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**Submission of British-American Tobacco Company (Hong Kong) Limited to the
Legislative Council Bills Committee on
the Smoking (Public Health) (Amendment) Bill 2005
relating to Graphic Health Warnings
September 26, 2005**

Preamble

The purpose of this submission is to express the views of British-American Tobacco Company (Hong Kong) Limited ("BAT (HK)"), a member of the British American Tobacco international group of companies, on the *Smoking (Public Health) (Amendment) Bill 2005* (the "Bill") relating to Graphic Health Warnings ("GHW").

BAT (HK) recognises the health risks associated with tobacco use and the importance for adult smokers to be informed of those health risks when deciding whether to start or continue smoking. BAT (HK) agrees that cigarette packs provide a direct channel of communications with adult consumers. As such, BAT (HK) supports the Government's initiative to place health warnings ("Textual Warnings") on cigarette packs. For many years now cigarette packages have carried Textual Warnings such as "SMOKING CAUSES CANCER" and "SMOKING CAUSES HEART DISEASE".

Currently, Textual Warnings occupy 20% of the front and back panels of cigarette packs as required by the Government. BAT (HK) believes that this is an appropriate and effective arrangement to inform adult smokers of the health risks associated with smoking. Over the last decade, the smoking population has been steadily standing at approximately 15% of the total Hong Kong population. Any suggestion to change the current arrangement should be provided with solid and compelling reasons.

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EXECUTIVE SUMMARY

1. The Government is proposing to introduce GHW to replace Textual Warnings which currently appear on cigarette packs with the primary objective of reducing smoking incidence through enhancing the public understanding of the health risks associated with tobacco use.
2. However, experiences in other countries where GHW have been introduced, in particular official studies carried out in Canada (the only official ones worldwide), show that there is no causal connection between GHW and the reduction in the consumption of tobacco products and change in smoking behaviour.
3. The Government has yet to produce evidence to demonstrate any causal relationship between GHW and the health objectives sought to be achieved, nor has it demonstrated that it has taken into account overseas experience and studies referred to in the preceding paragraph in its deliberation.
4. Whilst the WHO Framework Convention on Tobacco Control requires its signatory states, including China to place health warnings on tobacco packs, it has not stated GHW as mandatory. GHW are only an option for signatory states to consider. Currently, of 191 FCTC member states, only five of them have implemented GHW.
5. There are alternative solutions which are more appropriate and effective than GHW and BAT (HK) is willing to explore these alternatives with the Government.
6. GHW also raise legal and constitutional issues in that they infringe rights under the Basic Law (Articles 5 and 11), notably the rights of freedom of expression (Articles 27 and 39) and private ownership of property (Articles 6 and 105), including intellectual property rights (Trade Marks Ordinance, TRIPs, etc.).
7. The burden is on the Government to demonstrate in a legal and constitutional context that GHW are both necessary for imposing restrictions on rights protected by the Basic Law and proportionate to the objectives sought to be achieved. The Government has so far failed to discharge this burden and will have considerable difficulties in doing the same.
8. The Government should not therefore implement the GHW proposal but to explore more appropriate and effective alternatives in partnership with tobacco companies, and in particular address the commercial rights of BAT (HK) as protected under Article 105 of the Basic Law.

1. INTRODUCTION

- 1.1 In a bid to tighten the tobacco regulatory framework in Hong Kong, the Government gazetted the Bill on 29 April 2005. One of the proposals in the Bill is for the introduction of GHW in the form attached to the schedule to the Bill to replace the current Textual Warnings. In essence, the present regulations requiring prominent Textual Warnings on the two largest surfaces of the packet are proposed to be substituted with new requirements for GHW. Vividly coloured graphic warnings incorporating Chinese and English texts, each covering at least 50% of the two largest surfaces will be required. Six different versions of graphics are stipulated to be used in rotation with equal frequency on any one brand during any continuous period of 12 months.
- 1.2 BAT (HK) believes that in the introduction of any new regulatory measures, the Government should take into account implications of those measures on the social, economic and legal environment. The Government should also ensure that all proposed changes are necessary and proportionate to the health objectives sought to be achieved.
- 1.3 BAT (HK) considers that the GHW proposal raises a number of serious concerns and issues on the social, economic and legal fronts. It is submitted the proposed changes are both unnecessary and disproportionate to the Government's health objectives.
- 1.4 BAT (HK) is aware of the concerns of the Government and the public over tobacco consumption. We will be pleased to work with the Government and relevant parties to consider alternative means to address the public concerns. A number of these alternative means are set out at paragraph below.

