Mr Reid: Yes. There was legal advice which has been the subject of an FOI application. It goes back to 1995.

Senator CASH: Correct. That is the legal advice. Is that not referred to as the A-G's legal advice?

Ms Huxtable: It is not from 1997, I believe.

Senator CASH: Sorry, what was the date, then?

Mr Reid: 1995.

Senator CASH: So it was not the Howard government. They got that wrong. Did you seek a copy of that legal advice?

Mr Reid: We have seen a copy of the legal advice and, indeed, it is the subject of proceedings before the AAT, the full Federal Court and shortly, we believe, the High Court.

Senator CASH: But you did seek a copy of this legal advice in the context of this particular legislation? It is a very simple yes or no answer.

Mr Reid: I am not aware of whether we sought a copy of it. We are certainly aware of it and have been aware of it for some time.

Senator CASH: Could you take on notice as to whether or not you specifically sought a copy of that legal advice in relation to this legislation? If so, when a copy was sought and who actually sought a copy of the advice?

Mr Reid: We can certainly take it on notice.

Senator CASH: Thank you.

Senator BOYCE: Will the Attorney-General's Department be able to help us in that area at all?

Senator CASH: We have them, do we?

Senator BOYCE: Yes. Mr Faulkner.

Mr Faulkner: No, I do not think I can. I am of course aware of the litigation, but just offhand I could not say precisely to whom the advice in question was provided to. It would be a matter for the department that sought and received the advice.

Mr Cotterell: Senator, if I may, the department was aware of the 1995 legal advice as it was preparing this legislation. I just want to clarify your question and what you mean by: did we seek a copy of it? We were aware of it.

CHAIR: Perhaps you could tell us what you meant by 'aware'?

CHAIR: Did someone reread it? Did you rely on it for this?

Mr Reid: There has been a copy of that advice on file in the department since 1995. As to who first accessed it in recent times, I cannot say. I am not sure we would be able to determine that from the file necessarily.

CHAIR: And I suppose so the question is: did you reread that advice in the preparation of this legislation or did you refer to that advice in the preparation of this legislation? You do not know?

Mr Reid: Look, I think—

Senator BOYCE: What does 'aware' mean?

Senator CASH: Exactly. What does 'aware' mean?

CHAIR: If you do not know—

Mr Reid: The answer is that there is a series of legal advices which was considered by the department in relation to this legislation, going back to 1995 and conceivably before 1995.

Senator CASH: Excellent. Okay, and that is what we needed to establish. So there was a series of legal advice. Was any of that legal advice sought by the department in relation to this legislation, specifically?

Mr Reid: Yes, I believe so.

Senator CASH: Yes. Are you able to say in relation to what aspects of the legislation the legal advice was sought? I am not asking what the legal advice was.

CHAIR: Well, it is a bit close to the wind, because it could be some aspects of it and not others. But they will know the answer to this.

Mr Reid: That is not something that we can answer off the top of our heads; that is something that we could answer on notice.

Senator CASH: If you could take it on notice. Could you also then please take on notice on what date each piece of legal advice was sought and, in relation to the series of legal advice that the department looked at in relation to the legislation, if it was not sought specifically for this legislation and was actually drafted prior to this legislation being drafted, what legal advice you are actually referring to.

CHAIR: You are just talking about the trademarks amendment legislation?

Senator CASH: Correct.

CHAIR: Not the broad plain packaging legislation. So that might narrow—

Mr Reid: We may be at cross-purposes here. I understood you to be referring to advice concerning not only the bill which we are presently here to talk about today but the Tobacco Plain Packaging Bill itself, and I doubt —

Senator CASH: Yes, if you could provide us with all of it, that would assist.

Mr Reid: Yes.

Senator CASH: Has the department sought legal advice or any other advice as to the potential for litigation if and when this legislation is passed and the amount of compensation that the government may be liable for in the event that one of the High Court challenges that has been alluded to is successful?

Mr Reid: The prospect of litigation is something about which advice has been sought. I cannot tell you whether any advice has been sought about quantum of compensation, because I doubt that there is any serious—there is at the moment no well-articulated basis for any claim of compensation—

Senator CASH: Were you in the room today when British Tobacco gave evidence?

Mr Reid: I heard the figures and I have heard the figures in—

Senator CASH: Well you would have heard them say that they were mounting a legal challenge.

Mr Reid: Indeed.

Senator CASH: They will be taking it to the High Court.

Mr Reid: Indeed.

