HEALTHY CARIBBEAN COALITION
"a civil society alliance for combating chronic diseases"

HCC Secretariat, Cnr of River Rd & Spruce St, St. Michael, Barbados, BB11155, Tel. 246 435 7486, www.healthycaribbean.org

April 22, 2015

Mr Alexander Erwin
Chairman
Australia – Tobacco Plain Packaging
(WT/DS434 & WT/DS435,
WT/DS441, WT/DS458, WT/DS467)
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
CH-1211 Geneva 21
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Re: Australia – Tobacco Plain Packaging (WT/DS434 & WT/DS435, WT/DS441, WT/DS458, WT/DS467)

Dear Sir,

We enclose a written submission of non-party amicus curiae for consideration by the Panel in Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS434, DS435, DS441, DS458, and DS467).

The Healthy Caribbean Coalition (HCC), the Caribbean regional non-communicable disease (NCD) alliance, out of an abundance of concern regarding the weakening of global tobacco control efforts, including status of WHO FCTC, and the undermining of national government's efforts at the domestic level, considers it important that the WTO Agreement be interpreted in such a way as to preserve the ability of governments to implement future tobacco control and other public health measures. The HCC firmly supports the WHO's assertion that '*the implementation of standardized tobacco product packaging represents a legitimate and effective tobacco control measure, and is fully in line with the spirit and intent of the outcome of the UN High-level Meeting, and is in accordance with international legal obligations under the WHO FCTC.*' (WTO TRIPS Council Meeting; Geneva 28-29 October 2014;

http://www.who.int/fctc/mediacentre/news/2014/WHOSTATEMENTWTOTRIPSOCT2014.pdf?ua=1).

HCC submits that a proper reading of Article 8 of the TRIPS Agreement, read together with paras. 4 and 5 of the Doha Ministerial Declaration on TRIPS and Public Health, clearly supports the position that plain packaging legislation is consistent with WTO Members' obligations. In this regard, HCC recalls that para. 8(1) of the TRIPS Agreement specifically provides:

> "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. "

Moreover, paras. 4 and 5 WTO Ministerial Declaration on TRIPS and Public Health 2001 clarifies and reinforces this position by providing:

> "[T]he TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Member's right to protect public health …
> In this connection we reaffirm the right of WTO Members to use, to the full, the provisions of the TRIPS Agreement, which provide flexibility for this purpose.
> Accordingly, and in light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognise that these flexibilities include:
> a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles ….'

The Doha Declaration on TRIPS and Public Health is clearly a "subsequent agreement" within the scope of Article 31(3)(a) of the Vienna Convention on the Law of Treaties 1969. As such, the entire TRIPS Agreement, particularly Article 8 thereof, must be interpreted in light of the Doha Declaration on TRIPS and Public Health giving Members the fullest flexibility to pursue their legitimate public health objectives, including introduction of plain packaging tobacco legislation.

Tobacco plain packaging is a legitimate measure designed to achieve a fundamental objective – the protection of public health. The HCC is committed to the importance

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of preserving the policy space, enshrined in the WTO Agreement, for sovereign governments to introduce non-discriminatory measures for legitimate public policy purposes, including public health. The current WTO tobacco disputes present an opportunity to make clear that Parties obligations under the WTO Agreement and the WHO FCTC can be mutually supportive while maintaining a coherent and consistent approach to international treaty obligations. The WHO FCTC and the commitments its State Parties have undertaken, including introduction of plain packaging legislation, can properly be considered by the Panel in interpreting the provisions of the TRIPS Agreement as "relevant rules of international law applicable in the relations between the parties" in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969.

The HCC, representing civil society from across 20 CARICOM Member states and Associate Member states, is in complete disagreement with the Ukraine (the complainants') submission and in full support of the support of the position of the Government of Australia.

The Healthy Caribbean Coalition

The Healthy Caribbean Coalition (HCC) is a registered not for profit non-governmental organization formed in 2008 in response to the Declaration of Port-of-Spain, "Uniting to Stop the Epidemic of Chronic Non-communicable Diseases". It is a regional network of Caribbean Health NGOs and civil society organizations with the remit to combat NCDs, associated risk factors and determinants. Membership of the HCC consists of more than 60 Caribbean-based health NGOs and over 65 not-for-profit organisations. There are in excess of 250 individual and organisational members based in the Caribbean and across the globe. Against the background of an epidemic of NCDs, the HCC works closely with regional and international leaders in NCD prevention and control to leverage the power of civil society by strengthening and supporting its participation in the implementation of programmes aimed at reducing NCD associated morbidity and mortality.

The Disease and Economic Burden Caused by Tobacco in the Caribbean Region

NCDs – cardiovascular disease, diabetes, cancer and chronic respiratory disease result in death of 36 million per year, with 80 per cent of these deaths occurring in low and middle income countries. If current trends continue, this figure is projected to rise to 52 million deaths by 2030.