2. FRAMEWORK CONVENTION ON TOBACCO CONTROL

- 1.5 2.1 The Framework Convention on Tobacco Control ("FCTC"), on which the Government's tobacco regulatory proposals are based, was adopted by member states of the World Health Organisation in May 2003 and came into force in February 2005. The FCTC, which applies to Hong Kong through China's signatory and ratification, contains a number of measures designed to reduce the adverse health and economic impacts of tobacco.
- 1.6 2.2 However, it is important to note that the FCTC mainly provides a framework and timetable for global tobacco regulation development. Individual signatory state is required to adapt it into its local law in a way that best fits its national environment and public health needs. As such, the developments of tobacco regulation vary in different countries.

1.7 2.3 Article 11 of the FCTC specifically deals with packaging and labelling of tobacco products. As such, member states are therefore under an obligation to ensure that tobacco product packaging carries health warnings. They are, however, not obliged to ensure that those warnings are accompanied by any other messages. GHW is only optional. Currently, of the 191 signatory states, only five of them have implemented the GHW. They are Canada, Brazil, Thailand, Singapore and Jordan.

3. **EFFECTIVENESS OF GHW**

Rational behind the Proposed GHW

3.1 The Government's stated policy is to discourage smoking, contain the proliferation of tobacco use, and minimise public exposure to environmental tobacco smoke, or passive smoking. Its policy is not to outlaw tobacco use or to coerce smokers to give up smoking other than by free will.

3.2 Health warnings in general are seen by regulatory bodies to serve two main functions, namely,

(a) to educate and to produce a high awareness amongst existing and potential tobacco users of the serious health problems associated with tobacco use;

(b) through (a) above, to produce behavioural changes, such as,

(i) for smokers to smoke less,

(ii) for smokers to be more motivated to cease smoking, and

(iii) for non-smokers to be less inclined to start smoking.

3.3 Underlying the Government's proposal to introduce GHW is the assumption that the current Textual Warnings with their stipulated wording and lesser size are inadequate, and that GHW will be more effective in achieving the above objective. Based on experience and official studies carried out by the government in Canada which has adopted GHW since 2001 (see below), it is submitted that this is flawed.

Overseas Experiences

3.4 It is important to note that there is a distinction between conveying information attracting attention or engineering an emotive reaction. Although GHW on packs might initially attract attention, this impact is temporary because it is derived from novelty. Research demonstrates that the novelty soon wears off. Further, attracting attention is not the same as communicating information. If adult consumers register a change in the presentational content of warnings, this does not equate to effective

communication that will prompt changes in their behaviour, for example, by ensuring they cut down on smoking or quit smoking altogether.

