



## Tobacco Plain Packaging Bill 2011

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# Tobacco Plain Packaging Bill 2011

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**House:** House of Representatives

**Portfolio:** Health and Ageing

**Commencement:** Clauses 1–2 on Royal Assent; 1 January 2012, Clauses 3–29, Clauses 81–82, Clauses 106–109; 20 May 2012, Clauses 33–36, Clause 39, Clauses 42–46, Clauses 49–80, Clauses 83–105; 1 July 2012, Clauses 30–32, Clauses 37–38, Clauses 40–41, Clauses 47–48.

**Links:** The links to [the Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

## Purpose

The Tobacco Plain Packaging Bill 2011 (the Bill) seeks to prohibit the use of all tobacco industry logos, brand imagery, colours and promotional text on the retail packaging of tobacco products. It allows for the use of a brand and variant name in a standard colour, position, font size and style. The Bill mandates that retail packaging of tobacco products be a standard drab dark brown colour, with the exception of health warnings, the brand and variant name and any other relevant legislative requirements.

The Bill makes it an offence to sell, supply, purchase, package or manufacture tobacco products in retail packaging that does not comply with the requirements of the Bill.

The Bill is one of two Bills introduced for the purpose of introducing plain packaging of tobacco products. The other Bill, the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011, is consequential and seeks to amend the *Trade Marks Act 1995* to enable regulations to be made in relation to the use of trade marks under the *Tobacco Plain Packaging Act 2011*.

## Background

Tobacco smoking is one of the leading preventable causes of death and disease in Australia. Each year around 15 000 Australians die of tobacco-related causes.<sup>1</sup> When the sickness and disability

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1. S Begg, T Vos, B Barker, C Stevenson, L Stanley and A Lopez, *The burden of disease and injury in Australia 2003*, PHE 82, AIHW, Canberra, 2007, pp. 76–77, viewed 19 August 2011, <http://www.aihw.gov.au/publication-detail/?id=6442467990>+. It should be noted that estimating the number of deaths due to tobacco smoking is very

caused by tobacco are taken into account as well as tobacco-related deaths, tobacco causes more disease and injury in Australia than any other single risk factor. Accordingly, the social and economic costs of smoking to the nation are significant. These costs have been estimated at around \$31.5 billion a year.<sup>2</sup>

Australia's tobacco control achievements over the past decades have been substantial. Tobacco control measures (such as social marketing campaigns, the gradual restriction of tobacco advertising and promotion, mandated health warnings and product information on tobacco packaging, stronger enforcement of legislation prohibiting the sale of tobacco products to children, increasing restrictions on the places in which people are permitted to smoke and continuing increases in the price of tobacco through excise hikes) have prevented a significant number of premature deaths, and saved far more in health and other costs than the amount spent on the measures themselves.<sup>3</sup>

Measurements of the prevalence of smoking in Australia first became available in 1945. These data indicate that with the exception of women's smoking from the mid-1970s to 1980s there has been a steady decline in rates of smoking since this time. From the mid-20<sup>th</sup> century to the mid-1960s, a majority of males aged 16 and over were smokers, and around a quarter of females aged 16 and over were smokers. This compares with latest 2010 National Drug Strategy Household Survey data which indicate that, in 2010, around 20 per cent of males and 16 per cent of females aged 14 years and over were smokers.<sup>4</sup> Overall, just over 15 per cent of the population aged over 14 were smokers in 2010.

On the basis of these (and other) figures, as at 2007, Australia had the third lowest overall prevalence of smoking in the world (behind Sweden and Canada).<sup>5</sup>

While the tobacco control efforts of successive Australian federal and state and territory governments and public health organisations have helped to reduce the smoking prevalence in Australia, there is clearly still room for improvement. Almost three million Australians still smoke, including almost half of Aboriginal and Torres Strait Islander people over the age of 15 years.

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difficult. This is both because smoking is a risk factor for a wide range of diseases and it may take some time before smoking results in sickness, disease and mortality.

2. D Collins and H Lapsley, *The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004/05*, Commonwealth of Australia, Canberra, 2008, viewed 19 August 2011, <http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/mono64>
3. See National Preventative Health Taskforce, Tobacco Working Group, *Australia: the healthiest country by 2020, Technical report 2: tobacco control in Australia: making smoking history*, Commonwealth of Australia, Canberra, 2009, p. 49, viewed 19 August 2011, [http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/96CAC56D5328E3D0CA2574DD0081E5C0/\\$File/tobacco-jul09.pdf](http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/96CAC56D5328E3D0CA2574DD0081E5C0/$File/tobacco-jul09.pdf)
4. That is, they smoked daily, weekly or less than weekly. Australian Institute of Health and Welfare, 2010 National Drug Strategy Household Survey Report, cat. no. PHE 145, AIHW, Canberra, 2011, p. 25, viewed 19 August 2011, <http://www.aihw.gov.au/publication-detail/?id=32212254712&tab=2>
5. S Chapman, 'Falling prevalence of smoking: how low can we go?', *Tobacco Control*, vol. 16, no. 3, June 2007, pp. 145–147.

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The Australian Government has made a strong commitment to ensure that smoking and premature deaths from smoking continue to decline. In 2008, as a part of the National Healthcare Agreement, the Council of Australian Governments (COAG) agreed to a target of reducing the national adult smoking rate to 10 per cent and halving the Aboriginal and Torres Strait Islander smoking rate by 2018. To this end, the Government has introduced a range of measures, including: increasing the excise rate applying to tobacco products by 25 per cent as a part of the 2010–11 Budget<sup>6</sup>; introducing legislation to restrict the advertising of tobacco products on the internet, in line with advertising in other media<sup>7</sup>; increasing funding for anti-smoking social marketing campaigns and Indigenous-specific anti-smoking measures; and, subsidising the inclusion of nicotine replacement therapies on the Pharmaceutical Benefits Scheme.

These are significant measures that, when combined with the tobacco control activities of the states and territories, make up a reasonably comprehensive approach to tobacco control. Nevertheless, if the above, ambitious targets are to be met, then it is clear that further action will be required.

### Plain packaging<sup>8</sup>

In countries that have introduced wide-ranging tobacco marketing controls (controls on advertising and promotions), such as Australia, tobacco packaging has assumed a central role as a marketing tool. As one Phillip Morris executive is reported as having stated, ‘our final communication vehicle with our smoker is the pack itself. In the absence of any other marketing messages, our packaging ... is the sole communicator of our brand essence. Put another way—when you don’t have anything else—our packaging is our marketing’.<sup>9</sup>

Moreover, tobacco packaging is a highly effective marketing tool in the sense that cigarettes have a high degree of social visibility. As tobacco researcher, David Hammond notes, ‘unlike many other consumer products, cigarette packages are displayed each time the product is used and are often left in public view between uses’.<sup>10</sup>

The tobacco industry has invested heavily in research and development of packaging as a promotional tool. Through the use of colour, images, logos, fonts and the packaging itself, the

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6. The last general increase in tobacco excise was a 10 per cent increase in the 1995–96 Budget.

7. This is in line with Article 13(4)(e) of the World Health Organisation’s Framework Convention on Tobacco Control, to which Australia is, along with 167 other countries, a signatory. Under Article 13(4)(e), Parties are required to: undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years.

8. Plain packaging is also variously referred to as generic, standardised or homogenous packaging.

9. D Hammond, ‘“Plain packaging” regulations for tobacco products: the impact of standardizing the color and design of cigarette packs’, *Salud Publica de Mexico*, vol. 52, 2010, p. s227. The Philip Morris submission to the Senate Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009 states, ‘given the extensive regulation to which the manufacture, marketing and sale of cigarettes is subject to in Australia, cigarette packaging is the last means by which Philip Morris can use its property in its registered trade marks, registered designs and brand goodwill’.

10. D Hammond, *op. cit.*

industry has developed positive brand image associations that are particularly effective where it comes to attracting young people.