Senator CASH: So has the department before today sought any legal advice in relation to potential litigation and compensation, if any, that may be payable?

Mr Reid: Yes, as to the first question. I would have to take the second part of the question on notice.

Senator CASH: In relation to that particular legal advice on whether or not litigation may be taken, and potential compensation, can you please advise upon what date that legal advice was sought?

Mr Reid: Again, that would have to be a question on notice.

Senator CASH: That is fine. One of the statements British Tobacco made was that the department must be 100 per cent confident that its legal advice is sound and will sustain a High Court challenge. So I put to you, in drafting this legislation, is the department 100 per cent confident that the legal advice it has obtained is sound and will sustain a High Court challenge? I am going to hope the answer is yes, because British Tobacco's answer was given pretty quickly to that.

CHAIR: It might be a matter of whether they can answer your questions.

Mr Reid: Look, we have sought and we have received legal advice. I am not at liberty to talk about to you about the substance of that legal advice.

Senator CASH: I am not asking you to talk about the substance of it. I would like you to give the committee a guarantee that you are 100 per cent sure that the legal advice is sound and will survive a High Court challenge.

CHAIR: Senator Cash, I understand you are not asking for the context, but—

Senator CASH: No, not at all.

CHAIR: The answer of 'yes' or 'no' will reflect quite clearly on that context, so if the answer is no it will reflect on that context.

Senator CASH: If the answer is no we have a huge problem! We will need to go back to the drawing board.

Senator Boyce interjecting—

CHAIR: Standing orders of the Senate quite clearly say that you cannot ask for the legal advice and the question you are asking requires the departmental officials to reflect on the content of that legal advice. I think, at best, the question could be taken on notice to see whether or not it is a question that can be answered.

Mr Reid: My main problem in answering it is that I am being asked to express an opinion about the advice.

Senator CASH: Did you draft this legislation? Did you provide advice to the government on this legislation?

Mr Reid: No, I did not.

Senator CASH: Who at the table did? Is this not the relevant department?

Mr Reid: A variety of people who are not presently at the table, I think.

Senator CASH: In other words, the department—however—relied on legal advice.

Mr Reid: The department does rely on legal advice, yes.

Senator CASH: Can you at least guarantee to the committee that the legal advice you relied on was not given by the same person who gave the legal advice in relation to the Malaysian solution? Quite frankly, we have heard it all before.

Mr Reid: I am not aware of who gave—

CHAIR: That question is out of order. It is a separate department we are dealing with here and a separate bill in a different context.

Senator CASH: The bill we are referring to tonight was not released as part of the exposure draft and consultation paper on plain packaging on 7 April. I understand that the first time it was known to the parliament was when it was introduced by the minister on 6 July. When did the Department of Health and Ageing or the government realise that they would require an amendment to the Trade Marks Act?

Mr Cotterell: There was a consultation process on the draft bill and the relevant section of that draft bill is section 15. We received comments from three organisations—I think in our submission it says two—in relation to that section and from one of the members of our expert advisory group in relation to that section and its interactions with the Trade Marks Act. That is why we had another look at that section and the need for this parallel bill.

Senator CASH: Section 15 of the original bill is the acquisition on 'other than just terms' clause.

Mr Cotterell: That is right.

Senator CASH: What came about or what then caused the department to realise they would have to introduce this particular bill? It was raised to you during the consultation period.

Mr Cotterell: The wording of that section of the exposure draft of the bill was raised during the consultation period and the drafters went away to try to respond to the comments that were raised. The solution presented was the new section 28 of the Tobacco Plain Packaging Bill 2011 and the trade marks amendment bill.

Senator CASH: Why did the department not pick this up itself?

Mr Cotterell: It is a matter of drafting.

Senator CASH: Yes, but why was this not picked up by the department before it went out to consultation?

Mr Cotterell: We were exposing the draft bill to consultation to flush out issues like this.

Senator CASH: Is the bill that we are discussing tonight fundamental to the plain packaging legislation?

Mr Cotterell: We have explained the need for this bill, which is about the interactions.

Senator CASH: The answer is yes.

Mr Cotterell: Yes.

Senator CASH: So why did the department not pick it up before it went out to consultation?

Mr Cotterell: The issue of protection of trademarks in the draft bill that went out to consultation was addressed in section 15 of that bill. We took on board comments that had been raised about the application of that section.

Senator CASH: But why did the department not pick this up before it went out to consultation? This is fundamental to the actual legislation. Why did it take other people to raise it before the department realised it needed to then introduce another piece of legislation?