- 3.5 Amongst the few countries in which GHW have been introduced, Canada is the only country which has carried out official surveys to determine the effectiveness of GHW (the "Wave Studies"). The Wave Studies were commissioned by Health Canada (the Federal department responsible for helping Canadians maintain their health), and commenced in 2000 (pre-GHW) with a baseline survey, which was then followed by further studies between April 2001 and December 2003. The Wave Studies asked questions about smoking incidence, quit attempts, awareness of smoking and health problems as well as questions about quitting intents.
- 3.6 The results of the Wave Studies indicate that the introduction of GHW in Canada has not been associated with a reduction in cigarette consumption per smoker, has not resulted in more smokers making quit attempts, and has not been associated with an increase in the number of smokers believing that smoking is a serious health problem. The Wave Studies throw into doubt the proposition that GHW are more "effective" than Textual Warnings in achieving the objectives set out above, or that the Textual Warnings are inadequate by their nature and therefore needed to be substituted by another type of warning.
- 3.7 In light of the Wave Studies, therefore, there is no evidence of any causal or established relationship between GHW and reduction in the consumption of tobacco products or change in smoking behaviour. Instead, the likely public, and indeed normal, reaction to such images is discomfort and repulsion.
- 3.8 Soon after GHW have been introduced in Canada, some smokers have purchased "slide pack covers" to cover the entire cigarette packet which has the effect of obscuring the whole of the GHW. Such consumer behaviour serves not only to obscure any GHW, but all health warnings, including any textual messages or other product information (such as tar and nicotine levels). It is submitted that this is worse than having no health warning at all.
- 3.9 "Slide pack covers" are not Canada's monopoly. They also appear in other GHW-adopted countries like Singapore and Thailand (samples of these "slide pack covers" are shown in the Appendix). It is not difficult to anticipate the growth of businesses thriving on giving away free "slide pack covers" printed with advertisements and other decorative motifs. By using disproportionate means to achieve the legislative purpose, the Government may inadvertently be driving consumers into hiding from the realities of the risks of tobacco consumption.

Insufficient evidence to indicate GHW will be effective in Hong Kong

- 3.10 The Government has yet to show any evidence to contradict the Wave Studies, or indeed it has taken into account experience in countries where GHW have been introduced.
- 3.11 The objective of a health warning is, in our view, to reinforce the messages about health risks associated with smoking already provided in much greater detail through public health education initiatives. The current ubiquitous health warnings in Hong Kong, including through the media, adequately achieve these goals. Using visual and sometimes disturbing images is not necessary, nor proportionate, to educate the public. Instead, it stigmatises and shames smokers, who in fact are consumers of a lawful product.

4. IS GHW NECESSARY AND PROPORTIONATE?

- 4.1 As shall become apparent at paragraph 8 below, the Government carries the burden of showing that the proposed legislation for GHW is necessary, and is in terms *no more than is necessary*. This involves passing *at least* the following hurdles:-
- (a) demonstrating that the existing requirement for Textual Warnings on tobacco product packaging is inadequate for the purpose of educating the public and maintaining a high degree of awareness of the serious risks involved in use of tobacco; and
 - (b) that such inadequacy cannot be remedied by an enhancement or updating of the texts of the warnings in order to impart better and more information; and
 - (c) GHW in the forms proposed will be more effective than Textual Warnings in both enhancing understanding of the message content and bringing about the desired behavioural changes amongst smokers and non-smokers; and
 - (d) there are no other means of communicating the message to the public.
- 4.2 As already mentioned at paragraph 3.10, no evidence has yet been put forward by the Government pertinent to the local community that proves that Textual Warnings are incompetent in achieving their intended purpose, i.e. informing the public of the health risks involved, or that additional, more up-dated or better information could not continue to be delivered to the public via clearly worded Textual Warnings or the media.
- 4.3 GHW attempts to induce smokers to stop using tobacco products not by encouraging an informed decision in a non-judgmental way, but by denouncing and embarrassing them with stigmatising and revolting images that are for all to see whenever and

wherever they carry the packet with them. It is submitted that the means employed is unpalatable and distasteful, and incompatible with the purpose the legislation seeks to achieve. GHW are also discriminatory of smokers who are singled out as a group to be shamed, embarrassed and stigmatised. No other groups of users of products with health risks attached, e.g. alcohol which carries the risk of liver ailments, have been similarly targeted. GHW deliver no additional and no more accurate information than clear Textual Warnings could have done. They are therefore unnecessary, and disproportionate to the legislative purpose sought to be achieved.

- 4.4 Due to the nature of GHW, not surprisingly, adverse effects have been seen in the few countries where they have been implemented. Rather than being memorable as they are intended to be, stigmatising images which are deliberately loathsome may become trivialised. Importantly, strong images designed to stigmatise and scare with an exaggerated visual impact can have the opposite effect on young people, some of whom are known to equate rebellious behaviour with glamour.