Amid the global NCD epidemic, the Caribbean Community (CARICOM) has the highest prevalence of chronic non-communicable diseases (NCDs) in the regions of

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the Americas. NCDs are recognized to result from and be driven by aging of our populations, social determinants, (modernization, urbanization, poverty); which create environments that facilitate an increase in the four main "behavioural" risk factors (physical inactivity, unhealthy diets, tobacco use and alcohol abuse) and the resultant high rates of biological risk factors (high blood pressure, high blood glucose and cholesterol, and obesity).

Heads of Governments of Caribbean countries, have recognised that NCDs not only constitute a major health burden but significantly impede development and as stated by a Caribbean Prime Minister in 2008, "If left to chance, all the gains achieved in Caribbean during the march from poverty to relative affluence since Independence can be wiped out by the chronic non-communicable diseases (NCDs)." It is for this reason that Leaders of the Caribbean have played significant roles regionally and internationally in efforts aimed at slowing the epidemic of NCDs. These efforts it is well recognised and internationally accepted require that people are not exposed to the known harmful and highly preventable effects of tobacco smoke, be more physically active, not abuse alcohol and eat healthy. Among these known and established risk factors for NCDs, the most recognised and most contributory to the occurrence of the range of NCDs is exposure to tobacco smoke.

The level, and public health impacts of, tobacco consumption or exposure to tobacco smoke in the Caribbean is a source of ongoing concern as it is in most developing countries since tobacco exposure and consumption is the most important avoidable risk amongst NCDs. The rate of tobacco consumption and burden of tobacco–related disease amongst the Small Island Developing States (SIDS) of the Caribbean with their small population base, and economic fragility, and among the most vulnerable, such as children and adolescents and indigenous people of these countries, is a source of concern of the HCC and its constituent members.

A snapshot of data from surveys carried out in the region and published as WHO Reports on the Global Tobacco Epidemic, Country Profiles, 2012, revealed that: 21.1 per cent of Trinidad and Tobago's adult population smokes cigarettes and 9.3 per cent of the youth population; 15.1 per cent of Jamaica's adult population smokes cigarettes and 17.8 per cent of the youth population; 14.0 per cent of Haiti's youth population smokes cigarettes, and 9.7 per cent of Barbados's youth population smokes cigarettes.

Tobacco consumption and its resulting NCDs imposes significant avoidable costs to Caribbean countries' public health systems, which often rank amongst the largest or fastest growing item of expenditure in government budgets. It is further recognised that Government expenditure on treatment for tobacco-related illness and disease imposes an opportunity cost to the detriment of other health or government programs.

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The indirect economic costs of NCDs, including lost productivity, disability and premature death of current and future working age adults due to tobacco –related diseases is well recognised. Furthermore, the Global tobacco market produces an annual global loss of $US 500 billion annually, with direct health and indirect productivity cost outweighing the value of global tobacco production.

Data for the Caribbean on issues of direct and indirect economic cost and social cost of tobacco use and exposure and of NCDs, produced by the World Bank indicate that smoking kills more than five million people a year worldwide – more than tuberculosis, HIV/AIDS and malaria combined (WHO), and is responsible for at least 10 percent of all deaths in Caribbean countries. Among countries possessing statistical data tracking tobacco usage, the rate is highest in Trinidad and Tobago, where 33 percent of adult male and 6 percent of the adult females smoke cigarettes. (Ref Caribbean Knowledge Series, June 2013, Non-communicable diseases in the Caribbean: the new challenge for productivity and growth. http://worldbank.org/lac.

National aggregate out of pocket health expenditure amounted to 3.08 percent of Jamaica's GDP. The poorest, the elderly, and persons with hypertension spent more on healthcare, indicating important targets for government intervention (World Bank 2011a). Data for Jamaica from the period 1990 to 2007 shows that over the 18-year period, the percentage of health care visits by patients without NCDs was relatively stable, whereas the rate for patients with NCDs increased 20 percentage points (World Bank 2011a). These visits are labour intensive and require costly technology and physical space, which results in the diversion of limited financial and human resources away from other pressing needs in the medical system. For example, in the Organisation of Eastern Caribbean States (OECS) the total annual public health expenditure per diabetic patient ranges from USD 326 in St. Vincent and the Grenadines to as high as USD 776 in Antigua and Barbuda. Expenditure on diabetes patients totalled USD 1.8 million and USD 2.4 million in the two countries presented, respectively. Ref: World Bank. (2011a). The non-communicable diseases in Jamaica: Moving from prescription to prevention. World Bank, Washington, DC. Retrieved from http://www.worldbank.org/lac.

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The economic burden of NCDs on individuals is high. A 2006 study estimates the total average private economic burden of NCDs to be approximately USD 1,320 in St. Lucia per year, or roughly 25% of per capita GDP. Poorer households spend 48 percent of their per capita expenditure on healthcare while better off households spend less than 20 percent. Even though the poor spent less, their spending represents a higher proportion of their annual income triggering a vicious circle, since poverty often increases exposure to NCD risk factors and NCDs in turn drive the poor into deeper poverty, unless strong interventions take place. Ref: World Bank. (2011b). The growing burden of non-communicable diseases in the Eastern Caribbean. Washington, DC.