Ms Huxtable: I think Mr Cotterell has responded to the question a number of times. The reality is that the bill was drafted in a particular way. It sought to provide these protections in a certain way. There were issues raised in consultation, particularly around the complexities of interaction with the Trade Marks Act. Those issues were sent

back to the drafters and their consideration was that there were these options in respect of section 28 and the amendments.

Senator CASH: So was the draft bill inadequate? It was fundamentally flawed.

Ms Huxtable: The consultation process associated with exposing bills often points to issues that may require clarification—

Senator CASH: Such a fundamental flaw. Hansard does not understand your hand gesture.

Ms Huxtable: I do not understand the question. I think we have been through this a number of times.

Senator CASH: The bill was fundamentally flawed and the department did not pick that up.

Ms Huxtable: I do not accept that. The process of developing legislation is one that often has an interactive element with the community. That is the case for much legislation and, as a result of that, the legislative drafting sometimes changes. That happened on this occasion. It is not the first time and I am sure it will not be the last time.

Senator CASH: Did the department consider amending the tobacco plain packaging bill as opposed to having to introduce this particular legislation?

Ms Huxtable: There were amendments to the plain packaging bill that occurred at the same time.

Senator CASH: Could you not have done this as part of the plain packaging bill?

Ms Huxtable: The issues were put to the drafters and the solution was developed on that basis. I cannot speak for them in terms of the thinking behind it.

Senator CASH: Could you make the changes without resorting to a Henry VIII clause?

Ms Huxtable: I think there are certain benefits that the Henry VIII clause offers in terms of providing additional assurance, particularly when there are potentially complex interactions and perhaps a need to act quickly to protect a trademark. The advice that we received is that it was a sensible and useful way to address that.

Senator CASH: Can you outline those benefits to the committee.

Ms Huxtable: I think I already outlined the benefits in my opening statement, but I can go through them again.

Mr Reid: I can probably assist with that. There are really two benefits in having a Henry VIII clause. Firstly, there is the speed with which a response can be made to a development. That development might be by way of a court decision which creates a need to act quickly to protect trademarks, and that is fundamentally what those provisions are about. Secondly, if the Madrid protocol resulted in changes being made under the existing Henry VIII clause in the legislation it might cause a need for consequential changes to be made under the new Henry VIII clause.

Senator CASH: Would there be any other circumstances in which the government would need to act quickly, thus justifying the need for the Henry VIII clause?

Mr Reid: Not that I can think of, but that does not necessarily mean that they are not there.

Ms Huxtable: The reality is that it is difficult to predict where there are circumstances that might arise in the court's interpretation of the interaction between the two acts. It is hard to know in advance what those are.

Senator CASH: Has the department had the opportunity to read the submission provided by the British tobacco company as part of this process?

Ms Huxtable: I personally have not.

Senator CASH: But has the department?

Mr Cotterell: Yes.

Senator CASH: And has the department sought legal advice in relation to the issues raised by the British tobacco company? Again, I would like a simple yes or no.

Mr Cotterell: We have not sought legal advice following receipt of that submission.

Senator CASH: Have you sought legal advice previously in relation to any of the issues raised by the British tobacco company? I would like a simple yes or no—I am not asking you to disclose the content of the legal advice—in relation to the issues raised by the British tobacco company.

Ms Huxtable: Obviously, a number of issues have been raised. A blanket response may not particularly pick up on the granularity of what the issues were.

Senator CASH: In relation to any advice that the department sought based on either the submission or issues raised by the British Tobacco Company, can you provide the date upon which that advice was actually sought?

Mr Reid: That is a question we would have to take on notice.

Senator CASH: That is fine. Absolutely. Your submission talks about:

> The proposed amendment gives the Government flexibility and an efficient way to ensure that, if necessary, the Government can quickly remedy any unintended interaction between the Plain Packaging Bill and the Trade Marks Act 1995 that may adversely affect the rights of legitimate trade mark owners and which cannot be dealt with under the existing provisions of the Plain Packaging Bill.

What are the unintended interactions that you are referring to?

Mr Reid: Because they are unintended we cannot really predict what they might be, but the problem is, of course, that they—

Senator CASH: For you to say that, I assume that you have actually canvassed the possibility of unintended interaction?