5. **GHW COULD LEAD TO UNFAIR TRADE COMPETITION**

- 5.1 GHW will create severe financial burden for the tobacco industry. Tobacco companies will be required to incur significant costs to comply with the requirements of the proposed warnings. These include substantial redesign costs, the expense of producing new printing cylinders, losses resulting from production stoppages, as well as stock write-offs for packages already printed with the Textual Warnings. The proposed GHW will also have a differential effect on smaller tobacco companies, who unlike the large manufacturers will lack the resources to effect the switch-over efficiently, or at all. Smaller manufacturers or brands with smaller market share may eventually be locked out of the market primarily resulting in unemployment.
- 5.2 BAT (HK) submits that the Government should be very cautious about introducing legislation which might risk weakening the local economy.
- 5.3 BAT (HK) submits, for the reasons set out above, that the Government's proposal to require GHW is not warranted. The introduction of such a requirement would impose an excessive burden on the tobacco industry to implement a measure which has not been shown to be an effective deterrent against smoking.

6. **A MORE PROPORTIONATE WAY FORWARD**

- 6.1 BAT (HK) will be pleased to work in partnership with the Government to promote public awareness and understanding of the health risks associated with tobacco use. We have been actively engaged in youth smoking prevention programs locally and internationally. We are prepared to do more to prevent children from picking up

smoking. BAT (HK) would, therefore, welcome the opportunity to explore appropriate solutions which might represent constructive, effective and proportionate alternatives to the GHW proposal.

6.2 Set out below are some areas which might be explored:

- (a) To address concerns that current warnings are "stale" or "old fashioned", the language of warnings could be varied without changing the essential messages;
- (b) Consideration should be given to making warnings more constructive. As we have stated above, GHW can lead to denial of danger and an abdication of responsibility by the individual to take action. Health messages work most effectively when it is made clear to the target audience that the risk they are taking is real but that they can do something about it. More emphasis should be placed on assisting those who wish to cease smoking. Warnings could, for example, have specific links to other initiatives such as quit lines, web sites, TV, radio and press campaigns.

6.3 Public health education campaigns are a key source of information about smoking. Co-ordinated campaigns including the involvement of schools, local doctors and hospitals, using pamphlets as well as TV and radio, press, and web sites allow the information to be targeted, (ie also reach non-smokers and young people), more informative and constructive, and can involve (rather than preach to) groups such as young people.

7. **LEGAL IMPLICATIONS**

7.1 It is important to remember that the sale of tobacco products is a lawful activity. As stated in the preamble, BAT (HK) recognises and accepts the need to ensure the smokers are well informed of the health risks associated with tobacco use before making a conscious choice to start using or to continue to use tobacco products. BAT (HK) also believes that on-pack health warnings are only one means of communicating to smokers of the health risks associated with smoking. However, the Government should not solely rely on on-pack health warnings to achieve the objective of enhancing the understanding of health risks associated with smoking.

7.2 It is in this context that the question arises whether the contents of the Bill provide for restrictions which overreach the constitutional limitations placed on the Hong Kong Legislative Council by the Basic Law. It is a plain constitutional fact of life that laws enacted by the Hong Kong legislature must be consistent with the Basic Law. If any part of the Bill is inconsistent with the Basic Law, it is of no force and effect.

- 7.3 It is submitted that GHW are intended to do more than inform the reader about the health risks of smoking – they will create social embarrassment by marking out the smoker as a person who, when carrying a packet of cigarettes, carries on him unpleasant, repulsive even, pictorial representations of death and disease.
- 7.4 In communicating a graphic message in this way the GHW impinge on two important freedoms protected by the Basic Law: (i) freedom of expression; and (ii) freedom of private ownership of property including intellectual property rights.