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Regulatory efforts in the Caribbean

In the Caribbean the specific regulatory challenges faced by the Region in combatting tobacco consumption has essentially been a lack of systems, mechanisms and resources, both human and financial, to undertake monitoring and evaluation. This is often compounded by resistance to passage of regulations due to the financial contribution of the tobacco industry to politically strategic and highly visible government projects and programmes, including in areas which are aimed at seeking the support of children such as the provision of scholarships in education and sports and games. Additionally, due to the lack of awareness of some provisions of the WHO FCTC, political leaders often find themselves interacting with and receiving support from the industry in contravention of a fundamental mandate of the WHO FCTC which recommends that policymakers should have no contact with the tobacco industry in matters related to public health. Finally, a challenge to the passage of regulations in the region has been, particularly in some countries such as Jamaica, the provision of misinformation which leads to uncertainty and doubt.

Despite the challenges, recognising the significant adverse health impact of exposure to tobacco smoke there have been noteworthy efforts and appreciable achievements in broadening, deepening and enriching the regulatory experience around tobacco control in the Caribbean. For example, Barbados, Trinidad and Tobago, and Suriname have enacted legislation banning smoking in public places and Barbados has in addition passed legislation banning the sale of cigarettes to minors. Jamaica has recently increased excise tax on tobacco products, and after a long and protracted battle by civil society led by the Jamaica Coalition for Tobacco Control and the Heart Foundation of Jamaica and the Jamaica Cancer Society, members of the HCC, supported by the Government of Jamaica, that country has recently also passed legislation banning smoking in public places.

Countries of the Caribbean were among the earliest signatories to the WHO FCTC, recognising as they did that the Convention had the potential to assist the economically vulnerable countries of the region in enacting legislation and putting in place regulatory frameworks to lessen adverse health and economic impacts of tobacco exposure in the Region. The WHO FCTC has been ratified by all but one Caribbean country and is used by all countries as a guide to action to reduce exposure to tobacco smoke..

In the Caribbean the implementation of Article 11 - packaging and labelling of tobacco products is being undertaken by Governments of the region with countries such as Barbados having agreed to standards of labelling of tobacco products which will be an improvement on current labelling, with the production of graphic, large rotating pictorial warnings depicting the adverse effects of smoking.

Steps to enact legislation around Article 13 - tobacco advertising, promotion and sponsorship is being undertaken in the Caribbean using a Regional/CARICOM approach with the appropriate guidelines protocols and standards developed within the region. The target date for completion of the policy and passage of legislation to support Article 13 is set for 2016

The regulatory experience in the Caribbean is best known with regard to Jamaica, Trinidad and Tobago, Barbados, and Suriname, but the experience of all of the Caribbean countries to varying degrees is characterised by: the necessarily long time span required to assess efficacy of preventative public health measures; the comprehensive nature of government efforts required to achieve results; synergistic and comprehensive/ multi- sectoral nature of tobacco control measures required to achieve results; competing public health priorities; limited human resources; absence of dedicated units or tobacco focal points; legislative process that tends to be lengthy; need for multidisciplinary commitment and action at the highest level; subtle and sometimes not so subtle interference by the tobacco industry; absence of strong advocacy and health promoting interventions and weak measurement and evaluation of compliance with legislative changes especially as these apply to the youth.

The Role HCC has Played in Tobacco Control and NCD Prevention and Control

Since its formation the HCC, and the members of its network has taken several steps aimed at reducing exposure to tobacco smoke of the people of the region and more generally contributing to the prevention and control of NCDs in the region. And thus by way of example the HCC has over the years provided strong and consistent support to the Jamaica Coalition for Tobacco Control and the Heart Foundation of Jamaica in well documented and internationally recognised efforts at tobacco control in Jamaica which led ultimately to the passage of Tobacco Control legislation in that country. The HCC contributed to the advocacy effort, which led to the passage of legislation banning smoking of tobacco products in Barbados and Suriname, and was instrumental in the recent establishment of a Coalition for Tobacco Control in Trinidad and Tobago. The HCC conducted a National Institutes of Health, USA supported pilot project in Barbados aimed at smoking cessation using mobile phones. In the area of NCD prevention and Control the HCC has been very active since it was established, executing programmes that include the NCD Alliance funded "Strengthening Health Systems, Supporting Non Communicable Disease (NCDs) Action" in which the HCC was selected to be the implementation partner for the Caribbean; the Commonwealth Secretariat supported project in which the HCC is strengthening the multi-sectoral effort in the Caribbean in prevention and treatment of NCDs, and the CDC, USA, and PAHO supported project in which the HCC is contributing to the improved detection and management of hypertension. These

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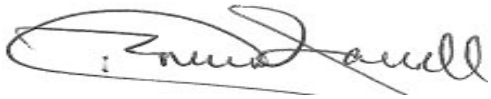
projects by their very nature address in one form or another adverse effects of exposure to tobacco smoke.

We respectfully request that the Panel consider this submission in its deliberations in the dispute.

Yours sincerely,



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President, Healthy Caribbean Coalition

Cc: Mrs. Maisha Hutton, Executive Director, HCC
Directors, HCC