Tobacco packaging has also been demonstrated to communicate value to price conscious consumers and to stimulate interest in a range of different tobacco products through innovation.<sup>11</sup> Further, there is substantial evidence that the tobacco industry employs packaging as a means to influence sensory and health perceptions of tobacco products. For example, through the use of descriptors such as 'light', 'mild' and 'low-tar' on tobacco packaging, the industry conveys the false perception that certain brands 'deliver less tar, lower health risk and are less addictive than 'regular' or 'full flavour' brands.<sup>12</sup>

The colour and design of packaging may similarly be used to impart false beliefs about both the taste and the risks associated with different tobacco brands. Lighter shades of a given colour and the proportion of white space on a package are, Hammond argues, 'commonly used to manipulate perceptions of a product's strength and potential risk'.<sup>13</sup> Consumers tend to perceive white and lighter colours as being 'healthier'. This is to be expected given that white is generally associated with safety, purity and cleanliness. Hence, while many countries have prohibited the use of various terms that imply that some cigarette brands are lower risk and less addictive, so long as the colour and design of packaging can convey similar meanings, consumers may continue to be misled. This can have significant consequences. Mistaken perceptions regarding the risks of tobacco products can undermine health warnings on tobacco packaging and lead many smokers to either delay or put off quitting smoking altogether.<sup>14</sup>

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11. C Moodie and G Hastings, 'Making the Pack the Hero, Tobacco Industry Response to Marketing Restrictions in the UK: Findings from a Long-Term Audit', *Journal of Mental Health Addiction*, vol. 9, 2011, pp. 24–38.

12. D Hammond and C Parkinson, 'The impact of cigarette package design on perceptions of risk', *Journal of Public Health*, vol. 31, no. 3, 2009, pp. 345–353. A Senate Order of 27 June 2002 required the Australian Competition and Consumer Commission (ACCC) to report on the use of the descriptors 'light' and 'mild' by Australia's three major tobacco manufacturers, Philip Morris (Australia), British American Tobacco and Imperial Tobacco Australia. The ACCC found that the companies had breached the Trade Practices Act by marketing 'light', 'mild' and similarly named products. In 2005, it accepted court-enforceable undertakings that the companies would stop using terms such as 'light' and 'mild' and provide \$9 million towards a corrective advertising to be run by the ACCC. See M Scollo and M Winstanley, eds. *Tobacco in Australia: facts and issues*, Melbourne, Cancer Council Victoria, 2008, Chapter 16, Tobacco Litigation in Australia, viewed 19 August 2011, <http://www.tobaccoinustralia.org.au/>. As at 2009, over 40 countries had introduced legislation prohibiting the use of misleading information on tobacco packaging, including the terms 'light', 'mild' and 'low-tar'. It is not clear the extent to which other descriptors used on tobacco packaging may similarly deceive consumers with regard to the health risks of different cigarette brands.

13. D Hammond, *op. cit.*, p. s228.

14. D Hammond, "'Plain packaging" regulations for tobacco products: the impact of standardizing the color and design of cigarette packs', *Salud Publica de Mexico*, vol. 52, 2010, pp. 226–232. While the tobacco industry has argued that the descriptors used on packaging are used to communicate flavour and taste to smokers, rather than health risks or tar levels, research evidence indicates that many smokers perceive them as being equivalent. Further, internal industry documents suggest that the industry is all too aware that the two are being conflated in the minds of smokers. D Hammond and C Parkinson, 'The impact of cigarette packaging design on perceptions of risk', *Journal of Public Health*, vol. 31, no. 3, 2009, p. 351.

Under the World Health Organisation (WHO) Framework Convention on Tobacco Control—the world’s first public health treaty that has been signed by 168 countries and is legally binding in 172 ratifying or accessioned countries—Parties are obliged to ensure that:

Tobacco product packaging and labeling 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’.<sup>15</sup>

Further, Parties are required to ban or restrict as far as their Constitutions allow all forms of tobacco advertising, promotion and sponsorship. In recognition of the marketing role played by tobacco packaging, the Guidelines for implementation of Article 13 (Tobacco advertising, promotion and sponsorship) of the WHO Framework Convention on Tobacco Control recommend that Parties introduce plain packaging:

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive.<sup>16</sup>

Several countries have considered or are currently considering the introduction of plain packaging for tobacco products.

## **New Zealand**

In 1989, the New Zealand Department of Health’s Toxic Substances Board recommended the introduction of plain packaging for all tobacco products. While the New Zealand Government did not act on this recommendation in the face of what was then a volatile political climate, the current New Zealand Government has welcomed Australia’s decision to introduce plain packaging and indicated that it is likely to follow suit in the future.<sup>17</sup>

## **Australia**

In 1992, Australia’s Centre for Behavioural Research in Cancer similarly recommended the introduction of generic packaging. Initially, the Ministerial Council on Drug Strategy taskforce on tobacco supported the Centre for Behavioural Research in Cancer’s recommendation. However, a

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15. World Health Organisation (WHO), *WHO Framework Convention on Tobacco Control*, WHO, Geneva, 2003, p. 9, viewed 19 August 2011, [http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf)

16. World Health Organisation, *Guidelines for the implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship)*, viewed 19 August 2011, [http://www.who.int/fctc/protocol/guidelines/adopted/article\\_13/en/index.html](http://www.who.int/fctc/protocol/guidelines/adopted/article_13/en/index.html)

17. ‘NZ likely to introduce plain tobacco packets’, *NZ Herald.co.nz*, 7 April 2011, viewed 19 August 2011, [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10717788](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10717788)

decision was subsequently made in 1993 to employ a range of other strategies to focus public attention on the health effects of smoking, rather than to pursue the plain packaging option. One of these strategies was the introduction in 1994 of a national system of strengthened health warnings on tobacco products.

In 1995, the Senate Community Affairs References Committee conducted an inquiry into the tobacco industry and the cost of tobacco-related illnesses. The committee examined a range of different issues, including the question of whether or not a requirement for generic tobacco packaging should be introduced. Ultimately, the Committee concluded that on the basis of the evidence received there was not sufficient evidence to recommend that tobacco products be sold in generic packaging. It went on to recommend that 'additional research be undertaken into the efficacy of generic packaging of tobacco products as a means of addressing the problem of juvenile smoking'.<sup>18</sup>

In its 1997 response to the Committee's report, the Government undertook to commission further investigation of the efficacy of generic packaging as a means of enhancing the impact of package warnings. The Government's substantive response to the generic packaging proposal was as follows:

In response to the mounting interest in generic packaging, the Commonwealth obtained advice from the Attorney General's Department on the legal and constitutional barriers to generic packaging. This advice indicates that the Commonwealth does possess powers under the Constitution to introduce such packaging but that any attempt to use these power to introduce further tobacco control legislation needs to be considered in the context of the increasingly critical attention being focused on the necessity, appropriateness, justification and basis for regulation by such bodies as the Office of Regulatory Review, the High Court, and Senate Standing Committees. In addition, further regulation needs to be considered in the context of Australia's international obligations regarding free trade under the General Agreement on Tariff and Trade (GATT), and our obligations under international covenants such as the Paris Convention for the Protection of Industrial Property, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

To date, generic packaging of tobacco products has not been implemented anywhere in the world. As such, there is no international experience of the effect of generic packaging on consumer behaviour. In addition, there is limited primary research on the potential effect of generic packaging on the factors underlying or relevant to the uptake and cessation of tobacco consumption.<sup>19</sup>

On 30 June 2009, the National Preventative Health Taskforce released the National Preventative Health Strategy. This strategy outlined a strategic vision for Australia to be the healthiest country by

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18. Senate Community Affairs References Committee, *The Tobacco Industry and the Costs of Tobacco-Related Illness*, Commonwealth of Australia, Canberra, 1995, p. 71, viewed 19 August 2011,

[http://www.aph.gov.au/SENATE/committee/clac\\_ctte/completed\\_inquiries/pre1996/tobacco/report/report.pdf](http://www.aph.gov.au/SENATE/committee/clac_ctte/completed_inquiries/pre1996/tobacco/report/report.pdf)

19. Government Response to the Report of the Senate Community Affairs Reference Committee, *The Tobacco Industry and the Costs of Tobacco-Related Illness*, 1997, p. 30, viewed 19 August 2011,

[http://www.aph.gov.au/senate/committee/clac\\_ctte/completed\\_inquiries/pre1996/tobacco/gov\\_response/gov\\_response.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/pre1996/tobacco/gov_response/gov_response.pdf)

2020, with one of the targets set being a reduction in the prevalence of smoking from 17 per cent to 10 per cent over this period (in line with the national preventative health targets contained in the COAG National Partnership Agreement on Preventive Health). One of the means recommended to help achieve this target was the elimination of the promotion of tobacco products through the design of packaging.<sup>20</sup>

On 20 August 2009 former Senator, Steve Fielding, introduced to the Senate the Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009. This Bill required that tobacco packaging be plain and uniform, devoid of industry logos, brand imagery and colours, and not contain any inserts or 'onserts'.<sup>21</sup> On 26 November 2009, the Senate referred the then Senator's Bill to the Senate Community Affairs Legislation Committee for report by 26 August 2010, on the recommendation of the Selection of Bills Committee. On 19 July 2010, the Governor-General prorogued the 42<sup>nd</sup> Parliament and dissolved the House of Representatives. After consideration, the Committee determined not to continue its inquiry into the Bill. Fifty eight submissions were made to the inquiry.<sup>22</sup>

## Canada

In 1994, the Canadian House of Commons Standing Committee on Health examined the issue of plain packaging. The Committee was generally supportive of the notion of plain packaging, but observed that there was a lack of evidence that plain packaging would reduce tobacco consumption. To remedy this, the Canadian Government commissioned an Expert Panel to study the likely effectiveness of plain packaging in reducing tobacco consumption. The Expert Panel found that plain and generic packaging would likely have a slight to moderate effect on smoking uptake and cessation among Canadian teens. However, in the face of significant tobacco industry lobbying against the proposal, and concerns about trade mark related issues, the Canadian Government chose not to pursue the plain packaging measure.