8. FREEDOM OF EXPRESSION

- 8.1 The introduction of GHW entrenches on the freedom of publication which is an aspect of the wider concept of freedom of expression guaranteed under the Basic Law. Article 39 of the Basic Law incorporates, amongst others, Article 19 of the International Covenant on Civil and Political Rights ("ICCPR")¹.
- 8.2 Just as a person has the right to publish honest and accurate information about a product so as to inform prospective purchasers, so too he has a right not to publish information in certain circumstances. One of those circumstances is when a third party, usually Government or a public authority, coerces him into publishing information which he does not want to publish. The Supreme Court of Canada has held that the *"freedom of expression necessarily entails the right to say nothing or the right not to say a certain thing"*.
- 8.3 Commercial speech – the language of information and persuasion used to convey a message about a product or service – is not excluded from the protection of the Basic Law. In fact, no form of expression is excluded from the Basic Law. The UN Human Rights Committee established under the ICCPR has held that Article 19 extends to commercial speech.
- 8.4 The constitutional courts of the USA, Canada and India have all recognised the constitutional importance of commercial speech in open societies where citizens are free to exercise economic rights of purchase and sale in an open marketplace. The value of commercial speech has also been recognised by the European Court of Human Rights in the context of the protection to which it is entitled under Article 10 of the Convention on Human Rights.
- 8.5 This freedom is of particular importance in a society which places a constitutional premium on a "capitalist system and way of life" (Article 5 of the Basic Law) and

¹ Article 19 of the ICCPR provides: "... Everyone shall have the right to freedom of expression .. [which may] be subject to certain restrictions, but these shall only be such as are provided by law and are necessary ... for the protection of public health ..."

specifically requires a policy of free trade and the free movement of goods (Article 115 of the Basic Law).

- 8.6 Whilst it is plain that this freedom to publish information about a product in the Hong Kong marketplace is not absolute, such freedom cannot be limited by any legislation: only "necessary" restrictions on the freedom of expression may be imposed on specified grounds. One of those grounds is the interests of public health.
- 8.7 A common constitutional technique that ensures that only "necessary" restrictions are imposed on rights and freedoms is to require the party defending impugned legislation to show that the restrictions are imposed so as to reflect a pressing and substantial social concern and that the means chosen are a valid constitutional response to the concern. That means showing:-
- (a) that they are rationally connected to the objective and are not arbitrary, unfair or based on irrational considerations;
 - (b) that they impair the right or freedom in question as little as possible; and
 - (c) that the effects of the limitation of rights and freedoms are proportional to the objective.
- 8.8 The above tests have been applied by the Supreme Court of Canada on many occasions. There is little doubt that Hong Kong courts would subject infringing legislation to the same or similar exacting tests. Indeed, the Court of Final Appeal held in the *Leung Kwok Hung v HKSAR* (FACC Nos. 1 and 2 of 2005) that the burden is on the Government to justify any restriction.
- 8.9 It is accepted that it may often be necessary to require the manufacturer of a lawful product to inform the public that the product may be hazardous to health. Such compulsory warnings are "necessary" on grounds of public health. However, there is a world of difference between requiring the manufacturer of a product to warn consumers of a known health hazard associated with the product, and commandeering the product to show images that go beyond what is necessary in the public interest.
- 8.10 The burden is on the Government to demonstrate why these new GHW are now "necessary". This means producing empirical evidence to show why the simple and unequivocal health warning message that smoking can seriously damage health cannot be communicated by means other than GHW and why GHW will be effective. It needs to show also that these particular warnings – graphic and unpleasant and of a minimum size – can only be effective when placed on a cigarette packet.

8.11 As mentioned at paragraph 3.10 above, it is submitted that the Government has yet to produce such evidence and will have considerable difficulty in discharging that burden.

9. **ENCROACHMENT ON INTELLECTUAL PROPERTY RIGHTS**

Registered Trade Marks and Product Get-up as Property

9.1 Where a piece of legislation impinges on the right to private ownership of property protected under Article 6 of the Basic Law, it must be shown to be no more than "necessary". Even where the measure is shown to be necessary and its deprivation lawful, Article 105 of the Basic Law obliges the Government to provide compensation for lawful deprivation of such property.

9.2 Mandatory GHW encroach upon at least two types of intellectual property rights with significant economic consequences to their owner, namely,

(a) the ownership of registered trade marks as a property right recognised under the Trade Marks Ordinance, Cap.559; and

(b) the ownership of goodwill attached to a get-up or trade dress used in relation to the sale of the product as a property right recognised under common law.