Ms Huxtable: Can I refer back to our statement? As I said there in respect of unintended interactions, the first relates to the potential for new and idiosyncratic trademark disputes which often arise. When new legislation is introduced affecting the operation of trademark law the practical interpretation of that legislation cannot always be foreseen.

Senator CASH: So they are the known potential consequences. What about the unintended consequences?

Ms Huxtable: The unintended consequences go to the consequence of an interpretation that may result in an unintended consequence in respect of the operation of the Act. That is the consequence of—

Senator CASH: Unknown consequences? You do not know what they are?

Mr Reid: No, we do not know what the unknown consequences are.

Senator CASH: They are intended; they are unknown?

Ms Huxtable: Yes.

Senator CASH: Okay.

CHAIR: I want to unpack this a bit myself. Mr Cotterell, you said there were three submissions when you went out to consultation on proposed section 15. Are you able to tell us who those responses were from?

Ms Huxtable: He is just checking his notes.

Mr Cotterell: The three submissions were from the International Trademark Association, the Institute of Patent and Trademark Attorneys of Australia and the International Association for the Protection of Intellectual Property—Australia. In addition, Professor Mark Davison, who is a member of our expert advisory group on plain packaging, raised this issue.

CHAIR: So British and American Tobacco Australia had no comments about proposed section 15 back then?

Mr Cotterell: Not that I am aware of.

CHAIR: When you talk about the unintended consequences, can you give us an example of what those three expert bodies might have raised as examples? Did they provide you with examples in their submissions to you?

Mr Noonan: As question that deals with the interaction of the Trade Marks Act perhaps I might assist here.

To take one example, there was a view expressed about section 42 of the Trade Marks Act. Section 42 provides that a trademark may not be registered if its use would be contrary to law. Obviously, the tobacco advertising restrictions impose some restrictions on the use of tobacco related trademarks and there was a concern that this might lead to section 42 being interpreted in a way that did not allow the registration of those marks.

For myself, as administering IP Australia, I think that this was a low risk and I think the provision actually says "just for the avoidance of doubt" this effect will not take place. What was done in the amendments to section 15 which became the new section 28, was to close off some doubts that had been expressed in these submissions. None of these particular issues were major in my view but they were useful to deal with in the substantive legislation. I think the thinking and the drafting of the bill that is currently before the House was that since the public exposure period had identified a couple of issues that were worthwhile addressing specifically, the concern may be, 'Well, what if there were another issue that has not yet emerged that might threaten the use of trademarks that are affected by the tobacco advertising restrictions?'

I think that is exactly the kind of area where the kind of clause that you see in the bill that is before the parliament can be very useful. In fact, in intellectual property legislation we have often used these types of

clauses. When you are bringing a new concept to a system that is a century old, such as tobacco restrictions, nobody can really anticipate exactly how that will play out in every area. You can go through a public exposure process and get submissions, and that has all been done with this bill. There is still the possibility that something else would only come up in a court decision and that is the issue that would be addressed through the regulation-making power in the bill before the committee tonight.

CHAIR: Thanks for that clarity.

Senator CASH: Did the department of industry provide any feedback itself in relation to the Henry VIII clauses?

Mr Noonan: Within the innovation and industry portfolio, IP Australia is responsible for IP policy, so we would provide advice on these matters.

Senator CASH: Are we able to get an understanding of what that advice actually was in relation to the Henry VIII clause, from the department of industry's perspective?

Mr Noonan: I think I have just explained our view about Henry VIII clauses. The submission by the joint agencies draws attention to the use previously of a clause of this nature, the Madrid protocol.

Senator CASH: The Madrid protocol.

Mr Noonan: That was exactly the same type of situation where you had a new international system intersecting with a century old trademark system in Australia. It is not possible to ensure that you have nailed down every point of the interaction there, so the Madrid protocol provision enables regulations to be made to adjust that interaction in a way that ensures that applicants are not disadvantaged.

Senator CASH: Do you see any difference between the Madrid protocol and this particular Henry VIII clause?

Mr Noonan: Each clause of this nature is different, as I think previous witnesses have specified. But I think Dr Rimmer pointed out that one key way in which this clause is much narrower is that it applies to only one of the 42 classes of trademarks, whereas the Madrid protocol clause is available for all 42 classes.

Senator CASH: It has been raised, though, that the Henry VIII clause contained in this particular bill allows the minister to make regulations that would override the Trade Marks Act. For the purposes obviously of the interaction between the Trade Marks Act and the Tobacco Plain Packaging Act, exactly what is the extent of what the minister is able to do under this particular Henry VIII clause? Because it has been put to us that it is basically giving the minister the power to almost do anything.