## UK

In 2008, the UK Department of Health conducted a public consultation on the future of tobacco control. In its consultation document, the Department of Health solicited, among other things, views on the potential for plain packaging of tobacco products to reduce the uptake of smoking, particularly among children and young people. Almost 98 per cent of respondents to the plain packaging question were in favour of the measure, while most of those opposing the measure

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20. Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National preventative health strategy – the roadmap for action*, The Department of Health and Ageing/The Taskforce, Canberra, 2009, pp. 181–182, viewed 19 August 2011, <http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/discussion-healthiest>

21. The full text of the Bill is available at: [http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s724\\_first/toc\\_pdf/0916020.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s724_first/toc_pdf/0916020.pdf;fileType=application%2Fpdf)

22. The submissions are available at: [http://www.aph.gov.au/senate/committee/clac\\_ctte/plain\\_tobacco\\_packaging\\_09/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/clac_ctte/plain_tobacco_packaging_09/submissions/sublist.htm)

suggested that it would be likely to stimulate counterfeit and illicit trade.<sup>23</sup> In March 2011, the UK Government published its tobacco control plan. This plan includes a commitment to ‘consult on options to reduce the promotional impact of tobacco packaging, including plain packaging, before the end of 2011’. The UK Government also intends to ‘look at whether the plain packaging of tobacco products could be effective in reducing the number of young people who take up smoking and in supporting adult smokers who want to quit’.<sup>24</sup>

## EU

The European Union is currently consulting on the option of introducing plain packaging as a revision to the Tobacco Products Directive.<sup>25</sup>

## Basis of policy commitment

On 29 April 2010 the then Prime Minister, Kevin Rudd, announced the introduction of a series of measures calculated to reduce smoking and its harmful effects, one of which was the plain packaging of tobacco products by 1 July 2012.<sup>26</sup> The plain packaging measure was one of the key recommendations of the National Preventative Health Taskforce in the area of tobacco control.

Following the development and testing of package designs that would minimise the appeal of tobacco, the Government released on 7 April 2011 an exposure draft of the Tobacco Plain Packaging Bill along with a Consultation Paper for public comment by 6 June 2011.<sup>27</sup>

## Main issues

The tobacco industry is strongly opposed to the Government’s proposal to require plain packaging of tobacco products. A number of tobacco companies have indicated that they are prepared to fight the proposal using legal measures.<sup>28</sup> Indeed, on 27 June 2011, Philip Morris served a notice of claim on the Government, stating that it intends to pursue legal action over the proposal.<sup>29</sup>

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23. Department of Health, *Consultation on the future of tobacco control: consultation report*, Department of Health Tobacco Program, 2008, viewed 19 August 2011,
  24. Department of Health, *Healthy lives, healthy people: a tobacco control plan for England*, Department of Health, 2011, viewed 19 August 2011, [http://www.coppt.pt/attachments/181\\_201103-Tabaco\\_UK\\_2011.pdf](http://www.coppt.pt/attachments/181_201103-Tabaco_UK_2011.pdf)
  25. European Commission, Health and Consumers Directorate-General, *Directorate C – public health and risk assessment, possible revision of the Tobacco Products Directive 2001/37/EC, public consultation document*, 2010, viewed 19 August 2011, [http://ec.europa.eu/health/tobacco/docs/tobacco\\_consultation\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/tobacco_consultation_en.pdf)
  26. K Rudd, *Anti-smoking action*, media release, 29 April 2010, [http://parlinfo.parlinfo/download/media/pressrel/67MW6/upload\\_binary/67mw60.pdf;fileType=application/pdf#search=%22plain%20packagingtobacco%20%20rudd,%20kevin,%20mp%22](http://parlinfo.parlinfo/download/media/pressrel/67MW6/upload_binary/67mw60.pdf;fileType=application/pdf#search=%22plain%20packagingtobacco%20%20rudd,%20kevin,%20mp%22)
  27. Department of Health and Ageing, *Public consultation on plain packaging of tobacco products*, viewed 19 August 2011, <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/plainpack-tobacco>
  28. For example, British American Tobacco has stated that in the event of a plain packaging proposal, ‘we would take every action necessary to protect our brands, our right to compete as a legitimate commercial business selling a legal product, and the interests of our shareholders’. British American Tobacco, *British American Tobacco response to the*

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The tobacco industry (and a number of patent and trade mark associations) has raised a series of objections against the plain packaging proposal. Broadly speaking, these objections fall within three main lines of argument:

- first, there are significant legal barriers to the introduction of plain packaging
- second, there is no credible evidence that plain packaging will deliver a public health benefit and
- third, there may be significant unintended consequences associated with the introduction of plain packaging.<sup>30</sup>

The industry has also argued, more broadly, that the proposal is a ‘nanny state’ measure, treating Australians as though they were children, incapable of making their own decisions about whether or not to smoke.

## Legal barriers

Legal objections to plain packaging have it that mandatory plain packaging breaches trademark law, international trade agreements and intellectual property rights. The basis of these arguments, and some objections to them, are briefly outlined below.

The tobacco industry uses trademarks as a means to enable consumers to make judgments about particular brands of cigarettes and to differentiate between them. Thus, tobacco companies draw on trademarks to compete with their rivals and competitors in the market place. As such, the tobacco industry argues that trademarks are of significant value to their owners and the wider economy and must be protected at both domestic and international levels as a result.

At present, trademarks and related intellectual property rights are protected under the *Trade Marks Act 1995* and a range of international trade agreements, including the *Paris Convention for the*

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Department of Health discussion document ‘Consultation on the future of tobacco control, May 2008’, 5 September 2008. British American Tobacco is the leading tobacco company in Australia, accounting for 45.5 per cent of the cigarette market. British American Tobacco Australia, Submission to the Senate *Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009*, 6 May 2010, p. 5.

29. C Kenny, ‘Big tobacco ignites legal war’, *The Australian*, 27 June 2011, [http://parlinfo.parlInfo/download/media/pressclp/873963/upload\\_binary/873963.pdf;fileType=application/pdf#search=%22big%20tobacco%20ignites%20legal%20war%22](http://parlinfo.parlInfo/download/media/pressclp/873963/upload_binary/873963.pdf;fileType=application/pdf#search=%22big%20tobacco%20ignites%20legal%20war%22). Legal experts debunk suit as ‘frivolous treaty shopping’ <http://www.canberratimes.com.au/news/opinion/editorial/general/gillard-must-repel-big-tobaccos-latest-attack/2209168.aspx?storypage=1>
30. See, for example, British American Tobacco, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011, viewed 19 August 2011, [http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/54C7253A91413C22CA2578C70026F5B5/\\$File/British%20American%20Tobacco%20Australia%20-%20Public%20Submission.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/54C7253A91413C22CA2578C70026F5B5/$File/British%20American%20Tobacco%20Australia%20-%20Public%20Submission.pdf); Philip Morris, Commoditising tobacco products through plain packaging will harm public health, violate treaties, and does not meet the test of “evidence-based policy”: Submission by Philip Morris Limited on the Tobacco Plain Packaging Bill Exposure Draft, June 2011, viewed 19 August 2011, [http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/5FE513ABABF10941CA2578C70029C378/\\$File/Philip%20Morris.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/5FE513ABABF10941CA2578C70029C378/$File/Philip%20Morris.pdf)

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*Protection of Industrial Property* (the Paris Convention) and the World Trade Organisation's Agreement on *Trade-Related Aspects of International Property Rights 1994* (TRIPS).