9.3 The Trade Marks Ordinance, which binds the Government, provides that a registered trade mark is a property right obtained by registration. Any sign which is capable of distinguishing the goods or services of one undertaking from those of other undertakings, and which is capable of being represented graphically, is registrable. It follows that a lot of registered trade marks for tobacco do not only contain the brand name of the product alone, but also the main panels of the packaging of the product which make up its trade dress.

9.4 Goodwill in a business (e.g. of sale of tobacco products) attached to a brand name and/or get-up is acquired through long-term use of the brand name or get-up. Its value is enhanced through years of advertising, promotion and sale. In common with many other commercial activities, cigarette manufacturers go to great troubles to make sure that their products are distinguished by packaging. Generally, the longer a trade dress has been in use, the more valuable it will be as a tool to help visually distinguish the product from those of other sources. Even where a get-up is used alongside a well-known brand name in marketing a product, its importance is not diminished.

9.5 Like other private property, the goodwill attached to a business is valuable property capable of being assigned and licensed together with the business for money or money's worth. In the business of retail sale of a packaged product, the

distinctiveness of the get-up of the product is often where the value of the business lies. It is hardly surprising that any major alteration to the existing get-up of a consumer product is usually preceded with careful strategic and logistical planning, and supported by advertising campaigns (whenever possible and permitted) in order to preserve the value of the goodwill related to the get-up.

- 9.6 Under the comparable provision for protection of right to personal possessions in the European Convention of Human Rights (Article 1, Protocol 1), goodwill in a business or professional practice has been decided by the European Court of Human Rights to qualify as "possession", the deprivation of which requires justification on ground of public interest and "a fair balance between the means used and the intended aim".
- 9.7 Goodwill in different territories is capable of being dealt with as separate pieces of property, such that the dealings in the goodwill in relation to a product in one territory will not affect the existence or ownership of the goodwill in relation to the same product in another territory. Even if the goodwill may already have been damaged in some other territories where mandatory GHW have been enacted, it does not affect the right now asserted by owners of the goodwill in this territory.

Particular Importance of the Get-up in Tobacco Products

- 9.8 The following factors each standing alone and when combined together further accentuate the value of the get-up or trade dress of cigarette products:-
- (a) The fact that all manners of advertising of tobacco products have already been banned, such that one of the last remaining channels of communication between the manufacturer and the consumer is through the packaging of the product for retail sale;
 - (b) the necessarily small physical size of the product for retail sale;
 - (c) the fact that the size and shape of the retail product are largely dictated by the shape of cigarettes (or cigars, as the case may be) and by the requirements that it be compact for carrying and convenient for use;
 - (d) the likely manner of purchase of cigarette products at their points of sale where a whole host of different brands are grouped and displayed together (which is unique to cigarette sale), making it imperative for a packet to be readily recognisable not only by its brand name, but, importantly, by the graphic design of the panels on the packaging.
- 9.9 It is submitted that not least due to the aforesaid constraints, the get-up or trade dress of a line of cigarette products is most valuable both to the trader and the consumer as

a tool of communication, and, in the trade mark sense, has significant value along with the brand name with which it is associated.

- 9.10 The manufacturer is already left with little space on the packaging with which to enable the packaging to perform the function of distinguishing its product from others. In this meagre space available, the proportion of lines and shapes on the panels big enough for visual graphic display (front and back) are of utmost importance in creating and maintaining the distinctive visual impression associated with the product.
- 9.11 The change in existing get-up dictated by GHW requirements will be drastic and is incapable of any gradual steps of introduction: to introduce an intermediate get-up over the grace period will make it even more confusing for consumers. To compound the problem further, unlike traders of other consumer products, members of the tobacco trade are not even in a position properly to bring to consumers' attention through advertising the changes made to the get-up.