Mr Noonan: I think a key element there is that the regulations that can be made under the clause can only make provision in relation to the effect of the operation of the Tobacco Plain Packaging Act. So that is quite a narrowly focused restriction.

Senator CASH: Yes, but within that particular constraint, is the minister able to do anything?

Mr Noonan: It is not a very prescriptive clause within that constraint, but that is in the nature of these kinds of provisions that, since you cannot anticipate the particular issue you would need to address, you need to leave them fairly broad and to rely upon the parliament's capacity to disallow regulations that seem offensive to it.

Senator CASH: What has actually been raised is, for example, the argument that it is intended to allow the minister to ensure that trademarks are still allowed. But the question that has been posed is: would it give the minister the power to create regulations that could or would remove trademarks with regard to tobacco companies and plain packaging? I understand what you have said in relation to the disallowance and I accept that, but does it actually give the minister the power to do that?

Mr Noonan: I am not the government's legal adviser on this, but it seems to me that the words 'in relation to the effect of the operation of the act' would not allow regulations that went much further than the act went.

Senator CASH: But there is the potential, though, for it?

Mr Noonan: I thought I just said that that would not happen, on my interpretation of these provisions?

Senator CASH: I do not think you said that would not happen. Are you saying it could not happen? Or just that it would not happen? Because those are two different concepts?

Mr Noonan: Let me read the words to you:

… in relation to the effect of the operation of the Tobacco Plain Packaging Act …

That does not seem to me to allow a provision of the kind that you speculated that goes well beyond the impact of that act.

Senator CASH: Has the government sought legal advice in relation to that aspect?

Mr Reid: It is not an unusual drafting device which may be used where the drafter may be quite confident that there is not one. I think the department is quite confident here that there would not be an acquisition of property.

Senator CASH: When you say 'quite confident', can we quantify that in terms of percentages? Are we 100 per cent confident? Are we 90 per cent confident? Are we quite confident in the 45 per cent range? I am hoping we are getting 100 per cent here or close to it.

Mr Reid: I think we might have to take that on notice. Frankly, I do not think I have ever seen a lawyer express himself as being 100 per cent confident about anything, but we will take that on notice and think about it.

Senator CASH: You are not even going with 95 per cent or 90 per cent. We are taking on notice the fact that we have got a bill before us that we are conducting an inquiry into and the department is not giving us any level of confidence.

Mr Reid: Senator, I just said that we are confident that it does not effect acquisition of property and therefore—

Senator CASH: One hundred per cent confident? Will it stand up to a High Court challenge?

CHAIR: Very confident, I suppose you would say, Mr Reid.

Senator CASH: They were confident in relation to Malaysia—and this is my problem. We have just had the High Court overturn a solution to a problem.

CHAIR: Senator Cash, this is a different department and a very different subject matter here.

Senator CASH: Absolutely. I am trying to ascertain what the actual level of confidence is.

Mr Reid: Ultimately, whether it is a matter of 99 per cent, 100 per cent or 95 per cent, it is simply a matter of opinion.

Senator CASH: It is quite a relevant opinion to the people who are affected by this.

CHAIR: Senator Cash, we are over time so we need to close the questions.

Senator CASH: That is fine. I have no further questions.

CHAIR: I have one question that I want to ask you. In your public consultations regarding the plain packaging bill—that is, proposed section 15, which I am assuming alluded to all of the trademark areas of the substantive bill—neither British American Tobacco Australia nor the Australian Retailers Association provided you with any comments or concerns about section 15. Is that right?

Mr Cotterell: Not that I am aware of, Senator. We looked at the submissions that had raised this issue, and I read out the three names of the organisations to you.

CHAIR: Yes. I wanted to get that very clear. The content of their submissions that you have read in relation to this particular inquiry, as in tonight's public hearing, would be the first time those issues have been raised in relation to the trade marks amendment bill?

Mr Cotterell: I would have to check—

CHAIR: Formally raised, I suppose, publicly.

Mr Cotterell: what was raised in the submissions in relation to the House of Representatives inquiry.

CHAIR: But during your broader consultations on the exposure draft, these issues were not raised by those organisations?

Mr Cotterell: No.

CHAIR: I do not have any other questions. Can I thank all of you—the three departments and IP Australia—for making yourselves available and particularly for making yourselves available tonight. Thank you.

Committee adjourned at 20:23