Section 20 of the *Trade Marks Act 1995* (the Act) specifies that:

If a trade mark is registered, the registered owner of the trade mark has, subject to this Part, the exclusive rights ... to use the trade mark; and ... to authorise other persons to use the trade mark ... in relation to the goods and/or services in respect of which the trade mark is registered.<sup>31</sup>

Under Section 21 of the Act, a registered trade mark is the property of the trade mark owner.

Hence, as the tobacco industry sees it, a demand for plain packaging would deprive tobacco companies of the use of their trade mark and of the right to their personal property, in contravention of the Act.<sup>32</sup>

Following similar lines, the tobacco industry maintains that the introduction of plain packaging regulations would violate minimum obligations for the protection of intellectual property rights under trade agreements in general, and under Article 20 of TRIPS, in particular.<sup>33</sup>

The relevant section of Article 20 is as follows:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.<sup>34</sup>

As can be seen, the wording of Article 20 is ambiguous when read in isolation, as the term 'unjustifiably' makes it difficult to determine the exact extent to which the article may limit the actions of a member state. As Benn McGrady notes,

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31. See: [http://www.austlii.edu.au/au/legis/cth/consol\\_act/tma1995121/](http://www.austlii.edu.au/au/legis/cth/consol_act/tma1995121/)

32. British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011. The Institute of Patent and Trade Mark Attorneys of Australia has made similar arguments. Institute of Patent and Trade Mark Attorneys of Australia (IPTA), Submission to Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, British American Tobacco, British American Tobacco response to the Department of Health discussion document 'Consultation on the future of tobacco control, May 2008', 5 September 2008.

33. British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011, pp. 9–10; British American Tobacco Australia, British American Tobacco Australia Submission to the Senate Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, 6 May 2010, pp. 8–10; British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011.

34. World Trade Organisation, TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights, Part II – Standards concerning the availability, scope and use of Intellectual Property Rights, viewed 19 August 2011, [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm3\\_e.htm#2](http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm#2)

At its broadest, Article 20 could constitute a rule preventing Members from prohibiting or restricting use of trademarks in any form. At its narrowest the provision could prevent Members from requiring that something be attached to a trademark wherever that trademark is used.<sup>35</sup>

The tobacco industry has chosen to interpret Article 20 in its broadest possible sense. Thus, as the industry sees it, the demand for plain packaging represents an illegitimate restriction in breach of the system of international trademark protection with which governments are obliged to comply.<sup>36</sup> The industry has also argued that the introduction of plain packaging regulations in Australia would, by imposing additional restrictions, restrict the free movement of tobacco products between countries, and thereby constitute an unlawful barrier to international trade—contrary to international obligations under the Technical Barriers to Trade Agreement (TBT) and the General Agreement on Tariffs and Trade 1994 (GATT).<sup>37</sup>

In response to claims such as those outlined above, tobacco researchers Becky Freeman, Professor Simon Chapman and Dr Matthew Rimmer have argued that the purpose of trademark law is not limited to the protection of private property rights.<sup>38</sup> Trademark law is also concerned with ensuring the provision of accurate information to consumers. They point to Articles 8(1) and 17 of TRIPS, both of which provide for member states to adopt measures necessary to protect public health and the public interest, so long as these measures take account of the legitimate interests of trade mark owners.<sup>39</sup> As Freeman, Chapman and Rimmer see it, plain packaging of tobacco (along with mandatory health warnings on packaging) is entirely consistent with the goal of promoting consumer welfare, and the obligations of multilateral and regional trade agreements. Further, they point out that trademark protection does not constitute an inviolable right; rather, it is a privilege that can be withdrawn or modified, and especially in the interests of public health.<sup>40</sup>

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35. B McGrady, 'TRIPS and trademarks: the case of tobacco', *World Trade Review*, vol. 3, no. 1, 2004, p. 60, [http://parlinfo.parlInfo/download/library/jrnart/MMOD6/upload\\_binary/mmod66.pdf;fileType=application/pdf#search=%22TRIPS%20and%20trademarks%20the%20case%20of%20tobacco%22](http://parlinfo.parlInfo/download/library/jrnart/MMOD6/upload_binary/mmod66.pdf;fileType=application/pdf#search=%22TRIPS%20and%20trademarks%20the%20case%20of%20tobacco%22)

36. British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill, 6 June 2011, p. 9.

37. Ibid.

38. B Freeman, S Chapman and M Rimmer, 'The case for the plain packaging of tobacco products', *Addiction*, vol. 103, 2008, pp. 580–590.

39. Article 8(1) states that 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement'. Article 17 specifies that 'Members may provide limited exemptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.'  
[http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPS](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPS)

40. B Freeman, S Chapman and M Rimmer, op cit., p. 586. This was the position advanced by the European Court of Justice in response to tobacco companies' claims that the large size of required health warnings diminished or prevented the use of trade marks on tobacco packaging, and thus constituted an infringement of their intellectual property rights.

It should be noted that there is always likely to be some tension between world trade agreements and some tobacco control policies and initiatives. A joint study on WTO Agreements and public health conducted by the WHO and the

Thus, Freeman, Chapman and Rimmer interpret Article 20 of TRIPS more narrowly than does the tobacco industry; as a provision that ‘establishes a standard of protection for the use of trademarks, but one that does not unconditionally prevent a state from prohibiting or restricting the use of a trademark’.<sup>41</sup>

The tobacco industry does not agree with such assessments. It has signalled that it intends to fight the plain packaging proposal on the grounds that it violates the fundamental right of property ownership (as described above). Should it fail in this enterprise, then it has indicated that it will demand significant compensation for what it sees as the deprivation of its valuable property rights. The industry has argued that the plain packaging requirements stipulated in the Bill would be in breach of its property rights as guaranteed under section 51 (xxxi) of the Constitution.<sup>42</sup> Section 51 (xxxi) guarantees just terms compensation where property is acquired compulsorily from any state or person. British American Tobacco Australia and Philip Morris have both indicated that, in their view, the Government’s requirement for plain packaging demands that it must acquire the relevant intellectual property and/or pay reasonable compensation under the Constitution.<sup>43</sup>

In response to such claims the Government has stressed that it has no interest in acquiring tobacco industry-owned trademarks. Indeed, **clause 28** of the Bill provides for the protection of these trademarks by specifying that while a registered owner may not use their trade mark on tobacco products and their packaging, the Registrar of Trade Marks may not, among other things: refuse to register the trade mark, revoke the acceptance of an application for registration of the trade mark, impose conditions or limitations on registration of the trade mark, or, revoke registration of the trade mark.

The Government simply does not want tobacco industry trade marks appearing on tobacco products for reasons of public health.

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WTO Secretariat in 2002 found that ‘none of the provisions of the [WHO Framework Convention on Tobacco Control] are inherently WTO-inconsistent; and many of the restrictions called for by some of its provisions may well be determined to be “necessary” for health protection under WTO rules. However, some governments and NGOs are arguing that health objectives should take precedence over trade agreements. Thus, the relationship between WTO rules and the FCTC will depend on the direction that future negotiations of the FCTC take, and the manner in which its rules are applied by governments’. World Health Organisation/World Trade Organisation, *WTO Agreements and Public Health: A joint study by the WHO and the WHO Secretariat*, World Trade Organisation/World Health Organisation, 2002, pp. 76–77, viewed 19 August 2011, [http://www.wto.org/english/res\\_e/booksp\\_e/who\\_wto\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf)

41. B McGrady, op. cit., p. 61.

42. See British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011, p. 7.

43. Allens Arthur Robinson (acting for Philip Morris), Submission to Senate Committee Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, [http://www.aph.gov.au/senate/committee/clac\\_ctte/plain\\_tobacco\\_packaging\\_09/submissions/sub45a.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/plain_tobacco_packaging_09/submissions/sub45a.pdf); British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011, p. 7.