Compulsory Deprivation or Devaluation of Private Property

- 9.12 Mandatory GHW are designed to stand out against the trade dress and usurp its function – they require a devotion of at least 50% of the area of the front and the back of the packaging for the Chinese and English versions of the health warnings respectively.
- 9.13 To comply with the GWH requirements, any existing front and back labels will have to be distorted beyond recognition. The goodwill attached to the abandoned get-up undermined by GHW cannot be revived even if future legislation were to permit a re-use of the previous get-up. Its value will have to be written off. The available space for the get-up is drastically reduced, as over half of the surface area of the packaging is allocated to GHW by an act of compulsory acquisition. What is more, the lines, layouts and proportions of any existing graphic representation appearing on the front and back labels will have to be abandoned to make room for the stipulated shape and size of GHW. This is downright compulsory deprivation of intangible personal property by destruction.
- 9.14 The new get-up to be designed to fit into the fraction of the space left for it will necessarily give an entirely different visual impact, if it still manages to compete with the GHW for any attention at all. The new get-up may be of little practical value independent of the brand name. Even over a prolonged period of time and accumulated volume of sales, it is unlikely that the packaging will ever have the distinctiveness its predecessor once had.

- 9.15 It has been suggested that Textual Warnings, though effective in communicating the health risks of smoking, may "wear out" in effect or become outdated and GHW have the effect of catching attention and leaving a lasting impression. If this argument were to be given weight, there will be a reason to repeat this whole process again because the GHW on the packaging would by the same token have been deemed outdated at a certain point in time and its effect worn off. New modes of health warning designed to subsume the distinctiveness of the packaging will be thought necessary. This can happen at a time when goodwill attached to the new get-up is acquired through time. The implication of the "wear out" argument is that there will be no end to the series of periodical destruction of any property right and goodwill built up in relation to the get-up.
- 9.16 The inevitable result will be that cigarette packagings will become largely generic, and the function of the packaging as a trade dress to indicate origin will be significantly undermined. Goodwill attached to the get-up as personal property of their respective owners will be wiped out and without compensation at a stroke. The proposition may be tested by taking the scenario to its extreme: if the Government were to decree that one generic get-up is to be used from now on to market tobacco products, it will be impossible to say that private property is not being confiscated by such an enactment.

Public Interest Considerations

- 9.17 It is in the interest of those who have chosen to buy cigarette products that they continue to be able readily to recognise by sight the product they desire, and not to be taken advantage of by unscrupulous traders who intend to confuse. With the only space of communication of "origin" drastically reduced in area, and the prominence of the graphic representation of the brand undermined by vivid and stigmatising GHW, there exists an increased likelihood of confusion amongst consumers due to the get-up losing its previous distinctiveness.
- 9.18 In this regard, the law of registered trade marks should be allowed to continue to perform its primary function, i.e. to protect consumers from confusion arising from the use of resembling or deceptive marks. Likewise, the law of passing-off should also be allowed to continue to perform its function of protecting the owner of goodwill and the public from the use of a get-up which confuses the product's origin or trade connection. The very purpose of the law is undermined by the virtual confiscation of the property rights aforesaid by making GHW mandatory, thereby exposing the public to the very risks which the law has set out to avoid.

10. **CONTRARY TO OBLIGATIONS UNDERTAKEN BY HONG KONG IN INTERNATIONAL TREATIES**

- 10.1 Legislation requiring the inclusion of GHW may be contrary to obligations undertaken by Hong Kong as a signatory to various international treaties. These include GATT, and in particular, the Uruguay Round on Trade Related Aspects of Intellectual Property Rights (TRIPs). Article 20 of TRIPs states that *"the use of a trade mark in the course of trade shall not be unjustifiably vigorously encumbered by special requirements, such as use of another trade mark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."*
- 10.2 It is submitted that implementing GHW will undermine the image that HK has been keen to promote in recent years as a jurisdiction where intellectual property rights are enforced and recognised in compliance with obligations under international treaties. This has been demonstrated by the number of ordinances passed during recent years such as the Organised and Serious Crimes Ordinance (Amendment Schedule 1) Order 1990 passed in January 2000, the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 and the Trade Marks Ordinance.