Given that the Government would not stand to gain any benefit from the acquisition, it has been argued that the proposal does not amount to an acquisition of property as specified at section 51(xxxi) of the Constitution. As Professor Mark Davison puts it:

The government does not wish to use the tobacco trade marks. Nor does it want third parties to do so. It does not desire to or intend to acquire any property. The proposition that prohibitions on the use of property do not constitute an acquisition of property was confirmed by the High Court as recently as 2009. In that case, the High Court held that the government was entitled to extinguish property rights in licenses of farmers to take bore water.<sup>44</sup>

Indeed, constitutional law expert, Professor Greg Craven, is so confident that the Bill does not acquire property on other than just terms that he has argued that the tobacco industry's prospects of success in gaining compensation are about the same as a three-legged horse has of winning the Melbourne Cup.<sup>45</sup> Professor George Williams, another of Australia's leading constitutional experts, agrees with Craven's reading of the tobacco industry's entitlement to compensation under the Constitution:

The plain packaging of cigarettes is certainly a blatant, and deliberate, infringement of [the tobacco industry's] brands and trademarks. There is no doubt that this intellectual property is protected by the constitution. If it is acquired under federal law, the Commonwealth must compensate.

The problem for the tobacco companies is that this is not quite what plain packaging will do. The key issue is whether the regulation amounts to an 'acquisition' of their intellectual property. The scheme will prevent the use of this property on packaging, and so will diminish its value. However, it is a stretch to suggest that the property will be 'acquired' by someone else. The tobacco companies will no doubt argue that the restriction on their intellectual property is so severe that there is, in effect, an acquisition of it. But this will be a hard argument to win.

High Court judges have recognised that 'just terms' are not required for laws 'which provide for the creation, modification, extinguishment or transfer of rights' in 'areas which need to be regulated in the common interest'. This may put the Commonwealth on strong ground. It can argue that the impact upon trademarks and brands is not an acquisition of property because the scheme is directed at improving health outcomes for all.<sup>46</sup>

However, Williams appears less confident than Craven of the outcome of the tobacco industry's likely High Court challenge. Although he sees the guarantee of compensation in the Constitution as being an 'awkward fit' for plain packaging and the tobacco industry's bid as liable to fail, Williams nevertheless notes that 'there have been some surprising outcomes when the High Court has

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44. M Davison, 'Plain packaging bill to extinguish some tobacco trade marks', *The Drum on ABC News*, 15 April 2011.

45. Ibid.

46. G Williams, 'Plain packaging challenge could go up in smoke, but you never know', *Sydney Morning Herald*, 7 June 2011,

[http://parlinfo.parlInfo/download/media/pressclp/826088/upload\\_binary/826088.pdf;fileType=application/pdf#search=%22plain%20packaging%20challenge%20could%20go%20up%20in%20smoke%22](http://parlinfo.parlInfo/download/media/pressclp/826088/upload_binary/826088.pdf;fileType=application/pdf#search=%22plain%20packaging%20challenge%20could%20go%20up%20in%20smoke%22)

tackled this part of the constitution ... High Court decision making in this part of the constitution is difficult to predict'.<sup>47</sup> And, should the tobacco industry's constitutional attack on plain packaging succeed, then the Government would be forced to either drop the measure, or be liable for millions or billions in compensation.

The Government seems to be relatively assured in the strength of its position. Nevertheless, it has exercised prudence in drafting the Bill, wording it in terms such that, even if it is not able to eliminate all tobacco industry owned trademarks, it will still be able to impose significant restrictions on tobacco packaging without having to pay any compensation. **Clause 15** of the Bill provides that, if the Bill were to result in the acquisition of property on other than just terms, the tobacco industry would be able to use its trade marks, but only subject to the requirements imposed by the regulations with regard to things like size and placement.

## Evidence

The tobacco industry has consistently argued that the evidence presented in support of plain packaging is speculative.<sup>48</sup> To a degree this is inevitably so, because no jurisdiction has yet introduced plain packaging requirements. In the absence of real world data, the only data that is available on the likely impact of plain packaging is based on experimental studies.

Perhaps the most comprehensive study of the likely effects of plain packaging of tobacco products on the uptake and cessation of smoking is that conducted by an Expert Panel commissioned by Health Canada in 1994. Based on the mostly converging results of five different studies, the Expert Panel concluded that:

Plain and generic packaging of tobacco products (all other things being equal) through its impact on image formation and retention, recall and recognition, knowledge and consumer attitudes and perceived utilities, would likely depress the incidence of smoking uptake by non-smoking teens, and increase the incidence of smoking cessation by teen and adults smokers. This impact would vary across the population. The extent of change in incidence is impossible to assess except through field experiments conducted over time.<sup>49</sup>

The Expert Panel's findings bear out the results of four earlier studies of the plain packaging of cigarettes. These studies each provided evidence to support the proposition that plain and generic

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47. Ibid.

48. The International Trademark Association similarly expressed the view that given 'the lack of discernible evidence linking restrictions on trademark use to the public health', the draft Tobacco Plain Packaging Bill 2011 did not meet the requirements for public health exceptions under Article 8(1) of TRIPS. International Trademark Association, Submission on the draft Tobacco Plain Packaging Bill 2011, 3 June 2011, viewed 19 August 2011, [http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/ED7295E315F51DBBCA2578C600355C8E/\\$File/International%20Trademark%20Association.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/ED7295E315F51DBBCA2578C600355C8E/$File/International%20Trademark%20Association.pdf)

49. M Goldberg, G Kindra, J Lefebvre, J Liefeld, J Madhill-Marshall, N Martohardjono and H Vredenburg, *When packages can't speak: possible impacts of plain and generic packaging of tobacco products*, 1995, pp. 14–15, viewed 21 June 2011, <http://legacy.library.ucsf.edu/tid/rce50d00/pdf;jsessionid=F1852CE901479F54035033A47E2B93B5.tobacco03>

packaging made cigarettes less attractive and appealing.<sup>50</sup> Generally speaking, it was found that plain packaging removed the imagery associated with branded cigarettes and, with it, the positive images that were associated with cigarette consumption by young people. Further, plain packaging of cigarettes significantly improved young people's recall of health warning messages on packages, and the believability of these messages. It also reduced the promotional value of the packages, along with the effectiveness of other forms of cigarette advertising, such as sponsorship. Each of the four studies concluded that dull, boring, plain packaging would reduce smoking among young people.

Other research findings provide further support for such conclusions<sup>51</sup> but also suggest that plain packages with the largest graphic health warnings are even less appealing to young people.<sup>52</sup>

A substantial and increasing body of research evidence indicates that plain packaging significantly reduces the attractiveness of cigarettes among young people. While it is highly likely that this would translate into less young people taking up smoking and more young smokers attempting to quit smoking, the behavioural effects of plain packaging are not known. That said, the tobacco industry's rigorous opposition to the introduction of plain packaging strongly suggests that plain packaging would influence not just choice behaviour, but actual behaviour. Put simply, if the plain packaging proposal did not threaten to reduce the industry's profitability, then it would be unlikely to mount a legal challenge against it.

## Unintended consequences

The main potential unintended consequence is that plain packaging could result in increased trade in illicit tobacco, and increased tobacco consumption.

The industry has argued that plain packaging would make it easier to counterfeit and smuggle tobacco products. This is because it would be less difficult to replicate plain packaging than the designs that are currently used on tobacco packaging.

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50. J Trachtenberg, 'Here's one tough cowboy', *Forbes*, 1987, pp. 108–110; P Beede and R Lawson, 'The effect of plain packages on the perception of cigarette health warnings', *Public Health*, 1992, vol. 106, pp. 315–322. See also M Goldberg, J Liefeld, J Madil and H Vredenburg, 'The effect of plain packaging on response to health warnings', *American Journal of Public Health*, vol. 89, 1999, pp. 1434–1435; Centre for Behavioural Research in Cancer, *Health warnings and contents labelling on tobacco products*, Melbourne, Anti-Cancer Council of Victoria, 1992; Centre for Health Promotion, *Effects of plain packaging on the image of tobacco products among youth*, Toronto, University of Toronto, 1993.
  51. For example, D Northrup and J Pollard, *Plain packaging of cigarettes, event marketing to advertise smoking and other tobacco issues: a survey of grade seven and grade nine Ontario students*, York University, Toronto, 1995; I Rootman and B Flay, *A study on youth smoking: plain packaging, health warnings, event marketing and price reductions: key findings*, University of Toronto, Centre for Health Promotion, Toronto, 1995, viewed 21 June 2011, <http://www.utoronto.ca/chp/download/RptsandPresents/youthsmoking.pdf>
  52. J Hoek, C Wong, P Gendall, J Louviere and K Cong, 'Effects of dissuasive packaging on young adult smokers', *Tobacco Control*, vol. 20, 2011, pp. 183–188; D Germain, M Wakefield and S Durkin, 'Adolescents' perceptions of cigarette brand image: does plain packaging make a difference?', *Journal of Adolescent Health*, vol. 46, 2010, pp. 385–392.

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The resulting distribution of tobacco products through unregulated, untaxed criminal networks would, the industry argues: decrease government tobacco excise and customs revenue; make policing of illicit trade in tobacco more difficult; and, enhance through reduced prices and informal distribution networks the accessibility of tobacco products to vulnerable and underage smokers.<sup>53</sup>

In support of its argument, British American Tobacco Australia has cited figures from an industry-commissioned PriceWaterhouseCoopers report on the size of the illegal tobacco market in Australia.<sup>54</sup> The report estimated that of all the tobacco consumed in Australia during 2009, 12.3 per cent (around one in every eight tailor-made and hand-rolled cigarettes) was illegal. This, PriceWaterhouseCoopers claims, translated into lost Commonwealth Government revenue of around \$624 million.<sup>55</sup> Were the plain packaging Bill to be passed, the industry maintains, tobacco counterfeiting and illicit trade would dramatically increase, and these figures worsen.

Leading Australian tobacco researcher, Professor Simon Chapman has argued that there are serious methodological flaws in the PriceWaterhouseCoopers report and its findings. With regard to the report's estimate of the number of illegal cigarettes smoked in Australia, for example, Chapman says:

Let's pause and get [the above figures] in perspective. Globally, an upper limit of 8.5 per cent of tobacco sold is estimated to be black market, but most of this occurs in nations with high corruption indexes like most of Africa and the former Soviet states. BAT [British American Tobacco] is saying that Australia is in that league.

Contrast this with findings of the 2007 National Drug Strategy Household Survey, (amazingly, not compared or even referenced by PWC) which found that, while 8.7 per cent of adult Australians had *ever* smoked unbranded, only 0.2 per cent of the population (around 33,000) people used it more than half the time.<sup>56</sup>

In a recent submission British American Tobacco Australia has cited figures from another industry-commissioned report on the illicit tobacco market in Australia. The Deloitte report suggests that the size of the illicit tobacco market in Australia has increased significantly since PriceWaterhouseCoopers' 2009 estimate. It estimates that the size of the illicit market represented as a proportion of the legal tobacco market has increased to 15 per cent and the foregone tobacco

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53. British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011, pp. 19–22.

54. British American Tobacco Australia, British American Tobacco Australia Submission to the Senate Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, 6 May 2010, p. 3.

55. PriceWaterhouseCoopers, *Australia's illegal tobacco market: Counting the cost of Australia's black market*, February 2010, The 2010 estimates are substantially higher than those cited in an earlier report by PriceWaterhouseCoopers—once again commissioned by British American Tobacco Australia. In that report, it was estimated that 6.4 per cent of all tobacco consumed in Australia in 2007 was of illegal origin, and that this resulted in an estimated loss of \$450 million in taxes (both excise and GST). PricewaterhouseCoopers, *Illegal tobacco trade: costing Australia millions: Strategies to curb the supply and use of illegal tobacco products*. Report prepared for British American Tobacco Australia BATA. Sydney, PriceWaterhouseCoopers, 2007, <http://www.bata.com.au/>

56. S Chapman, 'British American Tobacco's big numbers on illegal tobacco don't add up', *Crikey*

excise revenue to approximately \$1.1 billion in 2010.<sup>57</sup> Chapman is, as is to be expected, similarly sceptical of these figures.<sup>58</sup>

The issue of illicit trade in tobacco products is a significant one, largely because it has the potential to undermine the main objective of the proposed plain packaging measure; that is, to reduce the incidence and prevalence of smoking in Australia. Real price increases and reductions in the affordability of tobacco products are the most significant policy intervention in reducing tobacco consumption. Hence, illicit trade in tobacco that by-passes excise and customs duty and thereby reduces the price of some tobacco products undercuts the health protective element of taxation. Further, illicit tobacco products frequently carry no health warnings, which discourage people from taking up smoking and help to persuade existing smokers to quit. It should also be noted that the excise lost through illicit trade deprives governments of revenue that may be used for tobacco control measures and for the treatment of tobacco-related disease.

The National Preventative Health Taskforce has considered the potential for increased illicit trade in tobacco as a result of plain packaging and argued that this need not necessarily be the case. It proposed that the Government mandate some form of tax markings that would make cigarette packages difficult to counterfeit, as per Article 7, number 3 of the WHO Draft protocol to eliminate illicit trade in tobacco products:

With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets, packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party.<sup>59</sup>

Following consultation with the tobacco industry on possible anti-counterfeiting measures that might be included in packaging design, the Government proposed that the plain packaging legislation and regulations:

Permit the use of unique alphanumeric code markings on either the bottom of the pack or the side of the pack on a voluntary basis on condition that these codes are not linked to tobacco marketing or promotion and do not interfere with graphic health warnings;

Permit the continued use of covert markings in compliance with all other aspects of the Tobacco Plain Packaging Bill 2011; and

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57. Deloitte, *Illicit Trade of Tobacco in Australia: A report prepared for British American Tobacco Australia Limited, Philip Morris Limited and Imperial Tobacco Australia Limited*, February 2011, p. 4, viewed 23 June 2011, [http://www.bata.com.au/group/sites/bat\\_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/\\$FILE/medMD8EHAM5.pdf?openelement](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/$FILE/medMD8EHAM5.pdf?openelement)
58. S Chapman, 'Illicit tobacco in Australia: Tobacco bulls..t meter flies off the dial', *Action on Smoking and Health Australia*, 1 March 2011, viewed 23 June 2011, <http://www.ashaust.org.au/lv4/IllicitChapman1103.htm>
59. World Health Organisation Framework Convention on Tobacco Control, Conference on the Parties to the WHO Framework Convention on Tobacco Control, Draft protocol to eliminate illicit trade in tobacco products, 14 May 2010, p. 16, viewed 23 June 2011, [http://apps.who.int/gb/fctc/PDF/cop4/FCTC\\_COP4\\_5-en.pdf](http://apps.who.int/gb/fctc/PDF/cop4/FCTC_COP4_5-en.pdf)

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Not seek to specify the packaging material to a forensic level.<sup>60</sup>

As such, the Government does not appear to be overly concerned about the potential for increased counterfeiting and illicit trade as a result of the plain packaging measure. No demand for identification markings on tobacco products is specified in the Bill, so it is to be assumed that these requirements will be detailed in the regulations.

As noted above, the tobacco industry has suggested that an increase in illegal tobacco would result in tobacco products being available at a lower price and consumed at a higher rate. Further, it has observed that with the introduction of plain packaging, price would become the sole identifiable product feature. This would result in price competition among tobacco companies and between tobacco companies and illicit tobacco producers and importers. The ultimate consequence of such competition, it maintains, would be a fall in tobacco prices and potentially increased tobacco consumption.<sup>61</sup> British American Tobacco Manager, David Crow is reported as having said:

Tobacco companies would be urged to significantly reduce prices because no-name tobacco products that cost as [little as] 30 per cent of a regular packet, would be more attractive ... Could cigarettes reduce with time? I suppose in the near future, yes ... when you examine the four Ps (product, price, place and promotion), pricing is the most important one and the only one we have left. We will continue to fight on price. The lower prices usually mean that more people will smoke.<sup>62</sup>

A logical solution to such a move by the tobacco industry would be for the Government to increase the rate of excise to counter the effects of increased competition for market share. Several commentators have suggested this option.

We know that existing excises on tobacco products are reflected, to some degree, in their retail prices. As such, in most instances, any tobacco excise increases would be passed on to consumers more or less directly. Because tobacco companies do not want to lose profits, they would be obliged to increase their selling price in order to maintain the same or similar profit margins.

Research conducted by the Australia Institute suggests that tobacco companies have significant margins to play with at present. The Institute argues that tobacco companies are currently charging customers well over the cost of production and the relevant taxes (by around \$500 million a year).<sup>63</sup> As such, tobacco companies could afford to substantially reduce their prices in a bid to ensure that more people smoke, thereby retaining their profits. Hence, as some commentators have observed,

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60. Department of Health and Ageing, *op. cit.*, p. 14.

61. British American Tobacco Australia, British American Tobacco Australia Submission on the Tobacco Plain Packaging Bill 2011, 6 June 2011, pp. 18–19; British American Tobacco Australia, British American Tobacco Australia Submission to the Senate Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, 6 May 2011, p. 3.