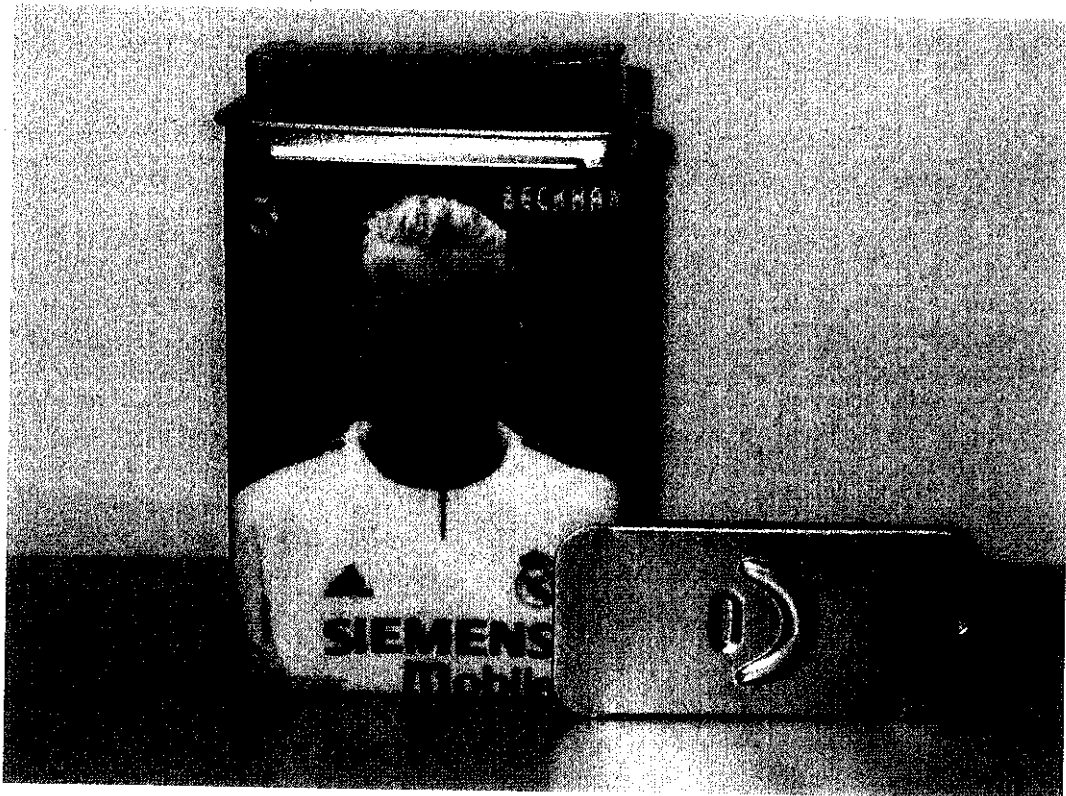
11. **CONCLUSIONS**

- 11.1 BAT (HK) recognises the Government's public health objectives but disagrees with its method. Regulation should be based on evidence, not emotion and speculation.
- 11.2 Sound public policy should be based on reliable data, supplying empirical evidence on whether previous legislation has been effective and showing what, if any, further Government action is needed. Legislating in a piece-meal fashion without a solid ground as well as comprehensive and long-term strategy is a wasteful use of the public's strained resources, and will place the public interest at risk. As mentioned at paragraph 3.10 above, the Government has yet to show any evidence that demonstrates a causal or established relationship between GHW and the effectiveness of the objectives that are sought to be achieved.
- 11.3 BAT (HK) acknowledges that in some circumstances freedom of expression and property rights can be restricted but only where there is a pressing social need, such as public health protection and the restrictions in question are necessary and proportionate. The GHW proposal does not satisfy either of these requirements.
- 11.4 Article 11 of the FCTC is a strong indication that the proposed GHW are not "necessary". GHW may, in the opinion of some, be desirable, sensible, or just "a good idea" but that is not good enough to pass the constitutional muster under the Basic Law.

11.5 There are other alternative solutions which are more appropriate and effective than GHW and proportionate to the objectives that are sought to be achieved by the Government, and BAT (HK) is willing to explore these alternative solutions with the Government.

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APPENDIX



APPENDIX