62. J Hildebrand and K Sikora, 'We'll flood market with cheap cigarettes, says British American Tobacco chief, David Crow', *Daily Telegraph*, 17 May 2011, viewed 23 June 2011, <http://www.news.com.au/business/well-flood-the-market-with-cheap-tobacco-says-british-american-tobacco-chief/story-e6frfm1i-1226057133358>

63. A Horin, *op. cit.*

increases in tobacco excise need not necessarily solve the problem of cigarettes being made available at lower prices as a result of price competition:

The [tobacco excise] increases would come into force after the event and would do nothing to stop shops selling cigarettes as loss-leaders below cost as Coles and Woolworths tried to do earlier this year with beer. The cigarette manufacturers might even help them if they saw it as a way to stay in business. And it is low prices, not low excise that does the damage.<sup>64</sup>

In order to counter this problem, a number of commentators have called for the Government to introduce a floor price on cigarettes.<sup>65</sup> For example, the Cancer Council has proposed the introduction of a minimum floor price of \$15 (depending on pack size, and with incremental increases) to control discounting following the introduction of plain packaging (should the Bill be passed).<sup>66</sup> There are some significant issues associated with the imposition of floor prices. That said, there is evidence to suggest that where floor prices on tobacco are accompanied by restrictions on discounting practices, this can lead to higher cigarette prices and lower cigarette consumption.<sup>67</sup>

The Government has indicated that it has no current plans to set a floor price on cigarettes.<sup>68</sup>

## Plain packaging as paternalistic

Recently, the tobacco industry launched a nation-wide media campaign in an attempt to stop the Government introducing plain packaging for all tobacco products sold in Australia. The campaign was based on the argument that the policy is a 'nanny state' measure. This argument has it that by requiring the removal of tobacco-industry branding and trademarks, the Government is effectively treating Australians as though they were children, incapable of making their own decisions about whether or not to smoke.

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64. P Martin, 'Please, put a floor under cigarette and alcohol prices', 1 June 2011, viewed 23 June 2011, <http://www.petermartin.com.au/2011/06/please-put-floor-under-alcohol-and.html>
65. Essentially, a floor price is an artificially introduced minimum for the price of a good. Typically, floor prices are set above the market price of a product and are used as a means to benefit the seller of the product. However, floor prices may also be used for public health purposes. For example, the Government has recently charged the Australian National Preventative Health Agency with developing the concept of a nationwide minimum floor price for alcohol. Such a mechanism could help to tackle the harm that has been contributed to by low and below-cost alcohol pricing. See P Martin, 'Roxon approves national plan for minimum alcohol price', *The Age*, 24 August 2011, viewed 24 August 2011, <http://www.theage.com.au/national/roxon-approves-national-plan-for-minimum-alcohol-price-20110607-1fr42.html>
66. See Cancer Council Australia, *Abolishing duty-free tobacco sales and setting a minimum floor price*, viewed 23 June 2011, <http://www.cancer.org.au/policy/electionpriorities2010/dutyfreetobacco.htm> and N Bitá and B Speedy, op. cit.
67. E Feighery, K Ribisl, N Schleicher, L Zellers and N Wellington, 'How do minimum cigarette price laws affect cigarette prices at the retail level?', *Tobacco Control*, vol. 14, 2005, pp. 80–85, viewed 23 June 2011, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1748010/pdf/v014p00080.pdf>
68. See K Murphy, 'Cigarette packaging row widens', *The Age*, 18 May 2011, <http://www.theage.com.au/national/cigarette-packaging-row-widens-20110517-1erfp.html?skin=text-only> and A Horin, op. cit.

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Arguments against the proposal on the grounds that it is paternalistic hinge largely on the question of whether or not Government attempts to de-normalise smoking through plain packaging amount to an infringement of people's liberty. While the tobacco industry clearly believes that the proposal amounts to a violation of its liberty to use its trademarks, it is not clear whether or not consumers or would-be consumers view the proposal as undercutting their ability to choose. Were this to be the case, then it might justifiably be argued that the plain packaging proposal is paternalistic. This then raises the further question of whether paternalism of this kind could be considered justifiable. For while policies that restrict the choices of individual citizens are frequently criticised as being paternalistic, very few people argue that the state has no role to play in limiting people's choices in certain areas for their own good.

For a definition of paternalism and discussion of relevant issues, see the Parliamentary Library research paper on the subject.<sup>69</sup> Essentially, this paper argues that paternalist policies may be considered justifiable under circumstances where high-stakes decisions are involved, the decisions being made by individuals are more or less irreversible and it is possible to identify failures in people's reasoning.

## Committee consideration

The House Standing Committee on Health and Ageing recently completed an inquiry into the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011.<sup>70</sup>

The Committee confined its scrutiny of and comments on the Bills to evidence relating to their health implications. As such, it did not examine the financial and legal implications of the legislation.

The Committee found that tobacco packaging serves as a vehicle for marketing tobacco products:

It is abundantly clear that packaging plays a significant role in the marketing of tobacco products, and that different packages are designed to appeal to different socioeconomic groups... it is also clear that packaging has been used to detract from the impact of graphic health warnings, and that plain packaging will increase the impact of these warnings.<sup>71</sup>

The Committee also found that existing plain packaging evidence was adequate to support the measure and its likely effectiveness:

The Committee believes the evidence base as outlined by witnesses and submitters is sufficient for the initiative to proceed. The Committee considers that criticisms of the evidence base in

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69. M Thomas and L Buckmaster, *Paternalism in social policy—when is it justifiable?*, Research paper, no. 8, 2010–11, Parliamentary Library, Canberra, 15 December 2010, <http://www.aph.gov.au/library/pubs/rp/2010-11/11rp08.pdf>

70. The report, submissions to the inquiry and a transcript of the 4 August 2011 public hearing can be viewed at: <http://www.aph.gov.au/house/committee/haa/billtobaccopackage/report.htm>

71. House of Representatives Standing Committee on Health and Ageing, *Advisory Report on the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*, Commonwealth of Australia, Canberra, 2011, p. 17, <http://www.aph.gov.au/house/committee/haa/billtobaccopackage/report.htm>

submissions and the Committee's public hearing were insubstantial and, on the whole, superficial. Notably, the fact that plain packaging has not been introduced in other countries should not function as a deterrent to passage of the legislation. Rather it demonstrates Australia's willingness to take the lead in tobacco control, a role that Australia has taken in the past.<sup>72</sup>

Research has shown that over time many of [the tobacco control measures introduced in Australia] have been effective in reducing the smoking rate, and there is no reason to believe that it will not be the same in this case.<sup>73</sup>

The Committee was strongly supportive of the proposed tobacco plain packaging legislation and recommended that both of the Bills be passed.

## Policy position of non-government parties/independents

### Coalition

In a statement that coincided with World No Tobacco Day (31 May 2011), Opposition Leader, Tony Abbott, indicated that the Coalition would support the Bill, albeit with some amendments. However, should the amendments—which will seek 'to ensure [the legislation] really does bring smoking rates down'—fail, then the Coalition will nevertheless not oppose the Bill.

Mr Abbott's announcement follows a period in which he and Shadow Minister for Health and Ageing, Peter Dutton, refused to support the plain packaging measure on the grounds that the Government had not presented sufficient evidence to demonstrate that it would reduce smoking rates.<sup>74</sup> A number of commentators have observed that the Coalition's about-face was in response to some Coalition MPs warning that they were prepared to cross the floor to support the plain packaging measure.

### Independents

Of the six cross-benchers, only Bob Katter is opposed to the plain packaging measure. While Rob Oakeshott is yet to state his position on the measure, he is said to be inclined towards supporting it.<sup>75</sup>

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72. Ibid.

73. Ibid., p. 18.

74. B Packham, 'Abbott out of puff on plain cigarette packet laws', *The Australian*, 1 June 2011, [http://parlinfo.parlInfo/download/media/pressclp/806027/upload\\_binary/806027.pdf;fileType=application/pdf#search=%22Abbott%20out%20of%20puff%20on%20plain%20cigarette%20packet%20laws%22](http://parlinfo.parlInfo/download/media/pressclp/806027/upload_binary/806027.pdf;fileType=application/pdf#search=%22Abbott%20out%20of%20puff%20on%20plain%20cigarette%20packet%20laws%22)

75. P Coorey, 'Tobacco plain packaging to pass despite Opposition', *Sydney Morning Herald*, 26 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;adv%3Dyes;orderBy%3Dcustomrank;page%3D0;query%3D%22Tobacco%20plain%20packaging%20to%20pass%20despite%20Opposition%22%20Dataset%3Apressclp;resCount%3DDefault>

## The Greens

The Greens strongly support the plain packaging measure. They have also recommended the introduction of a minimum floor price on cigarettes to prevent the tobacco industry and retailers from flooding the Australian market with cheap imported cigarettes.<sup>76</sup>

On 15 June 2011, Senator Bob Brown introduced to Parliament the Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011. This Bill seeks to make unlawful ‘the receipt of a gift from manufacturers or wholesalers of tobacco products by political parties or candidates’.<sup>77</sup>

## Position of major interest groups

### Health experts

A significant number of public health experts have expressed unequivocal support for the proposal. For example, the Australian Medical Association, the Royal Australasian College of Surgeons, the Public Health Association, Australia, the Cancer Council, the National Heart Foundation of Australia and the National Stroke Foundation have each welcomed the measure on the grounds that it will help to reduce smoking in Australia, save lives and improve the health of many thousands of Australians.<sup>78</sup>

In its submission to the Government’s public consultation on plain packaging of tobacco products, the World Health Organisation (WHO) Secretariat welcomed the proposal, stating:

WHO is of the view that ... implementing the proposed legislation aiming to prevent tobacco advertising and/or promotion on tobacco product packaging will achieve its stated goals of: reducing the attractiveness and appeal of tobacco products to consumers, particularly young people; increasing the noticeability and effectiveness of mandated health warnings; and reducing the ability of the tobacco product packaging to mislead consumers about the harms of smoking.

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76. See The Australian Greens, Tobacco, viewed 14 July 2011, <http://greensmps.org.au/category/issues/health-wellbeing/drugs/tobacco>

77. Senator Bob Brown, ‘Second reading speech: Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011’, Senate, *Debates*, 15 June 2011, p. 2883, [http://parlinfo.parlinfo/genpdf/chamber/hansards/f83f57a9-5f72-4f3d-ba5c-76edde72f342/0156/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.parlinfo/genpdf/chamber/hansards/f83f57a9-5f72-4f3d-ba5c-76edde72f342/0156/hansard_frag.pdf;fileType=application%2Fpdf)

78. Australian Medical Association, *Plain packs send plain message – stop smoking*, media release, 7 April 2011; Royal Australasian College of Surgeons, Submission to the Department of Health and Ageing, Public Consultation on Plain Packaging of Tobacco Products, June 2011, viewed 23 June 2011, <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/plainpack-tobacco> ; Public Health Association and Australian Council on Smoking and Health, *Historic tobacco plain packaging will hasten end of smoking in Australia*, media release; Cancer Council Australia, the National Heart Foundation of Australia and the National Stroke Foundation, Submission on Plain Tobacco Packaging Bill 2011 – public consultation on an exposure draft of the Bill, June 2011, viewed 23 June 2011, <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/plainpack-tobacco>

WHO strongly supports the Australian Government's proposal on plain packaging and agrees with the conclusion that through the achievement of the aforementioned aims in the long term, as part of a comprehensive suite of tobacco control measures, this legislation will contribute to curbing the initiation of tobacco use, reducing tobacco consumption, and decreasing incidences of relapse in those who cease to consume tobacco ... In view of the scientific and legal bases for the interventions articulated in the exposure draft of Australia's Tobacco Plain Packaging Bill 2011, the WHO Secretariat strongly supports the proposed legislation.<sup>79</sup>

## Retailers

A number of Australian retailer organisations have expressed opposition to the Bill, and concerns regarding its implications.<sup>80</sup>

Generally speaking, retailers have argued that plain packaging will:

- impose an additional regulatory burden on retailers
- cause confusion for retailers, wholesalers and customers
- increase transaction times and costs, and
- make counterfeiting and smuggling easier, resulting in an increase in cheaper, illegal tobacco products. This, it is argued, would reduce retailers' trade and government revenue, while also potentially increasing rates of smoking.

Retailers also assert that the Government has provided no real evidence that plain packaging of tobacco products will help existing smokers to quit or prevent others from taking up smoking.

Some retailers have argued that plain packaging has been rendered unnecessary as a result of point of sale display bans in most jurisdictions. However, such arguments fail to account for the fact that, as highlighted above, tobacco packaging itself is now employed as a marketing tool.

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79. World Health Organisation (WHO), Submission of the World Health Organisation, Australia Plain Packaging Legislation, viewed 23 June 2011, [http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/FAFE1248FDEC563ECA2578C6003595CD/\\$File/World%20Health%20Organization.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/FAFE1248FDEC563ECA2578C6003595CD/$File/World%20Health%20Organization.pdf)
80. See Alliance of Australian Retailers, The Alliance of Australian Retailers Submission on the exposure draft Tobacco Plain Packaging Bill 2011 and Consultation Paper, 6 June 2011, viewed 23 June 2011, [http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/92B377CA56CD5977CA2578C6003505C8/\\$File/Alliance%20of%20Australian%20Retailers.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/92B377CA56CD5977CA2578C6003505C8/$File/Alliance%20of%20Australian%20Retailers.pdf); IGA Supermarkets, Public Consultation on Plain Packaging of Tobacco Products Inquiry into Tobacco Plain Packaging Bill 2011, Submission on behalf of IGA Supermarkets, Michael Daly, IGA National Board Chairman, viewed 23 June 2011, [http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/ED7295E315F51DBBCA2578C600355C8E/\\$File/IGA%20Supermarkets.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/ED7295E315F51DBBCA2578C600355C8E/$File/IGA%20Supermarkets.pdf); Master Grocers Australia/Liquor Retailers Australia, Tobacco Plain Packaging Bill 2011 – Exposure Draft, viewed 23 June 2011, [http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/ED7295E315F51DBBCA2578C600355C8E/\\$File/Master%20Grocers%20Australia%20-%20Liquor%20Retailers%20Australia.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/ED7295E315F51DBBCA2578C600355C8E/$File/Master%20Grocers%20Australia%20-%20Liquor%20Retailers%20Australia.pdf); Australian Retailers Association, *Retailers facing duplication of tobacco laws – State display bans make plain packaging pointless*, media release, 7 April 2011.

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## Financial implications

Given that the costs of implementation are to be borne by the tobacco industry, the Government has indicated that it does not anticipate any costs. However, a Treasury document released under a Freedom of Information request related to the plain packaging of tobacco products measure states that 'the Government is ... providing \$2.6 million to support the introduction of plain packaging for tobacco products'.<sup>81</sup>

The Government is currently considering cost recovery options for the monitoring and enforcement of the Bill. It has indicated that 'before any decision is taken to proceed with cost recovery, a draft Cost Recovery Impact Statement will be prepared. This will form the basis of industry consultation, and will be conducted in the middle of this year, in accordance with the Guidelines administered by the Department of Finance and Deregulation'.<sup>82</sup>

Ultimately, the costs of the plain packaging measure will be determined by the number and nature of legal challenges mounted by the tobacco industry, and their success or otherwise. Should the Bill be passed and the measure prove successful in reducing the prevalence and incidence of smoking in Australia, then this could result in significant savings, given the considerable social and economic costs of smoking.

## Key provisions

For a full description of the Bill's provisions, the reader is referred to the Explanatory Memorandum.

## Concluding comments

Market testing and peer reviewed research evidence indicates that tobacco packaging acts as a promotional tool. These findings are supported by tobacco industry internal documents. Similarly, a deal of evidence demonstrates that plain packaging reduces the appeal of cigarettes for young people. Plain packaging has also been found to enhance the impact of health warning messages on tobacco packaging.

It is reasonable to assume, based on this evidence, that plain packaging could contribute to the reduced prevalence and incidence of smoking in Australia. This is especially so when plain packaging is combined with a range of other anti-smoking measures that collectively help to de-normalise smoking.

It is clear that the Government has scope under trademark law and international trade agreements to introduce measures in the interests of public health. The plain packaging of tobacco products is just such a measure. However, it remains to be seen whether or not a requirement for plain

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81. See [http://www.treasury.gov.au/documents/2086/PDF/Document\\_31.pdf](http://www.treasury.gov.au/documents/2086/PDF/Document_31.pdf)

82. Department of Health and Ageing, op. cit., p. 17.

packaging amounts to an unjustifiable encumberment of the use of tobacco trade marks. If the tobacco industry mounts a constitutional challenge to the legislation, as it has threatened, then this will be a matter for the courts to decide. Given that the measure is unprecedented, and that High Court decisions in relation to the relevant section of the Constitution are relatively unpredictable, it is difficult to determine the likely outcome of such a challenge.

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